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2022 RUSSIAN INVASION OF UKRAINE THROUGH THE PRISM OF INTERNATIONAL LAW: A CRITICAL OVERVIEW

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I. A BRIEF CHRONICLE OF BACKGROUND EVENTS – II. FROM THE THREAT OF FORCE TO THE USE OF FORCE – III. CYBERATTACKS AS THE USE OF FORCE: AN EMERGING CONCEPT – IV. USE OF FORCE OR SELF-DEFENSE: THE ISSUE OF RECOGNITION – V. GENOCIDE ACCUSATIONS AND THE ICJ PROCEEDING – VI. INTERNATIONAL HUMANITARIAN LAW: A FORGOTTEN CONCEPT? – VII. NATIONAL AND INTERNATIONAL CRIMINAL LAW: IS THERE ROOM FOR JUSTICE? – VIII. CONCLUDING REMARKS

ABSTRACT: The research focuses on a legal analysis of some facts and events taking place during the 2022 Russian invasion of Ukraine through the prism of international law. The article analyzes different facets of the current conflict that trigger such major topics of international law as the threat and use of force, cyberattacks, recognition, international humanitarian law, international criminal law and many others. Special attention is paid to legal reasoning articulated by the Russian Federation in order to justify its aggression against Ukraine, in particular, to the claim of self-defense and the accusations of genocide, dispelling them. Furthermore, the relevance of international humanitarian law for the current conflict and the prospects of bringing to responsibility for the crimes committed on the territory of Ukraine both through the prism of national and international criminal law are explored. Finally, special emphasis is given to the challenges that the Russian aggression against Ukraine poses to international law and the international community as a whole.

KEYWORDS: Russian invasion of Ukraine, aggression, use of force, threat of force, cyberattack, self-defense, recognition of states, genocide, war crimes.

LA INVASIÓN RUSA A UCRANIA DEL 2022 A TRAVÉS DEL PRISMA DEL DERECHO INTERNACIONAL: UN PANORAMA CRÍTICO

RESUMEN: La investigación presenta un análisis jurídico de algunos hechos y acontecimientos ocurridos durante la invasión rusa a Ucrania de 2022 a través del prisma del Derecho internacional. El artículo analiza distintas facetas del conflicto actual que desencadenan temas tan importantes del

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derecho internacional como la amenaza y el uso de la fuerza, los ciberataques, el reconocimiento, el derecho internacional humanitario, el derecho penal internacional, etc. Se presta especial atención a los razonamientos jurídicos articulados por la Federación Rusa para justificar su agresión contra Ucrania, en particular, al alegato de legítima defensa y las acusaciones de genocidio, desmintiéndolas. Asimismo, se explora la relevancia del derecho internacional humanitario para el conflicto actual y las perspectivas de responsabilizar por los crímenes cometidos en el territorio de Ucrania a través del prisma del derecho penal nacional e internacional. Finalmente, se hace especial hincapié en los desafíos que la agresión rusa contra Ucrania plantea al derecho internacional y a la comunidad internacional en su conjunto.

PALABRAS CLAVE: invasión rusa de Ucrania, agresión, uso de la fuerza, amenaza de fuerza, ciberataque, legítima defensa, reconocimiento de estados, genocidio, crímenes de guerra.

LA INVASION RUSSE DE L'UKRAINE DE 2022 À TRAVERS LE PRISME DU DROIT INTERNATIONAL: UN APERÇU CRITIQUE

RÉSUMÉ: Cette étude porte sur une analyse juridique de certains faits et événements survenus lors de l'invasion russe de l'Ukraine de 2022 à travers le prisme du droit international. L'article analyse différentes facettes du conflit actuel qui soulèvent des questions de droit international aussi importantes que la menace et l'usage de la force, les cyberattaques, la reconnaissance, le droit international humanitaire, le droit pénal international, etc. L'auteur accorde une attention particulière au raisonnement juridique articulé par le Fédération de Russie pour justifier son agression contre l'Ukraine, par exemple, par la revendication de légitime défense et les accusations de génocide, en les niant. De même, la pertinence du droit international humanitaire pour le conflit actuel et les perspectives de responsabilité pour les crimes commis sur le territoire de l'Ukraine sont explorées à travers le prisme du droit pénal national et international. Enfin, un accent particulier est mis sur les défis que l'agression russe contre l'Ukraine pose au droit international et à la communauté internationale dans son ensemble.

MOTS-CLÉS: invasión rusa de l'Ukraine, agresión, recours à la force, menace de la force, cyberataque, légitime défense, reconnaissance d'États, génocide, crimes de guerre.

I. A BRIEF CHRONICLE OF BACKGROUND EVENTS

The 2022 Russian invasion of Ukraine is, without a doubt, one of the most important and tragic events of our times. Besides its disastrous humanitarian effects, it challenges international law and the modern international system as a whole. In our research we will try to present a legal analysis of some facts and events taking place during the recent stage of the Russian war against Ukraine through the prism of different branches of international law². The

² See also: BAQUÉS, J., «De Ucrania y de Rusia. Reflexiones estructurales y lecciones aprendidas», *Global Strategy Report*, n° 8, 2022, available at: <https://global-strategy.org/de-ucrania-y-de-rusia-reflexiones-estructurales-y-lecciones-aprendidas/>; LIGUSTRO, A., FERRARO, F., DE PASQUALE, P. “Il futuro del mondo e dell'Europa passa per Kiev”, *DPCE Online*, [S.l.], vol. 52, n° 2, July 2022, available at: <http://www.dpceonline.it/index.php/dpceonline/article/view/1613>; TOMÁS ORTIZ DE LA TORRE, J. A., “La guerra y el Derecho Internacional: a propósito de la

information used for the analysis is taken both from relevant major mass media sources and the official sites of international organizations.

The article analyzes different facets of the current conflict that trigger such major topics of international law as the threat and use of force, cyberattacks, recognition, international humanitarian law, international criminal law etc. In the introductory part the readers find a general description of the main background events that preceded the invasion of 2022. Following the chronological order, Chapter II considers legal issues of the prohibition of threat of force in modern international law that was seriously compromised by the Russian Federation while preparing for the full-scale aggression against Ukraine. In Chapter III cyberattacks that form an integral part of today's security discourse are addressed in the context of use of force, in particular, in relation to the cyberattacks carried out against Ukraine at the preparatory stage of invasion. Consequently, Chapters IV and V discuss legal reasoning articulated by the Russian Federation in order to justify its aggression against Ukraine, in particular, the claim of self-defense and the accusations of genocide, dispelling them. The relevance of international humanitarian law for a general assessment of the armed conflict in Ukraine is considered in Chapter VI of the publication. Hence, the last chapter is dedicated to the prospects of bringing to responsibility for the crimes committed on the territory of Ukraine both through the prism of national and international criminal law. The final part contains concluding remarks of the author.

Given the utmost complexity of the situation the author does not pretend to draw definitive conclusions or an exhaustive analysis of all events, but she has the intention to present a systematized overview that could give to the readers a holistic and complex understanding of legal implications of the situation.

The current crisis in the Russian-Ukrainian relations is not new. Actually it presents another stage of the unsolved territorial dispute between the states whose roots deepen into the 1990s of the past century when Russia constantly denied delimitation of certain parts of the Russian-Ukrainian border³. But the dispute gained the characteristics of a full-scale conflict only

agresión de Rusia a Ucrania”, *Anales de la Real Academia de Doctores de España*, vol. 7, nº 1, 2022, pp. 93-112 etc.

³ See, e.g., PANCHENKO, I. M., “Problems of the Delimitation of the Sea of Azov and the Kerch Strait” (Проблеми делімітації Азовського моря та Керченської протоки), *Journal of*

in 2014 due to the Russian Federation's occupation of the Crimea and its alleged support of the self-proclaimed republics of Donetsk and Luhansk regions. The independence of the latter was recognized by the president of the Russian Federation, Vladimir Putin, and consequently by the Russian Federation on 21 February 2022. The same day he ordered to deploy Russian troops on their territories under the guise of the peacekeeping operation that next day was confirmed by the resolution of the parliament⁴. Shortly after, exactly on 22 February, the lower house of the Russian parliament, the State Duma, ratified the Treaties on Amity between the Russian Federation and the Donetsk People's Republic (hereinafter – the DPR) and the Luhansk People's Republic (hereinafter – the LPR) that were signed on 21 February, almost the same moment with the republics recognition. For 4 months before the event the Russian Federation had been accumulating its armed forces along the Ukrainian border from the Black Sea to Belarus explaining the fact by military exercises. During the whole period the economy of Ukraine suffered huge losses as a result of the instability provoked by the war expectations. On 15 February 2022 Ukraine's main bank and state institutions became the targets of one of the biggest cyberattacks ever registered. The deployment of Russian troops on the territory of the DPR and the LPR though explained on the part of the Russian Federation by legal reasoning has caused great indignation and condemnation of the international community.

The given brief overview of the background situation in Ukraine presents only some facts that had been taking place through the course of the conflict till 24 February 2022 when the full-scale Russian invasion began. Actually the Russian Federation has been representing it as “a special military operation”,

the Kyiv University of Law, n° 3, 2020, pp. 365-370; Romanukha, O.M., *Formalization of the Legal Status of the Modern Ukrainian-Russian Border* (Оформлення правового статусу сучасного українсько-російського кордону), DonNUET, Kyyvyi Rih, 2019, 82 p.

⁴ Decree of the President of the Russian Federation of February 21, 2022, n° 71, “On the Recognition of the Donetsk People's Republic”, available at: <http://www.publication.pravo.gov.ru/Document/View/0001202202220002>; Decree of the President of the Russian Federation of February 21, 2022, n° 72, “On the Recognition of the Luhansk People's Republic”, available at: <http://www.publication.pravo.gov.ru/Document/View/0001202202220001>; Resolution of the Council of the Russian Federation and the Federal Assembly of the Russian Federation of February 22, 2022, n° 35-SF, “On the Use of the Armed Forces of the Russian Federation Outside the Territory of the Russian Federation”, available at: <http://www.council.gov.ru/activity/documents/133464/>.

whose purpose according to President Putin, is “to stop” a “genocide of the millions of people who live” in the Luhansk and Donetsk oblasts of Ukraine (hereinafter - Donbas). But the facts of the invasion show that almost the whole territory of Ukraine has suffered from land and air military operations. According to the official statistics of the Office of the High Commissioner for Human Rights, as of 4 July 2022, 11,152 civilian casualties were recorded, including 4,889 deaths. At the same time it is stressed that the actual figure could be significantly higher as reported victims are being confirmed⁵.

These events and the current war in Ukraine, considered the gravest violation of international law after the Second World War⁶, obviously challenge the modern international system based on the post war agreements and give rise to many complex issues, which solutions couldn't be found only in political negotiations, but should be based also on international law premises that embody and protect the main values of the contemporary world. Denying a legal solution to Ukraine's crisis we destroy the cornerstone of the world we know.

II. FROM THE THREAT OF FORCE TO THE USE OF FORCE

Nowadays the whole world knows that Russia's invasion of Ukraine began on 24 February 2022, but, in fact, harmful violations of Ukraine's rights have been taking place from an earlier date. According to Par. 2 of Art. 14 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”⁷. So, for the purpose of calculation of future Russian reparations to Ukraine it's very important to determine an initial date of the ongoing violations.

⁵ Ukraine: Civilian Casualty Update 4 July 2022, Office of the High Commissioner for Human Rights, available at: <https://www.ohchr.org/en/news/2022/07/ukraine-civilian-casualty-update-4-july-2022>.

⁶ SÁENZ DE SANTAMARÍA, P. A., “La guerra de Ucrania y el orden internacional global: las Naciones Unidas vuelven a la casilla de salida, *Temas para el debate*, n° 329 (mayo), 2022, págs. 28-31.

⁷ Draft Articles On Responsibility Of States For Internationally Wrongful Acts, November 2001, Supplement N° 10 (A/56/10), Chp.iv.e.1, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

In this regard, it is worth mentioning that at least for 4 months before launching a full-scale war on the territory of Ukraine the Russian Federation destabilized the situation threatening Ukraine with an active deployment of its troops along the northern and eastern Ukrainian border, included the territory of Belarus⁸, pretending they had massive joint military exercises⁹. It caused not only social tension and fears, but also great losses to the Ukrainian economy, provoking a significant hryvnia devaluation¹⁰, scaring off investors¹¹ and insurers¹². According to the estimation of Rostyslav Shurma, Deputy Head of the Office of the President of Ukraine, before the beginning of the full-scale invasion Ukraine was suffering “irretrievable losses amounting to \$2-3 billion a month”¹³.

⁸ For example, already on 30 October 2021 the movements of Russian troops along the Ukrainian border were disturbing. See, e.g., “Russian Troop Movements Near Ukraine Border Prompt Concern in U.S., Europe”, *Washington Post*, 30 October 2021, available at: https://www.washingtonpost.com/world/russian-troop-movements-near-ukraine-border-prompt-concern-in-us-europe/2021/10/30/c122e57c-3983-11ec-9662-399cfa75efee_story.html. It’s interesting to mention that, for instance, Sweden has decided to give temporary protection not only to the people that have fled Ukraine on or after 24 February 2022 as it is recommended in Art. 2 (1) of Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, but also to who traveled to and stayed in Sweden between 30 October 2021 and 23 February 2022. See for more information, *Temporary Protection Directive to Cover More People*, the Government of Sweden, 8 April 2022, available at: <https://www.government.se/articles/2022/04/temporary-protection-directive-to-cover-more-people/>.

⁹ Russia and Belarus Hold Joint Military Exercises as Diplomatic Talks Ramp Back Up, *CNN*, 10 February 2022, available at: <https://edition.cnn.com/2022/02/10/europe/ukraine-russia-news-thursday-military-exercises-intl/index.html>.

¹⁰ Ukraine to Raise Rates as Russia Jitters Weigh on Currency and Inflation Risks, *Reuters*, 18 January 2022, available at: <https://www.reuters.com/markets/europe/ukraine-raise-rates-russia-jitters-weigh-currency-inflation-risks-2022-01-18/>.

¹¹ Ukrainian Economy Is ‘Suffering’ amid Russian War Threat, Says British Investor, *The Northern Echo*, 26 January 2022, available at: <https://www.thenorthernecho.co.uk/news/19876369.ukrainian-economy-suffering-amid-russian-war-threat-says-british-investor/>.

¹² Russia Can Win in Ukraine without Firing a Shot, *Foreign Policy*, 28 January 2022, available at: <https://foreignpolicy.com/2022/01/28/russia-ukraine-insurance-black-sea-economy-war/>.

¹³ Rostyslav Shurma: Irreversible Losses of the Ukrainian Economy Are Now 2-3 Billion Dollars per Month (Ростислав Шурма: Безповоротні втрати економіки України зараз – 2-3 млрд доларів на місяць), *RBC - Ukraine*, 21 February 2022, available at: <https://www.rbc>

In order to conform with Art. 2 (4) of the Charter of the United Nations, all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. At first sight it seems that the provisions of this paragraph outlaw the threat of force in the same manner as the use of force which means that the Russian Federation has already committed an internationally wrongful act by threatening Ukraine and will be required to pay reparations for the damage caused.

At the same time we could observe a very weak reaction to the threat from the international community. For example, the first package of the EU sanctions against Russia was approved only on 23 February 2022¹⁴ after the recognition of the LPR and the DPR by Putin. Unfortunately, the case of Ukraine is not the first one when the use of threat by one State against another one is being ignored¹⁵, even though there are cases when threatening behavior was denounced and condemned both by states and international organizations¹⁶. We can not but agree with Marco Roscini that “most cases where threats of force have not met significant reactions were due [...] to the fact that the concern about the threat was absorbed by that about the subsequent use of force”¹⁷. But in our viewpoint such a situation can not be perceived as a lawful one since the victim state should have the possibility of receiving a reparation for losses caused by both the use of force and the threat of force.

Even though the use of force and the threat of force are prohibited by

ua/ukr/news/rostislav-shurma-bezvozvratnye-poteri-ekonomiki-1645386069.html.

¹⁴ EU Adopts Package of Sanctions in Response to Russian Recognition of the Non-Government Controlled Areas of the Donetsk and Luhansk Oblasts of Ukraine and Sending of Troops into the Region, Council of the EU, Press release, 23 February 2022, available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/>.

¹⁵ GREEN, J. A., “Questioning the Peremptory Status of the Prohibition of the Use of Force”, *Michigan Journal of International Law*, n° 32, 2011, p. 226.

¹⁶ ROSCINI, M., “Threats of Armed Force and Contemporary International Law”, *Netherlands International Law Review*, n° 54, 2007, pp. 245-247.

¹⁷ *Ibidem*, p. 247.

the same paragraph of Art. 2 of the Charter of the UN¹⁸ and, thus, both of them can be perceived as unlawful¹⁹, there are proposals to divorce them since the legal status of these prohibitions is different²⁰. First of all, it should be noted that despite the broad recognition of the prohibition of the use of force as a peremptory norm of international law²¹, some scholars bring it into question²². What is about the prohibition of the threat of force, it is often deprived of *jus cogens* characteristic²³.

Others researchers propose to distinguish between the prohibition of aggression as *jus cogens* and the prohibition of other less serious uses of force that lack this status, such as operations for the protection of nationals who are in danger abroad, to pursue an armed band or a terrorist group based in foreign territory, or to enforce certain UN resolutions without the Security Council authorization²⁴. As a result of this separation only the prohibition of the threat of aggression is qualified as *jus cogens*²⁵.

It is out of the scope of the present contribution to deepen into the above-mentioned scientific discussion, but despite the absence of unanimity towards the legal status of the prohibitions of the use of force and the threat of force, they are accepted with some exceptions²⁶ as customary norms by the

¹⁸ About the evolution of the prohibition of the use of force and aggression in the period before the Second World War see, e.g., HERNÁNDEZ CAMPOS, A., “Definición del crimen de agresión: evolución del concepto de crimen contra la paz hasta el Tribunal internacional de Nuremberg”, *Revista de Derecho y Ciencia Política*, vol. 66 (n° 1 - n° 2), 2009, pp. 112-135.

¹⁹ BERMEJO GARCÍA, R., “Cuestiones actuales referentes al uso de la fuerza en el Derecho Internacional”, *Anuario de derecho internacional*, n° XV, 1999, p. 39.

²⁰ GREEN, J. A., “Questioning the Peremptory Status of the Prohibition of the Use of Force”... cit.; ROSCINI, M., “Threats of Armed Force and Contemporary International Law”... cit.

²¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, *ICJ Reports* (1986).

²² GAZZINI, T., *The Changing Rules on the Use of Force in International Law*, Manchester University Press, Manchester, 2005, pp. 88-89; GREEN, J. A., “Questioning the Peremptory Status of the Prohibition of the Use of Force”, p. 217; LAURSEN, A., “The Use of Force and (the State of) Necessity”, *Vanderbilt Journal of Transnational Law*, n° 37 (2), 2004, pp. 485-525, etc.

²³ GREEN, J. A., “Questioning the Peremptory Status of the Prohibition of the Use of Force”, p. 255.

²⁴ ROSCINI, M., “Threats of Armed Force and Contemporary International Law”... cit., p. 258.

²⁵ *Ibidem*, p. 276.

²⁶ The so-called lawful threats of force, e.g. warnings of a forcible defending reaction of a

majority of states, which means that their violation should be perceived as an internationally wrongful act and give rise to international responsibility of a threatening state.

In the situation of Ukraine the threat of aggression obviously took place. At the same time due to the fact that the Russian government never recognized that military exercises announced by them were in reality war preparations, the threat had an implicit form²⁷ that raises some practical issues. First of all, the exact time when the breach of the prohibition of the threat of force began should be determined. Taking into consideration that the mental element of intention is crucial for the purpose of distinguishing between completely lawful military exercises and activities realized for intimidation of Ukrainian authorities and population, it is a complicated case to identify the moment when Russian authorities began intentionally to threaten Ukraine with armed force. Another tricky question is harm estimation since it is quite difficult to individuate economic losses caused exactly by the Russian threat of force.

One can see several hints about the lack of attention to the problem of the threat of force in international law science. Hopefully, the Russian - Ukrainian war and events that preceded it will attract more interest and push for deeper studies of the aforementioned issues.

III. CYBERATTACKS AS THE USE OF FORCE: AN EMERGING CONCEPT

According to some major media sources and scientific publications, the hybrid war²⁸ or cyberwar²⁹ against Ukraine began before Russia invaded Ukraine. Indeed, on 15 February, a large distributed denial of service attack

single state or of an operation authorized by the UN Security Council, are permitted and not considered as threats of force due to the fact that a possible subsequent use of force is lawful.

²⁷ A threat of force can be realized in an explicit form when the threatening state informs about its intentions the threatened state with a declaration or an ultimatum or in an implicit form when the threatening state without informing the threatened state verbally shows its intentions with certain actions demonstrating force. More about the forms of the threat of force in ROSCINI, M., "Threats of Armed Force and Contemporary International Law"... cit.

²⁸ The Hybrid War That Began Before Russia Invaded Ukraine, *Deutsche Welle*, 25 February 2022, available at: <https://www.dw.com/en/hybrid-war-in-ukraine-began-before-russian-invasion/a-60914988>.

²⁹ COLOM-PIELLA, G., "Lecciones de ciberguerra en Ucrania", *XI Foro de la Ciberseguridad (ISMS Forum)*, mayo 2022, pp. 13-14.

(hereinafter - DDoS) blocked the websites of the defense ministry, army and Ukraine's two largest banks, affecting mobile applications and the banks' ATMs³⁰. It was called "the largest assault of its kind in the country's history"³¹. The UK and the US attributed these DDoS attacks to the Russian Federation³². The situation repeated on the eve of the invasion on 23 February 2022 when international cybersecurity researchers at security company ESET had already registered cyberattacks on numerous computers in Ukraine³³. These attacks like the aforementioned use of threat against Ukraine caused huge economic losses that in our opinion should be also repaired by the Russian Federation. The same approach followed in the UK position on applying international law to cyberspace stating that hostile actors cannot take action by cyber means without consequence, both in peacetime and in times of conflict³⁴. At the same time it is not so obvious from the perspective of contemporary international law.

In today's world the characteristics and the very nature of many traditional concepts are changing. If previously wars were waged mostly with kinetic weapons, now new technological means are broadly used, which let us talk about a new emerging concept of cyber armed attacks or even cyberwar. It is not a secret that during the last 15 years many cyberattacks were carried out against different targets, including states. Among the first famous incidents it is enough to mention massive cyberattacks on Estonia in 2007, Lithuania in 2008, Iran in 2010, etc. The attack on Estonia led to the creation of the NATO's Cooperative Cyber Defence Centre of Excellence (hereinafter – the

³⁰ Cyberattack Hits Websites of Ukraine Defense Ministry and Armed Forces, *CNN*, 15 February 2022, available at: <https://edition.cnn.com/2022/02/15/world/ukraine-cyberattack-intl/index.html>.

³¹ Ukraine Says Cyberattack Was Largest in Its History, *The New York Times*, 15 February 2022, available at: <https://www.nytimes.com/2022/02/15/world/europe/ukraine-cyberattack.html>.

³² UK Assesses Russian Involvement in Cyber Attacks on Ukraine, the UK Government, 18 February 2022, available at: <https://www.gov.uk/government/news/uk-assess-russian-involvement-in-cyber-attacks-on-ukraine>; White House Says Russia behind Cyberattack on Banks, Ministry in Ukraine, *the Hill*, 18 February 2022, available at: <https://thehill.com/policy/cybersecurity/594947-white-house-says-russia-behind-cyberattack-on-banks-in-ukraine/>.

³³ The Hybrid War That Began before Russia Invaded Ukraine... cit.

³⁴ Attorney General's Office and the Rt Hon Jeremy Wright QC MP, Cyber and International Law in the 21st Century, Speech of 23 May 2018, the UK Government, available at: <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century>.

CCDCOE) in 2008.

Recently the quantity of cyberattacks of a different kind has grown drastically³⁵. Although private companies remain the main targets of cyberattacks, a lot of them perpetrated against government agencies, defense and high tech companies, state banks³⁶, that provides grounds, especially in the case of massive concentrated attacks against one state's bodies and companies, to suppose that the target of such attacks is the state itself.

Such malicious activities raise numerous legal issues, many of which, given their transboundary and transnational character, could be answered only within the international law framework. At the same time new realities require from international law deep transformations and developments of its traditional concepts and approaches. First and foremost, in the context of cyberattack the concept of the use of force should be reconsidered through the prism of new threats for national security. For sure, it poses many challenges, among which one of the major is the problem of attribution³⁷. Furthermore, different types of cyber incidents should be distinguished as long as not every incident could be qualified as a cyberattack and even the later could be divided into cyberattacks of low and high intensity. Exactly the latest ones are often considered in the context of the use of force.

³⁵ In 2021 Cyberattacks Increased 50% Year-Over-Year, with Each Organization Facing 925 Cyberattacks per Week Globally, *Spanning*, 18 January 2022, available at: <https://spanning.com/blog/cyberattacks-2021-phishing-ransomware-data-breach-statistics/>.

³⁶ The Center for Strategic and International Studies presents a timeline that records significant cyber incidents since 2006 focusing on cyber attacks on government agencies, defense and high tech companies, available at: <https://www.csis.org/programs/strategic-technologies-program/significant-cyber-incidents>.

³⁷ Cyber attribution is the process of tracking and identifying the perpetrator of cyberattack that, consequently, is strictly related to the attribution of international responsibility for a cyberattack that can be potentially qualified as a use of force. For more information about cyber attribution see: HRUSHKO, M. V., "Attribution of Cyberattacks As a Prerequisite for Ensuring Responsible Behavior in Cyberspace" (Атрибуція кібератак як передумова забезпечення відповідальної поведінки в кіберпросторі), *Constitutional State*, n° 43, 2021, pp. 195-201; KOSTADINOV, D. "The Attribution Problem in Cyber Attacks", *INFOSEC*, February 1, 2013 available at: <https://resources.infosecinstitute.com/topic/attribution-problem-in-cyber-attacks/>; LIN, H., "Attribution of Malicious Cyber Incidents: From Soup to Nuts", *Columbia Journal of International Affairs*, n° 70(1), 2016, available at: <https://jia.sipa.columbia.edu/attribution-malicious-cyber-incidents>; SCHMITT, M. *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd ed.), Cambridge University Press, Cambridge, 2017. 598 p. (Art. 14-18).

In fact, the consequences of cyberattacks are sometimes so serious and harmful that they can be considered a real armed attack or even aggression. It is also worth mentioning that cyberattacks are often a part of an armed conflict or precede it. In the last case one of the questions that still doesn't have an exact answer is the question whether it is possible to view a preceding cyberattack as a beginning of the subsequent armed conflict. In this way the war in Ukraine could be dated at least from 15 February 2022.

However, at the moment we don't have a unique understanding of the minimum requirements for the qualification of a cyberattack as a use of force in international law. At the same time the classic wording of the ICJ in its *Nuclear Weapons opinion* about the UN Charter provisions, in particular Article 2 (4), being applied "to any use of force, regardless of the weapons employed"³⁸, provides a platform for a further development of the concept of the use of force. According to the approach suggested in the Tallinn Manual 2.0, which was prepared by the CCDCOE, a cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force³⁹. This position is supported by some governments, e.g. the Federal Government of Germany in its position paper "On the Application of International Law in Cyberspace" of March 2021 agreed referring to the ICJ's *Nicaragua judgment*⁴⁰ that whenever the scale and effects of a cyber operation are comparable to those of a traditional kinetic use of force, it would constitute a breach of Art. 2(4) UN Charter⁴¹.

Leaving apart a traditional discussion about the difference between the use of force, armed attack and aggression and analyzing the cyberattack on Ukraine through the prism of a mere use of force, which threshold is the lowest and the easiest to be met, it is not a simple task to answer the question about its qualification due to the fact that "the parameters of the scale and

³⁸ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports*, 1996, para. 39.

³⁹ Tallinn Manual 2.0 (note 4), cit., rules 69, 71.

⁴⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua* (note 21), *I.C.J. Reports*, 1986, para. 195.

⁴¹ On the Application of International Law in Cyberspace, the Federal Government of Germany, March 2021, available at: <https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf>.

effects criteria remain unsettled beyond the indication that they need to be grave⁴². Despite that the author of the Tallinn Manual “found the focus on scale and effects to be an equally useful approach when distinguishing acts that qualify as uses of force from those that do not” understanding them as “a shorthand term that captures the quantitative and qualitative factors to be analyzed in determining whether a cyber operation qualifies as a use of force”⁴³.

The factors or parameters proposed to be taken into consideration are severity, immediacy, directness, invasiveness, measurability of effects, military character, state involvement, presumptive legality. Among them, severity remains “self-evidently the most significant factor in the analysis”⁴⁴. In this regard it is mentioned that “consequences involving physical harm to individuals or property will in and of themselves qualify the act as a use of force”, but “those generating mere inconvenience or irritation will never do so”⁴⁵.

Turning back to the analysis of the cyberattacks on Ukraine, they were highly invasive and of military character, but no physical harm to individuals or property took place. At the same time with a high probability it may be supposed that these attacks were a part of the plan of the subsequent aggression and were aimed at weakening Ukraine’s economy and army. Comparing them with kinetic attacks, one question arises: how would a missile attack that luckily or thanks to the efficiency of national air forces hasn’t led to human casualties or property losses be qualified? It is very likely that it can be seen as an armed attack. It seems that a massive cyberattack, whose consequences were prevented thanks to the functioning of the cybersecurity system, can be equated with other armed attacks, surely, if other essential criteria, e.g. state attribution, are met.

Thus, we may assume that future conflicts are likely to have a cyber-component which is also the method of warfare on the territory of Ukraine in the current war. Consequently, it is very important to elaborate an appropriate

⁴² SCHMITT, M. *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (1st ed.), Cambridge University Press, Cambridge, 2013, p. 55.

⁴³ *Ibidem*, p. 47.

⁴⁴ *Ibidem*, p. 48.

⁴⁵ *Ibidem*, p. 47.

legal answer to this challenge both in international law theory and practice.

It will lead to a higher coherence between such important concepts as the use of force, armed attack and aggression. Being similar at first sight they still lack a homogeneous legal regulation that makes them less efficient for the maintenance of peace and international security.

IV. USE OF FORCE OR SELF-DEFENSE: THE ISSUE OF RECOGNITION

Ironically, nevertheless Russia has recently violated many of the core international law principles and norms, it still tries to justify its actions referring to international law. One of the justifications President Putin hinted at in his famous address of 24 February 2022⁴⁶ in which he announced the beginning of “a special military operation”⁴⁷ in Ukraine, is the right to self-defense under Art. 51 of the Charter of the UN. As evidenced in his speech, self-defense was necessary to protect first of all “the people’s republics of Donbas region that turned to Russia with a request for help”⁴⁸. In fact, on 21 February 2022 the State Duma of Russia passed a bill to officially recognize the self-proclaimed DPR and LPR in eastern Ukraine as independent states. The bill was approved by President Vladimir Putin and consequently he signed the Federal Laws on Ratifying the Treaties of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the DPR and the LPR as well.

So, the situation raises several theoretical issues, first and foremost, the issue of recognition of the DPR and the LPR. It is out of the scope of this publication to delve into one of the most famous international law discussions about the significance of recognition for the creation of a new state⁴⁹. Yet,

⁴⁶ Address by the President of the Russian Federation of 24 February 2022, available at: <http://en.kremlin.ru/events/president/transcripts/statements/67843>.

⁴⁷ “We have been left with no other option to protect Russia and our people, but for the one that we will be forced to use today. The situation requires us to take decisive and immediate action. The people’s republics of Donbas turned to Russia with a request for help. ... In this regard, in accordance with Article 51 of Part 7 of the UN Charter, with the sanction of the Federation Council of Russia and in pursuance of the Treaties of Friendship and Mutual Assistance ratified by the Federal Assembly on 22 February of this year with the Donetsk People’s Republic and the Luhansk People’s Republic, I have decided to conduct a special military operation”, *Ibidem*.

⁴⁸ *Ibidem*.

⁴⁹ See, e.g., SHAW, M. *International Law*, Cambridge University Press, Cambridge, 2008, pp. 445-454.

we are going to make a few remarks important for the correct understanding and assessment of the current situation and for a further development of the theory and practice of state recognition in international law.

First of all, it is worth mentioning that till recently⁵⁰ the DPR and the LPR hadn't been recognized by other states-members of the UN. In fact, they had been recognized only by the entities with the same uncertain status: Abkhazia, the LPR / the DPR and South Ossetia. Though these entities appeared back in 2014, the Russian Federation had recognized them only 3 days before the invasion of Ukraine began. It is curious to note that Kazakhstan, traditionally considered as an ally of the Russian Federation, refused to recognize the aforementioned entities. At the plenary session of the 25th St. Petersburg International Economic Forum on 17 June 2022 the President of Kazakhstan Tokayev said that “modern international law is the United Nations Charter. Two UN principles, however, have come into contradiction – the territorial integrity of the state and the right of a nation to self-determination. Since these principles contradict each other, there are different interpretations of them. For this reason, we do not recognize either Taiwan, or Kosovo, or South Ossetia, or Abkhazia. Apparently, this principle will also be applied to quasi-state territories, which, in our opinion, are Lugansk and Donetsk”⁵¹.

Thus, the situation with the DPR and LPR recognition seems more the case of non-recognition than the case of recognition. But even if it can be supposed that the recognition by one state (or three states, Syria and North Korea included) may imply an international personality of a new state, the circumstances of its emergence and the consistency with relevant international law requirements should be taken into consideration⁵². Actually, the LPR and the DPR appeared in 2014 after the so-called referendums of 11 May where people supposedly expressed their will to create independent states. Russia has never recognized its control over these territories pretending that they were completely independent. At the same time the events of the subsequent

⁵⁰ The DPR and the LPR were officially recognized by two other UN members, allies of the Russian Federation: Syria on 29 June 2022 and North Korea on 14 July 2022.

⁵¹ Not Recognize Donetsk, Lugansk as Independent States, *Caspian News*, 20 June 2022, available at: <https://caspiannews.com/news-detail/president-tokayev-says-kazakhstan-will-not-recognize-donetsk-lugansk-as-independent-states-2022-6-20-0/>.

⁵² SHAW, M., *op. cit.*, p. 446.

years and, in particular, military operations⁵³ and the MH 17 downing⁵⁴ give grounds to suppose that during all 8 years after 22 February 2014 the territory of the DPR and the LPR was under an indirect occupation of the Russian Federation⁵⁵. Consequently, it calls into question the legitimacy of the aforementioned referendums and of the Crimea's status referendum of 16 March 2014 as well, since the latter was held in the presence and under the control of Russian troops and without a reliable international observation⁵⁶.

Accordingly, the independence proclaimed as a result of a foreign intervention shouldn't be considered as a lawful one and, consequently, the new entity shouldn't be recognized as it is required by Art. 41 of the Draft Articles

⁵³ Even though during these years the Russian Federation hasn't recognized the fact of its military presence on the territory of the DPR and the LPR, there are many proofs showing that their territories and the actions of their authorities have been under at least an "overall control", if not under an "effective control", of the Russian Federation. According to the conclusions of the Office of the Prosecutor of the International Criminal Court (hereinafter - the ICC) about the situation in Eastern Ukraine in 2014 -2016 "additional information, such as reported shelling by both States of military positions of the other, and the detention of Russian military personnel by Ukraine, and vice-versa, points to direct military engagement between Russian armed forces and Ukrainian government forces" (Report of the Office of the Prosecutor of the ICC on Preliminary Examination Activities of 2016, par. 169, available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

⁵⁴ On 17 July 2014 Malaysia Airlines flight MH17 crashed in the Donetsk region of eastern Ukraine (the territory under the control of the DPR), killing all 298 people on board. The individuals who are thought to be responsible for the crash are being prosecuted in the District Court of the Hague (Netherlands) according to the Agreement on International Legal Cooperation Between Ukraine and the Netherlands of 7 July 2017. The court may deliver the judgment in September 2022 (see more on the site of the court: <https://www.courtmh17.com/en/court-days-2022.html>). Four suspects believed to be involved in the transportation and combat use of the Buk missile system from which MH17 flight had been downed are Igor Girkin (Strelkov), former colonel in Russia's FSB intelligence service; Sergey Dubinskiy, general (at the time of downing – colonel) of the Main Intelligence Directorate of the General Staff of the Russian Armed Forces; Oleg Pulatov, lieutenant colonel of the Main Intelligence Directorate of the General Staff of the Russian Armed Forces. The fourth suspect is Leonid Kharchenko, a Ukrainian civilian, who fought on the side of the DPR. The use of heavy Russian weaponry under the commandment of the Russian officers suggests that the Russian Federation has been directly involved in military operations in Donbas since 2014.

⁵⁵ See more about it in Section VI "International Humanitarian Law: A Forgotten Concept?"

⁵⁶ Russian authorities claim that the observers of some organizations were present during the referendum, but there were no representatives of the OSCE or the UN among them, which makes the results of the referendum highly doubtful.

on Responsibility of States for Internationally Wrongful Acts. According to it no State shall recognize as lawful a situation created by a serious breach of peremptory norms of general international law. In the case of the DPR and the LPR the fact of their support by the Russian Federation can be considered as a violation of Art. 2(4) of the Charter of the UN that requires it to refrain in international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Although it is doubtful whether all provisions of Par. 4 of Art. 2 can be considered as *jus cogens*⁵⁷, the prohibition of aggression as the most serious breach of the principle of non-use of force is almost unanimously admitted as a peremptory norm of general international law. In its famous resolution 3314 (XXIX) on the Definition of Aggression adopted on 14 December 1974, the UN General Assembly stated that 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 State⁵⁸, can be qualified as an act of aggression. From this perspective the actions of the Russian Federation and an unofficial presence of its troops on the territory of the DPR and the LPR for 8 years before the official deployment of Russian troops in February 2022 can be considered as an act of aggression against Ukraine. Ergo, the results of it shouldn't be recognized as lawful by any state.

So, even taking into account the above mentioned considerations, it is easy to see that the untimely decision of Russia to recognize the DPR and the LPR and its legal effects are highly doubtful from the perspective of contemporary international law. But even if we admit such a possibility, another difficult issue arises. We talk about Putin's claim of self-defense. Although he has never explained its motivation in detail, from his speech it could be supposed that he hinted at a collective self-defense triggered by the newly recognized republics' call for help according to Art. 51 of the UN Charter.

The right to self-defense, despite being directly set out in the Charter of the UN, is one of the most controversial issues in the theory and practice of international law. In accordance with Art. 51 "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the

⁵⁷ See more about it in Section II "From the Threat of Force to the Use of Force".

⁵⁸ UN General Assembly, A/RES/29/3314, *Definition of Aggression*, 14 December 1974.

Security Council has taken measures necessary to maintain international peace and security”. Proceeding from the provisions reflected in the UN Charter, two issues emerge: firstly, the DPR and the LPR are not members of the UNO; secondly, no armed attack against them has happened.

Surely, the scarcity of the UN Charter wording has led to numerous subsequent interpretations and developments with anticipatory or preemptive self-defense as the most sensitive issue⁵⁹. Judicial practice, in particular, Caroline case⁶⁰, has elaborated a set of minimum requirements to be met for an armed attack being considered a preemptive self-defense act⁶¹. First of all, such an attack should be necessary, which means that the threat is imminent and, thus, peaceful alternatives are not available, and proportional to the threat. Both of the criteria are not met in the case of Ukraine. There is no evidence that Ukraine was going to attack the DPR and the LPR. Even so, the Russian response is obvious disproportional due to the simple fact that on 24 February 2022 Ukraine was attacked by the Russian armed forces from different directions along its border, the territory of Belarus included, in parallel with the massive bombardments of the main Ukrainian cities: Kiev, Kharkiv, Odesa, etc.

Accordingly, even without going deeper with the false Russian self-defense analysis, the conclusion of inconsistency of it with the main self-defense criteria could be made. It shows that strange attempts of the Russian Federation to justify its aggression against Ukraine cannot stand even a simple legal test.

V. GENOCIDE ACCUSATIONS AND THE ICJ PROCEEDING

Another reason for the invasion announced by Putin, both in his speech in the Human Rights Council of the Russian Federation on 9 December

⁵⁹ More about anticipatory/preemptive/preventive self-defense in VAN DE HOLE, L., “Anticipatory Self-Defense Under International Law”, *American University International Law Review*, n° 19 (1), 2003, pp. 69-106; ROSCINI, M., “Threats of Armed Force and Contemporary International Law”, cit.; WARREN, A., BODE, I., *Governing the Use-of-Force in International Relations. The Post-9/11 US Challenge on International Law*, Palgrave Macmillan, New York, 2014, pp. 46-60, etc.

⁶⁰ JENNINGS, R. Y., “The Caroline and McLeod Cases”, *The American Journal of International Law*, vol. 32 (1), 1938, pp. 82–99.

⁶¹ BARBOZA, J., *Derecho internacional público*, Víctor P. de Zavalía, Buenos Aires, 2008, p. 255.

2021⁶² and at his press-conference on 15 February 2022, was the supposed genocide committed by Ukrainian authorities on the territories of Donbas⁶³. In the early morning of the day of invasion Putin in his address proclaimed that the purpose of the special military operation is “to stop” a “genocide of the millions of people who live” in the Luhansk and Donetsk oblasts of Ukraine⁶⁴. He repeated this statement once again after the invasion had already begun during his conversation with the President of France Emmanuel Macron on 3 March 2022 claiming that a long-year genocide against civil population of Donbas had been hidden that had led to many human losses and hundreds of thousands people forced to flee to Russia⁶⁵. At the same time besides these claims he has neither presented any proof nor referred to concrete figures of the dead or those who fled from the distressed areas. What’s more he has never named even the place where the alleged genocide was committed.

This statement has been a strong point of Russian propaganda not only in Russia, but also far beyond. At the same time even without a deep investigation it seems quite weird due to one fact: for 8 years a huge part of the Donbas has been under a constant direct control of the DPR and the LPR authorities that can be also qualified as an indirect occupation by the Russian Federation⁶⁶. On the other hand, the crime of genocide, the so-called “crime of crimes”, has a very high threshold of proving, which means that several requirements should be met to prove accused guilty. In this regard a very close connection between crimes (in particular, the intention to commit exactly genocide) and a territory where they were committed should be shown. For this reason, for example, only the massacre committed on the territory of Srebrenica was qualified as a genocidal one⁶⁷ while the crimes committed during the Bosnian War of 1992-

⁶² The War in Donbas - Putin Declared Genocide (Война на Донбассе - Путин заявил о геноциде), *TSN*, 9 December 2021, available at: <https://tsn.ua/ru/ato/putin-zagovoril-o-genocide-na-donbasse-1928863.html>.

⁶³ Putin Called “What Is Happening in Donbass” Genocide (Путин назвал геноцидом «происходящее в Донбассе»), *RBC-Russia*, 15 February 2022, available at: <https://www.rbc.ru/rbcfreeneews/620bc8919a794797fe506b3c>.

⁶⁴ Address by the President of the Russian Federation of 24 February 2022... cit.

⁶⁵ Putin Told Macron about the Genocide in Donbas (Путин рассказал Макрону о геноциде в Донбассе), *Vesti*, 3 March 2022, available at: <https://www.vesti.ru/article/2684487>.

⁶⁶ See more about it in Section VI “International Humanitarian Law: A Forgotten Concept?”

⁶⁷ LATTANZI, F., “La pulizia etnica come genocidio” in Lattanzi, F. (Ed.), *Genocidio. Conoscere e*

1995 in the neighboring territories were not qualified as such.

Taking into consideration possible reputation losses and seeking legal ways for stopping Russian aggression, on 26 February 2022 Ukraine filed in the International Court of Justice an application instituting proceedings against the Russian Federation concerning “a dispute ... relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide”⁶⁸. In its application Ukraine rejected that any genocide had occurred and contended the false claims of the Russian Federation. Ukraine also requested for the indication of provisional measures guaranteeing that the Russian Federation “immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine, and immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide”⁶⁹. Ukraine asked the Court to require from the Russian Federation to provide a report to the Court on measures taken to implement the Court’s Order on Provisional Measures one week after such order and then on a regular basis to be fixed by the Court⁷⁰. Ukraine based its application on Article IX of the Genocide convention following which disputes between the contracting parties relating to the interpretation, application or fulfilment of the 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. Even though there are no many international treaties that stipulate a compulsory jurisdiction of international judicial bodies to which Russia is a party, the Genocide Convention is ratified

ricordare per prevenire, Romatre-Press, Roma, 2020, p. 48.

⁶⁸ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022.

⁶⁹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures submitted by Ukraine of 27 February 2022, available at: <https://www.icj-cij.org/en/case/182>.

⁷⁰ *Ibidem*.

by both states.

On 16 March 2022 the ICJ presented the Order on the Request for the Indication of Provisional Measures submitted by Ukraine. There are some interesting features of order provisions that could help develop relevant legal regulations. First of all, the ICJ concluded that it has a *prima facie* jurisdiction over the dispute as far as according to its findings there is a dispute between the parties relating to the interpretation, application or fulfilment of the Genocide convention. It is the most controversial part of the order. From the very beginning the Russian Federation rejected the ICJ jurisdiction over the dispute. Its position was supported by a few judges that presented their declarations.

Furthermore, the court supported two of Ukrainian requests and indicated provisional measures. According to Par. 81 of the order the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. In addition, recalling the statement of the Permanent Representative of the Russian Federation to the United Nations that the “DPR” and the “LPR” turned to the Russian Federation with a request to grant military support, the Court considers that the Russian Federation must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations⁷¹. Moreover, the Court deemed it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute⁷². At the same time the ICJ declined to indicate the measure requesting a report from the Russian Federation⁷³.

Notwithstanding the fact that the dispute is still under consideration, the aforementioned order brings us to the following conclusions. First and foremost, it offers hope that the genocide commitment accusation against Ukraine broadly promoted by the Russian propaganda will be rejected. In the same order the court stresses that it is not in possession of evidence

⁷¹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Order of 16 March 2022, par. 81.

⁷² *Ibidem*, par.82.

⁷³ *Ibidem*, par.83.

substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory⁷⁴. Moreover, whatever it was, the Genocide Convention doesn't give to its parties any right to a unilateral use of force for the purpose of preventing or punishing an alleged genocide. So, this argument can't be used by the Russian Federation to justify its unlawful aggression against Ukraine⁷⁵.

VI. INTERNATIONAL HUMANITARIAN LAW: A FORGOTTEN CONCEPT?

Another branch of international law that definitively should be taken into account in the context of the Russian invasion of Ukraine is international humanitarian law. Having the humanization of hostilities as one of its main objectives, international humanitarian law is unfortunately severely violated during the current war. The quantity and scale of violations is so high that it tends to be more a medieval conflict than a modern one.

International humanitarian law consists of a huge number of rules that regulate the conduct of hostilities, limiting their effects by protecting persons who are not participating in armed conflict and by restricting the means and methods of warfare available to its participants. Among the numerous sources of international humanitarian law the Geneva Conventions of 1949 and the Additional Protocols to them of 1977⁷⁶ contain core rules protecting civilians, combatants who are wounded, sick or shipwrecked during an international armed conflict and a non-international one⁷⁷.

⁷⁴ *Ibidem*, par.59.

⁷⁵ About the absence of Russian aggression justifications see also LIGUSTRO, A., FERRARO, F., DE PASQUALE, P., "Il futuro del mondo e dell'Europa passa per Kiev", p. XIII-XVI.

⁷⁶ The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Treatment of Prisoners of War, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.

⁷⁷ There are many other sources of international humanitarian law, among which a range of international conventions dedicated to victims of armed conflicts, means and methods of

It should be mentioned that the provisions of the Geneva Conventions are considered a part of customary international law due to their universal acceptance⁷⁸. At the same time the Additional Protocols that significantly broaden the protection of victims haven't been ratified by all states yet. Only 174 are parties to Protocol I with the US, Iran, Turkey, India, Pakistan, Israel being notable exceptions. Consideration should be given to the fact that on 23 October 2019 the Russian Federation decided to withdraw the declaration made by the Union of Soviet Socialist Republics at the time of the ratification of Additional Protocol I in accordance with Article 90, paragraph 2, "recognizing ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission"⁷⁹. However, the Russian Federation still remains a party to the protocol which means it is bound by its obligations.

It is worth noting that the application of international humanitarian law is closely related to the concept of armed conflict. When an armed conflict takes place, both of international or non-international character, international humanitarian law should be respected. Its application depends neither on the lawfulness of the conflict, nor on the status of participants. Non-governmental armed groups should comply with international humanitarian law as well as states.

In the case of the Russian-Ukrainian war according to the notions of conflicts in the Geneva Conventions and the Additional Protocols to them an international armed conflict undoubtedly takes place from 24 February 2022⁸⁰

warfare, naval and airwarfare, protection of cultural heritage (the list of treaties is available on the site of the International Committee of the Red Cross (the ICRC), available at: <https://ihl-databases.icrc.org/ihl>) and customary law studied by the ICRC and systematized in the Customary IHL Database (available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>).

⁷⁸ Nauru was the last one, 194th state, that ratified four conventions in 2006, *Geneva Conventions of 1949 Achieve Universal Acceptance*, the ICRC, available at: https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/geneva-conventions-news_210806.htm.

⁷⁹ Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, Swiss Federal Department of Foreign Affairs FDFA, 30 November 2019, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xspaction=openDocument&documentId=74BABB71087E777C1256402003FB5D4>.

⁸⁰ Due to the fact that the DPR and the LPR are not recognized as states (for more details see Chapter IV "Use of Force or Self-Defense: the Issue of Recognition"), even the decision

since its parties are states. With regard to international armed conflicts the threshold of their qualification is very low, i.e. the first air attack or the first border crossing by the armed forces of the attacking state can be considered as the beginning of an armed conflict between states that triggers international humanitarian law application. However, in view of the illegal Crimean occupation by the Russian Federation since 2014, international humanitarian law should be observed by it on the territory of Crimea during all years of the occupation. Indeed, according to their common Art. 2, the four Geneva Conventions of 1949 apply to any territory occupied during international hostilities, even in situations where the occupation of state territory meets with no armed resistance as happened in the case of the Crimean occupation. Such an assessment of the situation in the Crimea coincides with the conclusions of the Prosecutor of the ICC that in its Report on Preliminary Examination Activities of 2016 stated that “the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation. This international armed conflict began at the latest on 26 February when the Russian Federation deployed members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government. The law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an on-going state of occupation”⁸¹.

As for the DPR and the LPR the situation is more difficult for qualification due to the fact that Russia hasn't recognized the presence of its troops on the territory of the self-proclaimed republics nor the effective control over military operations that took place in eastern Ukraine during 8 years before the full-scale invasion of 24 February 2022. In fact, the situation has characteristics of both a non-international armed conflict and an international one. Due to the fact that the LPR and the DPR have pretended to be independent and Ukraine has never recognized their status, at first sight, the conflict can be qualified as a non-international one between the state (Ukraine) and organized armed groups (the DPR and the LPR). The threshold for a non-international armed
to deploy Russian troops on their territory, i.e. the territory of Ukraine taken by Russian authorities on 22 February 2022 and their further deployment can be already considered as the beginning of the armed conflict.

⁸¹ Report on Preliminary Examination Activities of 2016... cit., par. 158.

conflict is much higher than for an international one, which means that at least the criteria of the degree of organization of armed groups and the intensity of violence should be met. In this regard the Office of the Prosecutor of the ICC came to the conclusion that “the level of organization of armed groups operating in eastern Ukraine, including the “LPR” and “DPR”, had reached a degree sufficient for them to be parties to a non-international armed conflict”⁸². At the same time it admitted that “the level of intensity of hostilities between Ukrainian government forces and antigovernment armed elements in eastern Ukraine reached a level that would trigger the application of the law of armed conflict”⁸³. The qualification of the conflict in eastern Ukraine as a non-international one would mean that the level of international humanitarian law obligations of its participants would be much lower since the restrictions of hostilities in this case are limited by the provisions of the common for the Geneva conventions Art. 3 and the Additional Protocol II for states that acceded to it (as of 2022 – 169 states). The Russian Federation, not being considered a party to the conflict, would stay out of the picture.

Yet, the Prosecutor of the ICC stated that “additional information, such as reported shelling by both States of military positions of the other, and the detention of Russian military personnel by Ukraine, and vice-versa, points to direct military engagement between Russian armed forces and Ukrainian government forces that would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict”⁸⁴. This approach would allow a greater opportunity for bringing Russia to responsibility in the context of the aforementioned events. Moreover, being recognized as a participant of the conflict, the Russian Federation could be also considered as an occupying power and the creation of the LPR and the DPR could be perceived as an indirect occupation⁸⁵ of eastern Ukraine from 2014. At the

⁸² *Ibidem*, par. 168.

⁸³ *Idem*.

⁸⁴ *Ibidem*, par. 169.

⁸⁵ Indirect occupation is a type of occupation when one state occupies territory in another state through an intermediary group / a proxy exercising control over their activities. It is a relatively new concept that is not regulated by the Geneva Conventions of 1949 and Additional Protocols to them of 1977. See more about *indirect occupation* or *occupation by proxy* in FERRARO, T., “Determining the Beginning and End of an Occupation under International

same time the issue of the applicable standard of effective or overall control⁸⁶ should be solved. If the control exercised by the Russian authorities over the activities of the LPR and DPR armed groups meets the criteria of the overall control test and the latter is sufficient for the attribution of responsibility, the situation in eastern Ukraine can be qualified as an indirect occupation that, consequently, eliminates the question of their independent status.

So, international humanitarian law should be observed by the parties to the conflict in Ukraine from 2014. It has become especially relevant in the context of the full-scale war that began on 24 February 2022 since much more civilians have been involved in hostilities. But, unfortunately, it is here where we can see the gravest violations. We have no purpose to delve into their enumeration and analysis in the context of this contribution. But for the sake of completeness it should be mentioned that the Russian Federation has transgressed the core principles of international humanitarian law, among which: the principle of distinction between civilians and combatants, between civilian and military objects, the principle of necessity, the principle of proportionality, by intentionally destroying houses, theaters, hospitals, shopping malls and killing

Humanitarian Law”, *International Review of the Red Cross*, vol. 94 (885), Spring 2012, pp.133-163; Kapoor, R., “Indirect Occupation and the ICTY: It’s Not So Complicated”, *Opinio Juris*, 11 June 2020, available at: <https://opiniojuris.org/2020/06/11/indirect-occupation-and-the-icty-its-not-so-complicated/>, etc.

⁸⁶ “Effective control test” (sometimes “strict control test” is mentioned as a synonym or a type of “effective control test”) or *Nicaragua test* and “overall control test” or *Tadić test* are two types of test used by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia for the attribution of responsibility to a state for the conduct of non-state actors. The first one requires a higher level of state control over single actions of non-state actors for the attribution of responsibility, while the second one requires only that the state plays a role in organizing, coordinating or financing the military activities of a group or individuals for being attributed responsibility for their conduct. For more information see: CASSESE, A., “The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, *European Journal of International Law*, vol. 18 (4), 2007, pp.649–668; LICHTERMANN, S., “(Control) Tests,” the Nature of Conflict and Attribution of Responsibility for Mass Crimes and Genocide in Criminal and Civil Liability Cases: “Overall” v. “Effective” Control Test, *Sarajevo International and Comparative Law Review*, vol. 1 (1), 2012, p. 27-43, available at: <https://ssrn.com/abstract=2150126>; TALMON, S., “The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities”, *International and Comparative Law Quarterly*, vol. 58, 2009, Oxford Legal Studies Research Paper № 16/2009, available at: <https://ssrn.com/abstract=1402324>, etc.

civilians⁸⁷.

For sure, being crimes under the Criminal Code of Ukraine and the Rome Statute of the ICC these violations require an adequate response that hopefully can be provided by the means of national and international criminal law.

VII. NATIONAL AND INTERNATIONAL CRIMINAL LAW: IS THERE ROOM FOR JUSTICE?

Numerous and serious violations of international law and, in particular, of international humanitarian law raise an issue about responsibility of their perpetrators. In many cases they are the most serious war crimes and crimes against humanity. First of all, it should be mentioned that there are two main possibilities of prosecuting for their perpetration: under criminal law of Ukraine or under international criminal law⁸⁸. Both ways have their flaws and advantages that we'll try to explore.

Talking about the criminal law of Ukraine, its most important source is the Criminal Code of Ukraine of 2001. As of 21 July 2022 the Office of Prosecutor General of Ukraine has announced 24451 registered investigations of the alleged war crimes and aggression crimes committed on the territory of Ukraine since 24 February 2022. Most of them are open for the alleged violations of Art. 438 “Violation of rules of the warfare” (23548 cases), Art. 437 “Planning, preparation and waging of an aggressive war” (73 cases), Art. 436 “Propaganda of war” (21 cases), other articles (809 cases)⁸⁹. Actually in the code there is a chapter dedicated to war crimes and crimes against peace

⁸⁷ For the detailed information see: the OSCE Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February, ODIHR.GAL/26/22/Rev.1 13 April 2022, available at: <http://www.osce.org/files/f/documents/f/a/515868.pdf>; the OSCE Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April – 25 June 2022), ODIHR.GAL/36/22/Corr.1, 14 July 2022, available at: <https://www.osce.org/files/f/documents/3/e/522616.pdf> (the OSCE Reports).

⁸⁸ Actually there are more ways for prosecution, among them: the prosecution under the criminal legislation of the Russian Federation, which, however, seems possible only in case of regime change. Another prospect is a prosecution under some third states' jurisdiction according to the principle of universal jurisdiction.

⁸⁹ Crimes Committed during the Full-scale Invasion of the Russian Federation, the Office of Prosecutor General of Ukraine, 21 July 2022, available at: <https://www.gp.gov.ua>.

that makes it possible to prosecute Russian officers and soldiers and other officials for committed crimes. To be specific, we are talking about Chapter XX “Criminal Offenses against Peace, Security of Mankind and International Legal Order”⁹⁰. At the same time this chapter lacks many crimes or elements of crimes compared to how they are carved out in international criminal law, in particular, in the Rome Statute.

In the aforementioned chapter there is a mix of war crimes, crimes against peace and security of mankind and transnational crimes, but there is no article dedicated to crimes against humanity. The main article that deals with war crimes (Art. 438) is quite brief and contains provisions relating to cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international law, or any other violations of rules of the warfare prohibited by international treaties ratified by the Verkhovna Rada (Parliament) of Ukraine, and the same acts accompanied with a murder. The punishment for such crimes is relatively mild and the criminals face imprisonment for a term ranging from eight to twelve years or, in case of murders, from ten to fifteen years, or life imprisonment⁹¹. To be fair, it should be mentioned that there are other articles that rule out war crimes commitment, e.g., Art. 439 “Use of weapons of mass destruction”. Another article that should be mentioned is Art. 432 “Pillaging”. But the latter is situated in the previous chapter of the Criminal Code dedicated to criminal offenses against the established procedure of military service.

In regard to crimes against humanity Chapter XX contains Art. 442 relating to genocide. It is worth mentioning that while the Russian Federation unreasonably charges Ukraine with a genocide allegedly committed in Donbas, Ukrainian authorities consider the possibility of prosecuting Russian officials for the alleged genocide committed in Bucha, Mariupol and some other Ukrainian towns⁹². At the same time as it has been already mentioned the crime

⁹⁰ Criminal Code of Ukraine of 5 April 2001, n° 2341-III, available at: <https://zakon.rada.gov.ua/laws/show/en/2341-14>.

⁹¹ *Ibidem*.

⁹² The Situation with Mariupol Is Not Only about War Crimes, It Is Genocide, – Iryna Venediktova <the Prosecutor General of Ukraine> (Ситуація з Маріуполем – це не військові злочини, це геноцид, – Ірина Венедіктова), *TSN*, 28 March 2022, available at: <https://tsn.ua/ato/situaciya-z-mariupolem-ce-ne-viyskovyi-zlochyni-ce-genocid-irina-venediktova-2022544.html>.

of genocide has a very high threshold of proving. The most difficult element to show is *mens rea*. In the case of genocide it is a specific intent⁹³ to destroy, in whole or in part, a national, ethnical, racial or religious group (Art. 1 of the Genocide Convention). So, it should be proved that, for example, in regard to Mariupol, Russian leadership had exactly an intent to exterminate Ukrainians combating against Russian troops, which goes beyond a mere intention to take the city. It is a difficult task, but not impossible. For example, Flavia Lattanzi, *ad litem* judge at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, although being dubious, has found out some signs of the so-called *dolus specialis* in the events that took place in Mariupol⁹⁴.

A special issue is related to prosecution for the crime of aggression. It has been said that the Prosecutor General of Ukraine has already opened several investigations against Russian high-ranking officials such as deputies, ministers, military commands, etc. At the same time, Art. 437 of the Criminal Code of Ukraine contemplates criminal responsibility only for planning, preparation or waging of aggressive war or armed conflict, or conspiring for any such purposes in the form of imprisonment from seven to twelve years or for conducting an aggressive war or aggressive military operations in the form of imprisonment for a term of ten to fifteen years⁹⁵. However, the Code doesn't provide any definition of aggression.

Thus, even such a general overview of the provisions of the Criminal Code of Ukraine suggests that the relative chapter is outdated and unfortunately limits the possibility of prosecuting for the whole range of international crimes committed on the territory of Ukraine during the Russian invasion. Besides, the prosecution can be efficient mostly towards those persons that are arrested on the territory of Ukraine or can be extradited to Ukraine by other states.

At the same time Art. 8 (2) of the Rome Statute contains a much wider list of war crimes committed during an international armed conflict with the possibility of condemnation for their commitment to imprisonment up to 30 years or life imprisonment (Art. 77 of the Rome Statute). Among crimes

⁹³ PÉREZ TRIVIÑO, J. L., “La noción de intención en la definición de genocidio”, *Revista Española de Derecho Internacional*, vol. LXIV/2, 2012, p. 165.

⁹⁴ LATTANZI, F., “Quale giustizia per i crimini in Ucraina?”, *Formiche*, 29 April 2022, available at: <https://formiche.net/2022/04/crimini-putin-lattanzi/>.

⁹⁵ Criminal Code of Ukraine... cit.

that are not mentioned in the Criminal Code of Ukraine, there are tortures or inhuman treatment, including biological experiments; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; unlawful deportation or transfer or unlawful confinement; taking of hostages; intentionally directing attacks against civilian objects, that is, objects which are not military objectives; intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7 (2) (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions, etc⁹⁶. Article 7 of the Rome Statute contains the list of crimes against humanity as well. Supposedly many of them have been committed on the territory of Ukraine⁹⁷. So, it seems that there are more prospects to bring offenders to justice under international criminal law. Nevertheless, the International Criminal Court whose activities are regulated by the Rome Statute of 1998 has its constraints.

Above all, it is worth noting that both the Russian Federation⁹⁸ and Ukraine are not parties to the Rome Statute. Though back in 2000 the latter

⁹⁶ The Rome Statute of the ICC of 1998.

⁹⁷ The OSCE Reports... cit.

⁹⁸ The Russian Federation signed the Rome Statute in 2001, but in 2016 notified the Secretary-General of the UN about the intention of the Russian Federation not to become a party to the Rome Statute of the ICC, available at: <https://treaties.un.org/doc/Publication/CN/2016/CN.886.2016-Eng.pdf>.

signed this treaty, after the Constitutional Court of Ukraine found out that one of the Rome Statute provisions is not in line with the Constitution of Ukraine, Ukraine decided not to ratify it⁹⁹. But in 2014 according to Art. 12(3) of the Rome Statute it lodged two declarations accepting the so-called Court's jurisdiction *ad hoc* over alleged crimes under the Rome Statute occurring on its territory from 21 November 2013 to 22 February 2014 (the first declaration)¹⁰⁰ and after extending this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards (the second declaration)¹⁰¹. Nevertheless the Office of the Prosecutor of the ICC presented its preliminary report on the situation of Ukraine back on 14 December 2020, on 2 March 2022 the Prosecutor announced he had proceeded to open an investigation into the situation in Ukraine on the basis of the referrals received from 39 states (as of July 2022 – 43 states)¹⁰² taking into consideration that according to the second declaration Ukraine accepted the Court's jurisdiction on an open-ended basis.

Thus, for the moment the ICC has been conducting an investigation of the situation in Ukraine studying alleged crimes committed since 2014 onwards. It lets us hope that perpetrators of terrible crimes committed in Ukraine can be held accountable in conformity with the Rome Statute as well. It should be noted that for the moment 123 states are parties to the Statute and are obliged to collaborate with the Court. So, it is highly probable that suspects will be surrendered to the ICC.

Another advantage for prosecution under the Rome Statute is a broader standard of accountability for superiors' orders and prescription of law (Art. 33). For the purposes of this article, orders to commit genocide or crimes

⁹⁹ Opinion of the Constitutional Court of Ukraine in the Case of the Rome Statute (Висновок Конституційного Суду України у справі про Римський Статут), 11 July 2001, n° 1-35/2001, available at: <https://zakon.rada.gov.ua/laws/show/v003v710-01#Text>.

¹⁰⁰ Declaration of Ukraine Accepted ICC Jurisdiction with Respect to Alleged Crimes Committed on Ukrainian Territory from 21 November 2013 to 22 February 2014, Embassy of Ukraine to the Kingdom of Netherlands, 9 April 2014, available at: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>.

¹⁰¹ Declaration of Ukraine Accepted ICC Jurisdiction with Respect to Alleged Crimes Committed on Ukrainian Territory from 20 February 2014 onwards, Minister for Foreign Affairs of Ukraine, 8 September 2015, available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine.

¹⁰² ICC: Situation in Ukraine, the ICC, available at: <https://www.icc-cpi.int/ukraine>.

against humanity are considered manifestly unlawful¹⁰³. At the same time in conformity with Art. 41 of the Criminal Code of Ukraine a person's action or omission that caused harm to legally protected interests shall be lawful, where that person acted to obey a legal order or instructions. It is mentioned that only a person, who obeyed a manifestly unlawful criminal order or command, shall be criminally accountable¹⁰⁴, but there are no indications of crimes orders to which commitment could be perceived as manifestly unlawful. Such an approach of the legislator makes it more difficult to prove the guilt of suspects.

As it has been already said, the ICC has its own constraints. Among them the requirement of the presence of the accused during the trial (Art. 63) is important¹⁰⁵. In the situation where the Russian Federation is not a party to the Rome statute and supposedly will not cooperate with the court voluntarily, the possibility of prosecution reduces. At the same time according to Art. 139 of the Code of Criminal Procedure of Ukraine the trial can be held in the absence of the accused as well¹⁰⁶.

Thus, both ways for prosecution for the crimes committed on the territory of Ukraine during the Russian invasion of 2022 have some advantages and disadvantages. On the one hand, Ukrainian authorities may be more interested in prosecuting these crimes according to the national legislation on the territory of Ukraine demonstrating their work and making trials more retaliatory and close to a broader audience. It is also obvious that national criminal trials have procedural benefits and go faster that gives more satisfaction to victims. On the other hand, prosecution by the ICC would attract more attention from the international community and cause the Russian Federation more reputational losses.

VIII. CONCLUDING REMARKS

The above overview of the Russian invasion of Ukraine of 2022 has emphasized only some issues of international law that have been triggered by these tragic events. Unfortunately, at the moment international law can't give

¹⁰³ The Rome Statute... cit.

¹⁰⁴ Criminal Code of Ukraine... cit.

¹⁰⁵ The Rome Statute... cit.

¹⁰⁶ The Criminal Procedural Code of Ukraine, 13 April 2012, n° 4651-VI, available at: <https://zakon.rada.gov.ua/laws/show/en/4651-17#Text>.

answers to all of them. Some of these issues, e.g. cyberattacks as the use of force, are new and require more time for the elaboration of effective rules. Some of the problems, like threats of force and their legal consequences, are as old as the world itself, but are still waiting for the formation of a consecutive and consistent state practice that would let consider them serious violations of the principle of the prohibition of the use of force or better of a *jus cogens* norm and would give the international community the grounds to respond to them in the same manner as to the cases of aggression. Besides, serious violations of the main principles of international law, international human rights law and international humanitarian law during the conflict pose the question of responsibility for their commitment.

In our viewpoint in the present conflict with Ukraine the Russian Federation had violated international law long before 24 February 2022. It happened at least 3-4 months earlier, when it moved its troops to the Ukrainian border with the intention to threaten Ukraine, destabilizing its internal situation and weakening it financially and economically. From the perspective of *de lege ferenda* it is very desirable to acknowledge not only the threat of aggression, but all forms of the unlawful threats of force as internationally wrongful acts entailing international responsibility.

The same can be said about cyberattacks, even though the elaboration of their international legal regulation is more difficult due to the problems of their attribution, harm identification and calculation, etc. At the same time being a powerful tool of the intimidation and destabilization of the situation in a state they should find their place among other types of “weapon” used against the independence and sovereignty of another state. Accordingly, the cyberattacks on Ukraine of 15 February 2022 and the further ones due to their highly invasive and military character and their relation to the subsequent armed attack can be qualified as the use of force and, thus, as internationally wrongful acts giving Ukraine the right to demand reparations.

Other interesting issues for a legal analysis are related to the justifications of the aggression against Ukraine presented by Russia. Among them is the claim of self-defense. In fact, an uncertainty existing in international law in connection with the recognition of self-proclaimed entities is often utilized as a pretext for the use of force or other manipulations and violations of the UN Charter provisions. In the case at hand the recognition of the DPR and

LPR by the Russian Federation created a legal basis for it to provide them military “assistance” against “imaginary” attacks of the Ukrainian army even though such “assistance” can’t stand a self-defense test. Unfortunately, it is not the first time when Russia uses the self-defense context for the justifications of its misdeeds, yet the DPR and LPR case is even less corresponding to the precedent practice of recognition. Thus, being more unrecognized than recognized, these entities can not be considered full-fledged states and, consequently, the justification of self-defense can not be invoked.

The Russia’s accusation of genocide committed by Ukraine in Donbas looks even more baseless. It was confirmed by the innovative order of the International Court of Justice that established its jurisdiction over the case and partly authorized provisional measures requested by Ukraine emphasizing that the Russian Federation had not presented any evidence supporting its charge. At the same time the crimes committed by the Russian army on the territory of Ukraine are so numerous and so well-documented that it gives very reasonable hopes that the guilty will be punished. There are several options for it, but the possibility of bringing them to justice under national and international criminal law is greater, even though both ways have their advantages and disadvantages. For the moment the prospects of national prosecution look more promising and fast.

Among the crimes that have been massively committed on the territory of Ukraine, war crimes, which are the grave breaches of international humanitarian law, prevail. It shows us that unfortunately even the peremptory norms of international law that should be respected during every type of armed conflict are violated by the Russian armed forces in their aggressive and inhuman war against Ukraine. Other crimes allegedly committed are, obviously, the crime of aggression, crimes against humanity and genocide, however, the prosecution of the latter is less probable because of its high threshold of proving. We can only hope that justice will find the way and the higher officials of the Russian Federation that have been ruling the invasion will stand trial¹⁰⁷. For sure, the issues of state responsibility of the Russian Federation and individual criminal responsibility should be considered separately.

The present war is a huge challenge for international legal order. But,

¹⁰⁷ PONS RAFOLS, X., “La guerra de Ucrania, las Naciones Unidas y el Derecho Internacional: algunas certezas sistémicas insostenibles”, *Revista electrónica de estudios internacionales*, n° 43, 2022, p. 5, available at: <https://dialnet.unirioja.es/revista/2177/A/2022>.

even though international law is severely violated by the Russian Federation, it still tries to manipulate with it justifying its conduct. In this regard it is very important to prevent these attempts without giving possibilities to Russia for a further use of its false claims for propaganda purposes both inside and outside the country. The order of the International Court of Justice of 16 March 2022 provides a good example of how the international system can counteract legal insinuations and at the same time develop and elaborate prompt responses.

A complex character of legal problems that surround the conflict also shows a deep interrelation between at first sight different branches of international law. Thus, unsolved issues relating to the recognition of states and, in particular, the well-known Kosovo case¹⁰⁸ have created a precondition for the DPR and the LPR recognition and the further claims that Russia is helping them as sovereign states in the context of collective self-defense. It demonstrates how harmful an inconsistent or even double-standards practice can be for the international legal order and the international system as a whole.

At the same time the war in Ukraine over again discovers another major problem of modern international law, the problem of its enforcement. The absence of a compulsory jurisdiction of international courts, the UN Security Council paralyzed by the veto of permanent members, the lack of a unified system of sanctions and a homogeneous approach to the understanding of *jus cogens* and obligations *erga omnes* make it almost impossible to guarantee an effective functioning of the modern international system locking it in stalemate. The end and the results of the Russian war against Ukraine will show us whether the existing international system still can survive, develop and resolve its structural constraints or it will face another global reconstruction that can cost millions of lives.

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¹⁰⁸ See more about Russia's international law doctrine in KUHRT, N., "Russia, the Responsibility to Protect and Intervention" in Fiott, D., Koops, J. (Eds). *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization*, Palgrave Macmillan, London, 2015, pp. 97-114.

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