
PRAWNE ASPEKTY BEZPIECZEŃSTWA



LEGAL ASPECTS OF HYBRID WARFARE IN UKRAINE*

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Abstract

The article looks at the conflict taking place in Ukraine since 2014 and characterises its nature as hybrid warfare. The author examines documents of international and humanitarian law, as well as the reactions to described events from international perspective. Questions are raised concerning the adequacy of current legal solutions in the face of evolution of war itself.

Key words: Ukraine, Russian Federation, international law, humanitarian law

Introduction

The nature of the Russian-Ukrainian conflict differs from the experiences of past military armed conflicts that took place on the territory of Europe. It is characterised by escalation occurring in phases and the use of various forms of non-military and military influence with different degrees of intensity. From the social disturbances located in the centre of Kiev, it turned into the succession of the Crimean Peninsula, followed by its annexation by the Russian Federation and finally exploding as a rebellion in the eastern industrialised Donetsk and Luhansk regions. The bloody armed struggle between the rebels supported by the regular armed formations of the Russian Federation, including special forces, and Ukraine's regular armed forces

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and volunteer formations stopped a fragile truce. The conflict involved propaganda, information, diplomatic and economic actions.

That ‘fog of war’ set in the hybrid warfare structure can be compared to a demon, in front of which not only reason but also international law, especially international humanitarian law of armed conflicts and international human rights law, stay asleep. Hybrid warfare as a new concept for conducting armed conflicts in the 21st century gives us reason to think, according to the words of Marcus Cicero *inter arma tacent leges*¹, to what extent it influences the application and enforcement of public international law, and as a result to determine in which areas that law needs to be adapted by adopting the adequate legal standards. A key point here seems to be to determine the impact of hybrid warfare on the protection of fundamental humanitarian values as set out in customary and treaty humanitarian law of armed conflicts. It is not without significance that persons injured in a hybrid conflict can claim damages before courts, as well as the fact that *state responsibility for internationally wrongful acts* can be implemented. The Russian-Ukrainian conflict taking place at our eastern state borders was described in this paper as a main case study as it has recently been a subject of intense public interest.

Evolution of the prohibition on the use of force in international law

Development of the prohibition on the use of force in international documents

The right of states to declare and conduct war as an instrument of the settlement of international disputes was significantly restricted by the Covenant of the League of Nations. That process was continued in the interwar period by the adoption of the General Treaty for Renunciation of War, also called the Kellogg-Briand Pact (Paris, 27 August 1928)², followed by the *Resolution of Assembly of the League of Nations* (11 March 1932)³. The above-mentioned acts ruled out the possibility of aggressive declaration and conduct of war and thus undermined the legal effects of territorial acquisitions resulting from war operations.

The new international regulations led the states committing aggressive actions to give the cases for use of armed force a legal defensive character. To justify and

1 *M. Tvlli Ciceronis pro T. Annio Milone Oratio* <<http://www.thelatinlibrary.com/cicero/milo.shtml>>; visited: 20 March 2016.

2 The Treaty for Renunciation of War as a binding act of international law of universal scope did not provide for a possibility of its termination (Article II) (Journal of Laws of 1929, no. 63, item 489).

3 Resolution of Assembly of League of Nations, March 11, 1932, League of Nations Correspondence and Resolutions respecting Events in Shanghai and Neighbourhood, February – March 1932, Trinity College Library, Moore Collection Relating to the Far East, Miscellaneous No. 5 (1032) <<http://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1107&context=moore>>; visited: 22 March 2016.

legalise them, they attempted to prove the legitimacy of a self-defence action using available propaganda and diplomatic measures. The initiators of wars resorted to military provocations claiming that the use of armed force is dictated by the interests of the population of the attacked state, is conducted by invitation of the puppet governments, the occupation is peaceful in nature and military operations aimed at police work and order maintenance are below the threshold of war.

The Charter of the United Nations (hereinafter referred to as: UN Charter), being a kind of constitution for the contemporary international community, establishes the global post-war peace order and sanctions the delegatisation of aggression after World War II. Its Article 2 introduces the prohibition on the use of force against the territorial integrity or political independence of any state, conferring on the Security Council 'primary responsibility for the maintenance of international peace and security'⁴. The principle of non-recognition of the legitimacy of territorial acquisitions resulting from the use of armed force in breach of international law was repeated in the following documents: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970)⁵, the Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975⁶, the Charter of Paris for a New Europe of 21 November 1990⁷, the Budapest Summit Declaration, Budapest Decisions, Code of conduct on politico-military aspects of security of 6 December 1994⁸ and the United Nations General Assembly Resolution 3314 (XXIX) Definition of Aggression of 14 December 1974⁹.

Comments on terminology

Although the literal interpretation of Article 2 Section 4 of the UN Charter seems to be obvious, it turned out to be insufficient in practice. The legal doctrine emphasises that the classical international law had already made a distinction between such terms as: war, war operations, *de facto* state of war, intervention, armed intervention, military

⁴ Charter of the United Nations, Statute of the International Court of Justice and Agreement establishing the Preparatory Commission of the United Nations, San Francisco, 26 June 1945, Article 24 Section 1 and 2 (Journal of Laws of 1947, no. 23, item 90, as amended; Journal of Laws of 1966, no. 7, item 41; Journal of Laws of 1968, no. 30, item 197; Journal of Laws of 1974, no. 3, item 20).

⁵ S. Bieleń, *Prawo w stosunkach międzynarodowych. Wybór dokumentów*, Oficyna Wydawnicza ASPRA-JR i Fundacja Studiów Międzynarodowych, Warsaw 2004, at 57-63.

⁶ *Ibid.*, at 401-405.

⁷ *Ibid.*, at 405-411.

⁸ *Ibid.*, at 416-425.

⁹ M. Flemming, *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Zbiór dokumentów*, completion and ed. M. Gąska, E. Mikos-Skuza, Wydawnictwo Akademii Obrony Narodowej, Warsaw 2003, at 90-92.

expedition, military measures and paramilitary acts. In the 20th century, the terms, such as covert intervention, destabilisation, sedition, secret war, export of revolution and preventive attack, were added to the list, thereby eliminating the concept of ‘war’ from the international law documents¹⁰. Consequently, the Additional Protocols to the Geneva Conventions of 8 June 1977 relating to the protection of victims of war use the broader uniform concept of ‘armed conflict’¹¹ covering states, previously called ‘war’.

The treaty law does not include any legal definition of ‘war’ or ‘armed conflict’. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia (ICTY)¹² formulated a definition of ‘armed conflict’ acceptable in the doctrine: ‘(...) an armed conflict exists whenever there is a resort to armed force between State or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State (...)’¹³. In doctrinal terms, ‘war’ means breaking off peaceful relations between states and turning to war relations characterised by an armed struggle and hostile acts against the other state under the national procedure for declaration of war¹⁴. The term ‘war’ is related to cases of the use of armed force between states or groups of states. The UN Charter introduced a new terminology using the following terms: ‘aggression’, ‘use of force’, ‘armed attack’ and ‘intervention’.

Article 2, common to the four Geneva Conventions of 12 August 1949, confirms the universal application of humanitarian law in all armed conflicts regardless of their nature¹⁵. An official declaration of war or issuance of an ultimatum with a conditional declaration of war do not affect the application of international humanitarian law of armed conflicts¹⁶. The recognition of the above-mentioned state by any party to the conflict remains irrelevant. Its occurrence is decided by the scale of hostilities.

The definition of ‘aggression’ reflecting the binding customary law as well as cases of acts of aggression are included in the United Nations General Assembly Resolution

¹⁰ D. Kennedy, *International Legal Structures*, Nomos, Baden-Baden 1987, at 278, as cited in: W. Czaplinski, *Odpowiedzialność za naruszenia prawa międzynarodowego w związku z konfliktem zbrojnym*, Wydawnictwo Naukowe SCHOLAR, Warsaw 2009, at 19.

¹¹ Protocol Additional I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, Geneva 8 June 1977 and Protocol Additional II to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977 (Journal of Laws of 1992, no. 41, item 175, annex).

¹² S/RES/827 of 25 May 1993.

¹³ Prosecutor v. Duško Tadić, ICTY, 2 October 1995, § 70 <<http://www.icty.org/x/cases/tadic/acdec/en/51002>>; visited: 10 February 2016.

¹⁴ W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, 14th edition, Wydawnictwo Prawnicze LexisNexis, Warsaw 2011, at 367.

¹⁵ Journal of Laws of 1956, no. 38, item 171, annex.

¹⁶ Convention relating to the Opening of Hostilities, Hague, 18 October 1907 (Hague Convention III) (Journal of Laws of 1927, no. 21, item 159).

3314 (XXIX) of 14 December 1974¹⁷. Aggression is defined as the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations (Article 1). Article 3 of the Resolution lists seven states qualified as acts of aggression regardless of declaration of war¹⁸. The Resolution 3314 (XXIX) provides the interpretation of the UN Charter that does not include any legal definitions of ‘aggression’ or ‘act of aggression’. A special emphasis was given to the use of armed force, thus leaving such states as: economic pressure, economic coercion, political attacks, cyberattacks and most elements of hybrid warfare outside the definitional framework of the Resolution. The list of acts of aggression is not exhaustive, which means that the UN Security Council may consider other acts as acts of aggression (Article 4)¹⁹. The use of armed force falling into the concept of ‘aggression’ needs to be ‘of sufficient gravity’²⁰ bearing in mind the quantity and quality of the armed force used. Verification criteria include: extent and gravity of violation, scope of operations, size of the seized territory, personal and property damages caused, taking self-defence actions and the degree of threat to international peace.

Elements of hybrid warfare

The concept of ‘war’

On a doctrinal basis, the concept of ‘war’ does not correspond to any political, military and social concepts of ‘war on terror’ or ‘hybrid warfare’. Some elements of war on terror are international or non-international armed conflicts to which international humanitarian law of armed conflicts should be applied²¹. The international armed

17 Advisory Opinion of the Legal Committee to the Minister of Foreign Affairs of the Republic of Poland on annexation of the Crimean Peninsula to the Russian Federation in the light of international law of 22 June 2014 (hereinafter referred as to: Advisory Opinion of the Legal Committee to the Minister of Foreign Affairs of the Republic of Poland on annexation of the Crimean Peninsula), paragraph II.5 <<https://www.msz.gov.pl/resource/382f0629-a114-442a-9cf4-6456ca7b80c1:JCR>>; visited: 10 April 2016.

18 A/RES/3314 (XXIX), Resolution 3314 (XXIX), Definition of Aggression, Resolutions adopted on the reports of the Sixth Committee 2319th plenary meeting, 14 December 1974 (referred as to: A/RES/3314 (XXIX)), at 142 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3314%28XXIX%29>; visited: 15 March 2016.

19 Ibid.

20 Ibid., Article 2.

21 A. S. Weiner, *Law, Just War, and the International Fight Against Terrorism: Is It War?*, Center on Democracy, Development, and the Rule of Law, ‘Stanford Institute on International Studies’ 2005, no. 47, at 6, as cited in: A. Szpak, *Selektywna eliminacja w międzynarodowym prawie humanitarnym* [in:] *Międzynarodowe prawo humanitarne, volume IV: Selektywna eliminacja, rozkaz wojskowy*, ed. R. Bugajski, Wydawnictwo Akademii Marynarki Wojennej, Gdynia 2013, at 40-41.

conflict between the United States of America and Afghanistan conducted under the aegis of the ‘global war on terrorism’ gave rise to grievous violations of international law in an armed conflict. At that time, the first theses appeared that international humanitarian law of armed conflict has eroded, because it is not able to meet the new challenge of terrorism²². Consequently, the prisoner-of-war status of the soldiers of the Afghan government forces (Taliban) and their allies fighting on the Afghan side (Geneva Convention (III) relative to the Treatment of Prisoners of War)²³ as well as the status of civilian persons (Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War)²⁴ were denied. For the purposes of that practice, hybrid concepts of ‘enemy combatant’ and ‘unlawful combatant’ were introduced. By setting up and expanding the detention camp in Guantanamo Bay, Cuba, and using other transitional camps (among others in Poland) the United States used torture against civilian persons and prisoners of armed conflict in Afghanistan as well as against persons captured in other regions of the globe to obtain intelligence, which violated the non-derogable rights of an individual.

Hybrid warfare, as shown in the following diagram, is a combination of conventional military forces, police forces, irregular rebel operations, cyberattacks, disinformation, psychological influence, economic destabilisation, hostile diplomacy, spreading religious hatred etc. Multiplication of beings in international law is not very useful, if issues such as war (preamble of the UN Charter), use of force (Article 2 Section 4), use of armed force (Article 46), armed attack (Article 51), act of aggression (Article 39), intervention (Article 2 Section 7), as well as states of smaller gravity such as threat to or breach of the peace (Article 39) are regulated in the UN Charter. In the United Nations General Assembly Resolution 3314 (XXIX) Definition of Aggression of 14 December 1974, such terms as aggression (Article 1), declaration of war (Article 3) and war of aggression (Article 5)²⁵ are used.

Asymmetry of contemporary armed conflicts

The contemporary inter-state and intrastate conflicts are characterised by the asymmetry of military potentials used by the parties to the conflict in the sense that there is no guarantee that a party with a higher technological military or organisational potential achieves victory and that it is not sufficient to use only military means. The concept of ‘hybrid warfare’ which is the product of American legal doctrine²⁶ was reflected, among others, in the strategy of the Russian Federation. According to

²² A. Szpak, *Status prawny zatrzymanych w Guantanamo Bay*, TNOiK, Toruń 2007, at 13.

²³ Geneva, 12 August 1949 (Journal of Laws of 1956, no. 38, item 171, annex).

²⁴ Ibid.

²⁵ A/RES/3314 (XXIX).

²⁶ Frank G. Hoffman is considered to be the author of the concept of hybrid warfare (F.G. Hoffman, *Hybrid Warfare and Challenges*, ‘Joint Force Quarterly’ 2009, no. 52, at 34 et seqq).

Valery Gerasimov, Chief of the General Staff of the Russian Federation Armed Forces – first Deputy Defence Minister, the model of hybrid warfare is based on the following assumptions: ‘The very ‘rules of war’ have changed. The role of non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness. The focus of applied methods of conflict has altered in the direction of the broad use of political, economic, informational, humanitarian, and other non-military measures – applied in coordination with the protest potential of the population. All this is supplemented by military means of a concealed character, including carrying out actions of informational conflict and the actions of special operations forces. The open use of forces – often under the guise of peacekeeping and crisis regulation – is resorted to only at a certain stage, primarily for the achievement of final success in the conflict’²⁷.

The concept and constituent elements of hybrid warfare

Under international humanitarian law of armed conflicts, hybrid warfare is a conflict in which actual events corresponding to the legal status of international and non-international armed conflicts occur simultaneously, including internal disturbances subject to regulations of national law and international human rights law.

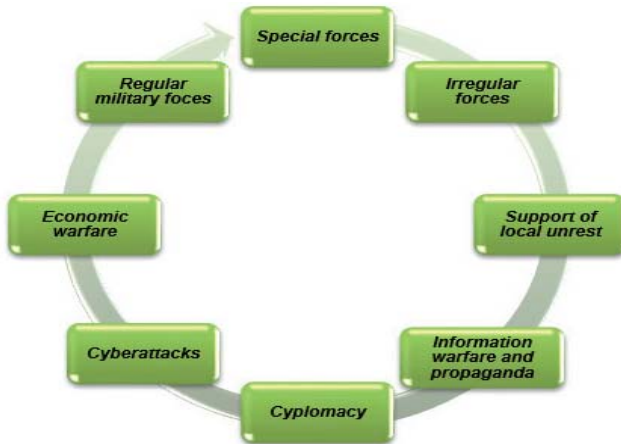
Hybrid warfare employs a broad range of tools: ‘Over the course of the crisis, Russian leaders denied any active involvement but sent irregular forces dubbed ‘little green men’, spread propaganda and encouraged local unrest, assembled regular forces at the border, and engaged in diplomacy trying to keep up the narrative that Moscow was not a party to the conflict’²⁸. In the opinion of the Supreme Allied Commander Europe of NATO (North Atlantic Treaty Organization), General Philip M. Breedlove, ‘What we see in Russia now in this hybrid approach to war is to use all of the tools that they have (...) to reach into a nation and cause instability, use their energy tools, use their finance tools, use what I think is probably the most amazing information warfare *blitzkrieg* we have ever seen in the history of informational warfare, using all these tools to stir up problems that they can then begin to exploit with their military tool – through coercion (...) or through, what we see now in Crimea, what we’ve seen in Eastern Ukraine, Russian regular and irregular forces, these little green men without badges inside of nations stirring trouble’²⁹.

27 V. Gerasimov, *The Value of Science in Prediction*, ‘Military-Industrial Kurier’, 27 February 2013 <http://vpk-news.ru/sites/default/files/pdf/VPK_08_476.pdf>, as cited in: R. Coalson, *Top Russian General Lays Bare Putin’s Plan for Ukraine*, ‘The Huffington Post’, 2 September 2014 <<http://huff.to/1CmQRoc>>; *Hybrid Warfare: Who Is Ready?*, Munich Security Report 2015, at 35, <<http://www.eventanizer.com/MSR2015/MunichSecurityReport2015.pdf>>; visited: 12 March 2016; own translation.

28 *Hybrid Warfare: Who Is Ready?*, Munich Security Report 2015, at 34; own translation.

29 P.M. Breedlove, *Implications of the Ukraine Crisis*, The Atlantic Council’s Future Leaders Summit, Newport, 4 September 2014 <http://youtu.be/W3qhFOENL_Q>, as cited in: *ibid.*, at 34; own translation.

The elements of hybrid warfare can be presented in diagrammatic form as follows (51st Munich Security Conference, 6-8 February 2015):



Hybrid warfare = Combination of multiple conventional and unconventional tools of warfare

Based on: *Hybrid Warfare: Who is Ready?*, Munich Security Report 2015, at 35.

Diagram 1. Elements of hybrid warfare

Escalation of the Russian-Ukrainian conflict

Internal disturbances as the first phase of the conflict

Each factual state making up the concept of ‘hybrid warfare’ has relevant legal regulations applicable to the Russian-Ukrainian conflict. Those issues can be presented by illustrating the escalation of the conflict (phase I – internal disturbances, phase II – annexation of the Crimean Peninsula and Sevastopol by the Russian Federation, phase III – rebellion in the Donetsk and Luhansk regions stabilised by the Minsk Agreement).

The first phase of the Ukrainian conflict involved demonstrations by opponents of the state authorities in the Independence Square in Kiev. Article 1 Section 2 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts defines internal disturbances as situations in which it comes to violation of public order as a result of acts of violence; however, on a smaller scale than during an armed conflict³⁰.

The above-mentioned provisions are completed by those in Article 8 of the Rome Statute of the International Criminal Court in Hague (hereinafter referred to as: ICC

³⁰ Journal of Laws of 1992, no. 41, item 175, annex.

Statute)³¹, in which war crimes committed during international and non-international (domestic) armed conflicts are defined. However, according to Article 8 Section 2 d) and f) those provisions do not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature (...)’³². Article 7 of the ICC Statute grants protection to the civilian population in peacetime as well. It concerns acts bearing the hallmarks of crime against humanity. As far as the Maidan crimes of murder are concerned, Article 7 Section 1 a) and Section 2 a) of the ICC Statute relating to an attack against civilian population could be analysed. According to the Elements of Crime, murder of one or more persons where the perpetrator intended the conduct to be a part of a widespread or systematic attack against the civilian population includes the elements of crime against humanity.

Although Ukraine did not ratify the ICC Statute, it recognised the jurisdiction of the Court by lodging a declaration with the Registrar relating to the crimes of murder committed during the protests in Maidan (Article 12 Section 2 and 3).

Second phase – annexation of Crimea and Sevastopol by the Russian Federation

In the Memorandum on Security Assurances (Budapest, 5 December 1994), the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Russian Federation provided security assurances for the territorial integrity of Ukraine reaffirming their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations³³. Taking over the Ukrainian nuclear weapons, the Russian Federation reaffirmed the inviolability of its borders.

On 27 February 2014, unmarked attackers overran the building of the Parliament of the Autonomous Republic of Crimea. The former authorities were replaced and a referendum on the extension of autonomy was announced. On 11 March 2014, the Supreme Council of the Autonomous Republic of Crimea and the Sevastopol City Council issued a declaration of independence which proclaimed the establishment of the Republic of Crimea referring to the Kosovo case, or more precisely, to the Advisory Opinion of the International Court of Justice (hereinafter referred to as: ICJ) of 22 July 2010 finding that a unilateral declaration of independence, as a rule, does

31 Rome Statute of the International Criminal Court adopted in Rome on 17 July 1998 (Journal of Laws of 2003, no. 78, item 708).

32 Ibid.

33 Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, signed on 5 December 1994 by the Presidents of Ukraine, the Russian Federation and the United States of America, and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland <https://www.msz.gov.pl/en/p/wiedenobwe_at_s_en/news/memorandum_on_security_assurances_in_connection_with_ukraine_s_accession_to_the_treaty_on_the_npt?printMode=true>; visited: 2 March 2016.

not violate international law³⁴. The Ukrainian authorities and the European Union (hereinafter referred to as the EU) found the referendum in Crimea (16 March 2014), with nearly 97% votes in favour of joining the Russian Federation, incompatible with international law. The final ratification of the agreement on the accession of Crimea to the Russian Federation providing for the full integration of the peninsula with the Russian Federation took place on 21 March 2014.

Under international humanitarian law of armed conflicts, the annexed Crimean Peninsula has the status of occupied territory. Military occupation occurs regardless of armed resistance shown while taking control of the particular territory (Article 2, common to the four Geneva Conventions of 1949). The actual transfer of power from the hands of the legitimate government into the hands of the occupant does not affect the legal continuity of an occupied state. The lack of legitimate state or local authorities leading to long-term occupation does not result in the loss of sovereignty by a state (Article 4 of the Protocol Additional I of 1977). The actions of the occupation authorities aimed at the establishment of sovereignty over the occupied territories or their annexation violate international law and, in light of that law, are considered null and void³⁵. The Russian Federation violated the Treaty of Friendship, Cooperation and Partnership Between Ukraine and The Russian Federation of 31 May 1997 that assures, *inter alia*, respect for territorial integrity, inviolability of borders and non-interference in internal affairs (Article 2 and 3)³⁶.

Ukraine did not declare the fact of being at war with the Russian Federation and its armed forces refrained from taking measures to protect property and its citizens living in the Crimean Peninsula. Only on 27 January 2015 did the Supreme Council of Ukraine adopt a resolution declaring the Russian Federation to be an aggressor and the self-proclaimed Donetsk and Luhansk People's Republics to be terrorist organisations.

Rebellion in the Donetsk and Luhansk regions (third phase)

Military operations of the pro-Russian separatist forces conducted since April 2014 in Donbass were supported by military formations of the Russian Federation. Military operations of the Russian Federation consisted in attacks against the Ukrainian armed forces within the latter's territory, shelling from the territory of the Russian

³⁴ Advisory Opinion of the International Court of Justice of 22 July 2010 on the accordance of the unilateral declaration of independence of Kosovo with international law (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*), International Court of Justice Reports 2010, at 40 <<http://www.icj-cij.org/docket/files/141/15987.pdf>>; visited: 12 March 2016.

³⁵ R. Bierzanek, *Wojna a prawo międzynarodowe*, Wydawnictwo Ministerstwa Obrony Narodowej, Warsaw 1982, at 235.

³⁶ Treaty of Friendship, Cooperation, and Partnership Between Ukraine and The Russian Federation, 31 May 1997, at 69 <<http://www.dtic.mil/dtic/tr/fulltext/u2/a341002.pdf>>; visited: 14 April 2016.

Federation, delegating ‘soldiers on leave’ within armed groups and irregular units to conduct armed attacks against Ukraine equal to acts of aggression, including capturing the ships of the Ukrainian navy preceded by a sea blockade of Crimea.

The referred acts correspond to the definition of ‘aggression’ as set out in the UN General Assembly Resolution 3314 (XXIX) as well as to the ICJ statement qualifying particular actions as aggression. The judgment concerning military and paramilitary activities in and against Nicaragua is relevant here, according to which a state was held responsible for the activities of armed groups being *de facto* its agents³⁷. Furthermore, activities conducted by regular forces and the sending of armed bands or groups by or on behalf of a state which conducts such serious armed operations that they may result in an attack with use of regular armed forces or with their significant involvement were included in the concept of ‘armed attack’³⁸.

Attempts to legitimise aggression in the Russian-Ukrainian conflict

Right to self-determination of peoples

The right to self-determination of peoples reserved for the decolonisation process connected with violation of human rights, discrimination and the lack of influence on exercise of power over the inhabited region are not applicable to the Autonomous Republic of Crimea and the city of Sevastopol. It does not authorise or encourage any actions that could lead to disruption or the partial or full violation of the territorial integrity or political unity of sovereign and independent states with governments able to represent the whole population of the particular territory without distinction to race, religion or colour. The following arguments can negate the legality of secessionist activities of the autonomous authorities of Crimea and their decision to join the Russian Federation: the referendum was held against the will of the Ukrainian government, during the occupation of the peninsula by Russian forces, in breach of domestic law, requiring not a local but nationwide referendum³⁹.

The question arises as to whether it is justified to look for similarities between the secession of the Republic of Crimea and the secession of Kosovo. The initial analysis shows many differences between both secessions. In Crimea, no independent mass political movement or military actions of population interested in the secession could be observed. No internal disintegration factors justifying the violation of the territorial

³⁷ P. Grzebyk, *Odpowiedzialność karna za zbrodnię agresji*, Wydawnictwo Uniwersytetu Warszawskiego, Warsaw 2010, at 112.

³⁸ Case concerning military and paramilitary activities in and against Nicaragua, 27 June 1968, International Court of Justice Reports 1986, at 14 and 94; 76 ‘International Law Reports’, at 349 and 428.

³⁹ M. Radziejowska, *Prawo i bezprawie – secesja i przyłączenie Krymu do Rosji*, ‘Biuletyn Polskiego Instytutu Spraw Międzynarodowych’ no. 38 (1150), 26 March 2014, at 1.

integrity of Ukraine were developed. Owing to the scale of ethnic cleansing and international crimes in Kosovo, there appeared a precondition for *remedia* secession. The secession of the Republic of Crimea (20 February – 21 March 2014) ended up in accession to the Russian Federation and persecution of the non-Russian population (especially Crimean Tatars). Kosovo, on the other hand, was after the civil war still under a protectorate administered by the United Nations Organisation (hereinafter referred to as: UNO), supported by the Kosovo Force, the EU and the Organisation for Security and Co-operation in Europe.

The NATO military operation in Kosovo was conducted with involvement of the international community, unlike in the Crimean Peninsula, whose occupation by the Russian Federation started without regard for the international community. The declaration of independence of Crimea, announced on 16 March 2014, gained the recognition of few states. Since the declaration of independence on 17 February 2008, the Republic of Kosovo has been recognised by 109 of the 193 UN member states.

The United Nations General Assembly Resolution 68/262 on the territorial integrity of Ukraine (27 March 2014) condemns the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 as well as the annexation of the Crimean Peninsula by Russia⁴⁰. The UNO did not adopt such a resolution in response to the proclamation of the new state of Kosovo. In the opinion of the IJC, the unilateral declaration of independence of Kosovo did not violate international law and its secession should be treated as an exception that is not suitable for a schematic reproduction⁴¹.

As there are no similarities, resorting to parallels and legitimising the secession of Crimea on the basis of international decisions and actual conditions typical for the secession of Kosovo seem to be unjustified. In the stance of the Russian Federation, an internal contradiction can be noticed. On the one hand, the right of Kosovo to secession has been denied and the state itself has not been recognised, on the other hand, the case of the ‘illegal’ secession of Kosovo has been referred to as a factual and legal basis for the legality of the secession of Crimea and its accession to Russia. With the annexation, the Russian Federation carried out an act of aggression against Ukraine.

Military intervention to protect nationals

An intervention to protect nationals is defined as use of armed force against a state, on whose territory the nationals of the intervening state are subject to threat, in accordance with the concepts of necessity and proportionality⁴². Taking the criterion

⁴⁰ A/RES/68/262, 27 March 2014 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262>; visited: 11 April 2016.

⁴¹ K. Czubocho, *Pojęcie państwa i procesy państwowotwórcze we współczesnym prawie międzynarodowym*, Wydawnictwo Adam Marszałek, Toruń 2012, at 194.

⁴² W. Czaplński, op. cit., at 53.

of legality as a basis, armed interventions to protect nationals can be divided into: lawful (with the consent of the territorial state)⁴³, tolerated (without the consent of a state which is unwilling or unable to protect nationals itself, initiated only after the exhaustion of all peaceful means of settling disputes)⁴⁴, unlawful (without the consent of a state, carried out against non-nationals of a state; however, having ethnic, language or cultural ties with it).

The systematic analysis speaks in favour of the legitimacy of armed intervention to protect nationals in the first two cases which, taking into account the actual state, do not correspond to the Russian-Ukrainian conflict. A threat to Russian nationals was given, among other things, as a reason to justify the Russian President's petition for permission to use armed forces in the territory of Ukraine. That argument remains irrelevant under international law as based on national regulations of the Russian Federation. The armed operations against Ukraine do not fulfil legal preconditions for armed intervention aimed at protection of nationals, as they refer to non-nationals of the intervening state having only ethnic, language or cultural ties with it.

Military assistance on request

The roots of military assistance on request, also called intervention by invitation or intervention on request, should be sought in international humanitarian law of armed conflicts. Military assistance on request means direct military assistance by the sending of armed forces by one to another state upon the latter's request (Article 1 a) of the Resolution of the Institute of International Law of 8 September 2011)⁴⁵. The request as a free expression of will of the requesting state must provide detailed terms and modalities of assistance which are in conformity with the international obligations of the requesting state⁴⁶. Military assistance is objectively restricted 'to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977'⁴⁷. Under humanitarian law, providing assistance on request is tantamount to peacetime occupation, which places it outside the mainstream of international humanitarian law of armed conflicts. The referred

⁴³ J. Kranz, *Między wojną a pokojem: świat współczesny wobec użycia siły zbrojnej* [in:] *Świat współczesny wobec użycia siły zbrojnej. Dylematy prawa i polityki*, ed. J. Kranz, Instytut Wydawniczy EuroPrawo, Warsaw 2009, at 40.

⁴⁴ W. Czaplński, A. Wyzomska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Wydawnictwo C.H. BECK, Warsaw 2014, at 894-895.

⁴⁵ Institute of International Law, Tenth Commission Present Problems of the Use of Force in International Law Sub-Group C – *Military assistance on request* <http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_10_C_en.pdf>; visited: 11 April 2016.

⁴⁶ Article 6 of the Resolution.

⁴⁷ Article 2 Section 1 of the Resolution.

occupation means temporary seizure of foreign territory under international law in a time of peace.

Viktor Yanukovich and the newly elected Prime Minister of the Autonomous Republic of Crimea, Sergey Aksyonov, did not have proper legitimacy to request military assistance from the Russian Federation on 1 March 2014. Viktor Yanukovich, by fleeing to the Russian Federation on 23 February 2014, withdrew from the exercise of his powers. However, Sergey Aksyonov, who was elected Prime Minister of the Autonomous Republic of Crimea on 27 February 2014 by the Crimean parliament, was not approved by the interim President of Ukraine, Oleksandr Turchynov⁴⁸.

The president was not authorised to request another state for military assistance without the consent of parliament (Article 106 of the Constitution of Ukraine)⁴⁹. Such a power had neither the local authorities of the Crimean autonomy nor the secessionist authorities of the People's Republic of Donetsk and the People's Republic of Luhansk. It was the Supreme Council of Ukraine that had exclusive power to take a decision on the admission of foreign military forces into the territory of Ukraine (Article 85 Section 23). The Parliament of Ukraine did not turn to the Russian Federation with a request for military assistance. The interim President of Ukraine, Oleksandr Turchynov, accused Russia of aggression, and thus ruled out the recognition of requests for military assistance as an official stance of Ukraine.

Responsibility to protect

The concept of responsibility to protect (R2P) is a continuation of the protective message of humanitarian intervention. The Resolution 60/1 adopted by the General Assembly on 16 September 2005 (60th session, High-Level Plenary Meeting in New York) affirmed the responsibility of each state towards the international community to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity through diplomatic, humanitarian and other means in accordance with Chapters VI and VIII of the UN Charter⁵⁰.

The United Nations member states are not obliged to conduct automatic armed intervention – it's solely the right to react⁵¹. Should peaceful and military measures of settling disputes provided for in the Chapters VI and VIII of the UN Charter turn out to be inadequate, military intervention may be undertaken (Articles 42-43 of the

⁴⁸ A. Kowalczyk, *Polityka Polski wobec Ukrainy w 2014 r. – próba bilansu*, 'Biuletyn OPINIE FAE' no. 3/2015, at 5.

⁴⁹ Constitution of Ukraine of 1996 (text amended by the Supreme Council on 21 February 2014) <<http://www.ccu.gov.ua/doccatalog/document?id=242321>>; visited: 20 March 2016.

⁵⁰ Resolution 60/1 adopted by the General Assembly on 16 September 2005, World Summit Outcome, A/RES/60/1, 24 October 2005 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1>; visited: 5 April 2016.

⁵¹ N. Tocci, *O pojęciu siły politycznej i normach. Libia, Syria i odpowiedzialność za ochronę* [in:] *Jan Karski a odpowiedzialność za ochronę*, ed. E. Smolar i B.M.J. Szewczyk, Wydawnictwo Fundacja Jana Karskiego, Warsaw 2015, at 143.

UN Charter). A decision on use of force is taken by the Security Council on a case-to-case basis when the criteria of legitimate authority, such as just cause (just reason, the highest humanitarian necessity), right intention (halting or averting human suffering), last resort (ineffectiveness of lesser measures), proportional means (proportionality of actions to the aim pursued and to the gravity of the situation), reasonable prospects (reasonable chance of success in halting or averting the suffering), and right authority (decision of the United Nations on military intervention)⁵² are fulfilled.

International crimes lying at the core of the R2P concept have the status of customary and peremptory norms in the sense that ‘(...) they are legally binding for all the states regardless of treaties ratified by them, as well as for armed resistance groups with regard to rules applicable to all parties to the international conflict’⁵³. With the ratification of the Geneva Conventions for the Protection of War Victims of 12 August 1949 (I-IV) and Protocols Additional to those Conventions of 6 June 1977 (I-II)⁵⁴, states approved the commitment to prevent genocide, war crimes and crimes against humanity.

The R2P concept is inadequate in reference to the Russian-Ukrainian conflict. First, the precondition for taking a decision on use of force by the UNO or with its authorisation against a sovereign state was not fulfilled (right authority). Second, military intervention should be preceded by a request to the UN Security Council for adequate authorisation (unilateral intervention of a single state is inadmissible and unlawful). Third, Ukraine did not commit international crimes in Crimea. There was no threat of serious and irreversible harm to the population resulting from a destructive strategy of the Ukrainian state. As the population of Crimea was not subject to mass hunger, murders, forced evictions, acts of terror, rapes or civil war, the preconditions for just cause and right intention were not fulfilled. The seizure of Crimea by the Russian Federation does not meet the preconditions for last resort, proportional means and reasonable prospects giving a reasonable chance of success in halting and altering the suffering.

⁵² G. Evans, M. Sahnoun, *Odpowiedzialność za ochronę. Nowe spojrzenia na interwencje humanitarne* [in:] *Jan Karcki a odpowiedzialność za ochronę*, ed. E. Smolar, M.J. Szewczyk, Wydawnictwo Fundacja Edukacyjna Jana Karckiego, Warsaw 2015, at 76.

⁵³ J.M. Henckaerts, *Studium poświęcone zwyczajowemu międzynarodowemu prawu humanitarnemu: wkład w zrozumienie i poszanowanie zasad prawa dotyczących konfliktu zbrojnego*, Ośrodek Upowszechniania Międzynarodowego Prawa Humanitarnego przy Zarządzie Głównym Polskiego Czerwonego Krzyża, Warsaw 2006, at 29.

⁵⁴ *Journal of Laws of 1992*, no. 41, item 175 (annex).

Stance of the UN Security Council on the annexation of crimea

The UN Security Council as political body obliged to maintain international peace and security (Article 24 of UN Charter) did not take a stance on the annexation of Crimea. It was assumed that the Russian Federation as a permanent member of the UN Security Council would block the adoption of a resolution condemning the aggression. A draft resolution that declared the referendum in Crimea on the status of the Crimea region invalid and reaffirmed the sovereignty, independence, unity and territorial integrity of Ukraine was voted on 19 March 2014. Owing to Russia's veto, the draft resolution was not adopted⁵⁵. China abstained.

In the absence of unanimity of the permanent members of the UN Security Council, the competence for the maintenance of international peace and security was shifted to the General Assembly (*Uniting for Peace* procedure), which was initiated by the Resolution 377 (V) of 3 November 1950⁵⁶. On 27 March 2014, the General Assembly of the United Nations adopted the Resolution 68/262 condemning the referendum in Crimea and the annexation of the peninsula by Russia (100 vote in favour, 11 against, 58 abstentions). The text of the Resolution does not differ significantly from the draft resolution of 19 March 2014 blocked in the UN Security Council by the Russian Federation. In paragraph 5 of the Resolution, the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was declared invalid⁵⁷.

The first resolution on Ukraine drafted by the Russian Federation was adopted unanimously by the UN Security Council on 17 February 2015. In paragraph 1 of the Resolution 2202 (2015) the Council endorsed the package of measures for the Implementation of the Minsk Agreement (Belarus) on the ceasefire agreed by the leaders of Russia, Ukraine, France and Germany on 12 February 2015 (Annex I to the Resolution)⁵⁸. The Resolution establishes the current division of Ukraine without reference to the aggression of Russia against Ukraine. However, it contains provisions concerning reinstatement of full control of the state border by the government of Ukraine (paragraph 9) and withdrawal of all foreign armed formations, mercenaries and military equipment from the territory of Ukraine (paragraph 10). The authorities of Ukraine were obliged to carry out constitutional reform with a new constitution entering into force by the end of 2015 providing for decentralisation as a key element, including a reference to the specificities of certain areas of the Donetsk and Luhansk regions (paragraph 11). Ceasefire in certain areas of the Donetsk and

⁵⁵ A. Łabuszewska, *Rada nierada: ONZ bezsilne wobec agresji na Krymie*, 'Tygodnik Powszechny' of 17 March 2014.

⁵⁶ K. Kocot, K. Wolfke, *Wybór dokumentów do nauki prawa międzynarodowego*, 4th edition, Wydawnictwo Państwowe Wydawnictwo Naukowe, Wrocław-Warsaw 1969, at 105.

⁵⁷ A/RES/68/262.

⁵⁸ S/RES/2202 (2015), 17 February 2015 <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2202%20%282015%29?>; visited: 26 February 2016.

Luhansk regions of Ukraine were to be implemented on 15 February 2015, 12:00 a.m. local time (paragraph 1). The terminology used in the Agreement related to exchange of hostages and unlawfully detained persons, amnesty for persons involved in the events that had taken place in certain areas of Donetsk and Luhansk as well as resumption of economic ties with Ukraine shows that we are dealing with an internal non-international armed conflict in Ukraine.

International responsibility of a state in an armed conflict

State responsibility for internationally wrongful acts

The International Law Commission's Draft Articles (hereinafter referred to as ILC) on State Responsibility for Internationally Wrongful Acts adopted at the 56th session of the UN General Assembly (Resolution 56/83 of 12 December 2001)⁵⁹ provide for general rules of state responsibility for internationally wrongful acts. According to Article 1, every internationally wrongful act (action or omission) of a state entails its international responsibility. A state cannot invoke its internal law in order to justify its conduct not in conformity with its obligation under international law (paragraph 3). The activities of armed units of one state violating international law on the territory of another state give rise to the international responsibility of the former state. The wrongfulness of an act can be precluded in the event of the consent of a state to a given conduct of the other state (e.g. military assistance on request conducted according to terms and modalities agreed with a territorial sovereign)⁶⁰ or lawful measures of self-defence⁶¹.

State responsibility for the conduct of an insurrectional or separatist movement during civil war arises with transition of power. The principle of succession results in the attribution of actions and omissions committed by a newly established government as well as actions and omissions committed during the period of fighting by the insurrectional movement to that state⁶². According to Article 8 of the Draft Articles of the International Law Commission, the hostilities of irregular forces in the Crimean Peninsula can be attributed to the Russian Federation. The conduct of a person or group of persons is considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that state in carrying out the conduct⁶³. That line of

⁵⁹ Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/56/589 and Corr.1)] 56/83. Responsibility of States for internationally wrongful acts; <<http://www.ilsa.org/jessup/jessup11/basicmats/StateResponsibility.pdf>>; visited: 25 March 2016.

⁶⁰ Article 20 of ILC's Draft Articles.

⁶¹ Article 21 of ILC's Draft Articles.

⁶² Article 10 of ILC's Draft Articles.

⁶³ Ilașcu and Others vs. Moldova and Russia.

argumentation strengthens two statements of President Vladimir Putin – the first one of 17 March 2014 (teleconference in Moscow), in which the fact of involvement of the soldiers of the Russian Federation armed forces in irregular groups was officially confirmed; the second one of 7 April 2014 concerning the support of local forces in Crimea by Russia. The stance of the European Court of Human Rights (hereinafter referred to as: ECTHR) in Strasbourg on state responsibility for conducts beyond its borders upon fulfillment of the preconditions for effective control by one state on the part of the territory of another state is noteworthy. Conduct of a state is considered an act of that state under international law if the state acknowledges and adopts the conduct in question as its own⁶⁴.

State responsibility for violations of international humanitarian law of armed conflicts

According to the United Nations General Assembly Resolution 3314 (XXIX), a war of aggression is a crime against international peace giving rise to international responsibility (Article 5 Section 2)⁶⁵. State responsibility for damages resulting from military operations was confirmed for the first time in the Hague Convention (IV) of 1907. Pursuant to Article 3, a belligerent party ‘(...) shall be responsible for all acts committed by persons forming part of its armed forces’⁶⁶. States acknowledged the responsibility for violation of the laws of war provided for in the Hague Regulations concerning the Laws and Customs of War on Land, including the obligation to bring the perpetrators of violations of international humanitarian law of armed conflicts to justice. The above-mentioned norm was reflected in Article 91 of the Protocol Additional I to the Geneva Conventions⁶⁷. It is applicable, among others, to armed conflicts resulting from national liberation struggles as well as to groups defined in Article 43 as armed forces. With the adoption of the principle of inadmissibility of avoidance of state responsibility for serious violations of the Geneva Conventions of 1949⁶⁸, equal treatment of all parties to an armed conflict was guaranteed and, at the same time, established a mechanism to prevent situations of forcing the defeated party to renounce its legal claims.

Criminal responsibility for international crimes is claimed first of all before national courts. The International Criminal Court in Hague⁶⁹, before which Ukraine brought two cases in the first phase of the conflict (the first one concerning the pacification of Euromaidan protesters; the second one concerning the shelling of a bus

⁶⁴ Article 11 of ILC’s Draft Articles.

⁶⁵ A/RES/3314 (XXIX).

⁶⁶ Convention respecting the Laws and Customs of War on Land (Hague Convention IV), Hague, 18 October 1907 (Journal of Laws of 1927, no. 21, item 161).

⁶⁷ Journal of Laws of 1992, no. 41, item 175, annex.

⁶⁸ Journal of Laws of 1956, no. 38, item 171, annex.

⁶⁹ Article 1 of the ICC Statute.

in Volnovakha in Ukraine with 13 civilians killed) has a complementary character. On the other hand, the ECHR examined two inter-state applications lodged by Ukraine against the Russian Federation⁷⁰. The application 20958/14 of 13 March 2014 concerns the events following the assumption of control by the Russian Federation over the Crimean Peninsula and subsequent developments in Eastern Ukraine⁷¹. The application 43800/14 of 13 June 2014 concerns the alleged abduction of three groups of Ukrainian orphan children and children without parental care and a number of adults accompanying them. In addition to the above-mentioned applications, there are more than 160 individual applications pending before the Court, lodged against Ukraine or Russia or both. The government of Ukraine announced that it would lodge claims before the ICJ and the International Tribunal for the Law of the Sea with its headquarters in Hamburg in order to regain the Crimean Peninsula.

Summary

The contemporary international law faces many challenges. One of them is the development of new concepts, such as hybrid warfare reflecting the eternal tendency of states towards territorial conquests and domination. The referred situation results from the lack of legal definitions of basic concepts relevant to maintaining international peace and security, the tendency to create imprecise legal norms and to blur them, the attempts to apply double standards and improper practice of states. Consequently, the following questions arise: Is international humanitarian law of armed conflicts broad enough to encompass the concept of hybrid warfare that is becoming more and more popular? Is it legitimate to claim that in the face of the recent development of new concepts of conduct of armed conflicts, the norms of international law are subject to revocation or suspension?

One of the greatest threats to peace order in the world is the questioning of the foundations of international law established over the centuries on the basis of such arguments as maintenance of external security, conduct of expansion policy, humanitarian intervention or assistance in the self-determination of peoples. The evolution of international humanitarian law of armed conflicts results from the changes in the course of armed conflicts themselves. However, they do not result, in any case, in revocation of fundamental rules on which the above-mentioned part of international law is based. Both initiation and progression as well as the end phase

⁷⁰ ECHR 073 (2014) of 13 March 2014 <<http://hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>>; visited: 1 March 2015 and ECHR 345 (2014) of 26 November 2014 <<http://hudoc.echr.coe.int/webservices/content/pdf/003-4945099-6056223>>; visited: 1 March 2016.

⁷¹ *European Court of Human Rights deals with cases concerning Crimea and Eastern Ukraine*, European Court of Human Rights, Press Release issued by the Registrar of the Court, ECHR 345 (2014), 26.11.2014 <http://hudoc.echr.coe.int/web_services/content/pdf/003-4945099-6056223>; visited: 14 April 2016.

of an armed conflict are subject to legal control. The right to self-determination of peoples, use of armed force to protect nationals, military assistance on request and responsibility to protect do not justify the Russian aggression in Ukraine.

Treaty humanitarian law of armed conflicts requires the observance of adopted regulations and its full implementation in the internal legal systems by the signatory states. The adoption of international obligations in that area by all the states, above all by the superpowers, is desirable. New treaty regulations as a response to the current needs and challenges should be developed only to a small extent. Placing the Russian-Ukrainian conflict in the concept of hybrid warfare does not affect the application of international law, in particular international humanitarian law of armed conflicts.

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