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International legal regime of the territory of Crimea after the Russian annexation

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Abstract

The purpose of the research. The purpose of the article consists in determination of the current international legal regime of the territory of Crimea for further proper argumentation of Ukraine's position in interstate disputes with the Russian Federation. Main content. Various forms of foreign military presence on the territory of a state have been studied, such as: occupation, conquest, deployment of foreign military bases, annexation, etc.

Determined are signs that characterize the legal regimes of occupation and annexation and their international regulation. Methodology: Review of materials and methods based on analysis of documentary materials of the annexation of Crimea on the part of Russia. Conclusions. Characteristic features of annexation being currently a kind of aggression crime include unilateral declaration of state sovereignty over a territory which have not been a part of this state, as well as the legitimation of annexation through de facto ownership of a territory and international recognition of this fact. According to the international law, there is currently no legal mechanism for the transfer of sovereignty over territory to an aggressor through annexation.

Keywords: forced annexation; conquest; foreign military presence; occupation; sovereignty.

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Régimen jurídico internacional del territorio de Crimea después de la anexión a Rusia

Resumen

El propósito del artículo consiste en la determinación del régimen legal internacional actual del territorio de Crimea para una argumentación adecuada de la posición de Ucrania en las disputas interestatales con la Federación Rusa. Se han estudiado diversas formas de presencia militar extranjera en el territorio de un estado, tales como: ocupación, conquista, despliegue de bases militares extranjeras, anexión, etc. Se determinan signos que caracterizan los regímenes jurídicos de ocupación y anexión y su regulación internacional. Metodología: Revisión de materiales y métodos a partir del análisis de materiales documentales de la anexión de Crimea por parte de Rusia. Conclusiones. Los rasgos característicos de que la anexión sea actualmente un tipo de crimen de agresión incluyen la declaración unilateral de soberanía estatal sobre un territorio que no ha sido parte de este estado, así como la legitimación de la anexión a través de la propiedad de facto de un territorio y el reconocimiento internacional de este hecho. De acuerdo con el derecho internacional, actualmente no existe un mecanismo legal para la transferencia de soberanía sobre un territorio a un agresor a través de la anexión.

Palabras clave: anexión forzada; conquista; presencia militar extranjera; ocupación; soberanía.

Introduction

Recent events in Ukraine have become significant and turning points not only for its history, but also for the whole Europe and the international community in general. Attempts of the Russian Federation to hybridly explain events such as “they are not there” or “it is a special military operation” in order to verbally hide aggression and based on formal grounds not to be formally brought to international legal responsibility are unsuccessful.

On 29 March, 2022, another round of peace talks between Ukraine and the Russian Federation took place in Istanbul, the procedure for resolving the issues concerning the temporarily occupied territories of Donetsk and Luhansk regions and Crimea was discussed there. It was proposed to bring these issues outside the main part of the international agreement on security guarantees for Ukraine and to hold bilateral negotiations on the status of Crimea and Sevastopol during a period of 15 years (Podolyak, 2022).

In these conditions and for future peaceful settlement of the situation it is extremely important to clearly determine the current international legal status of Crimea and the city of Sevastopol after the events of March 2014 and until now.

1. Literature review

On 27 March, 2014, the UN General Assembly adopted Resolution 68/262 “Territorial Integrity of Ukraine”, which does not explicitly define the accession of Crimea to Russia as an annexation, but it states that “the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force” (Law of UN, 2014).

In addition, on 01 July 2014 the OSCE Parliamentary Assembly adopted the Resolution “Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation”, this Resolution “the Russian Federation’s unilateral and unjustified assault on Ukraine’s sovereignty and territorial integrity” and “calls on all to refrain from any action or dealing that might be interpreted as recognizing the unlawful annexation of the Autonomous Republic of Crimea by the Russian Federation” OSCE Parliamentary Assembl., 2014.

On the same occasion on 09 April, 2014 the Parliamentary Assembly of the Council of Europe adopted the Resolution “Recent events in Ukraine: threats to the functioning of democratic institutions” where it “expresses regret about the (...) Russian military aggression and the further annexation of Crimea, which are a clear violation of the international law” and stresses that “the results of the referendum and illegal annexation of Crimea by the Russian Federation are not legal and are not recognized by the Council of Europe” (Law of the Parliamentary Assembly of the Council of Europe, 2014).

In addition, on 17 July the European Parliament ruled that “since the Russian occupation and the annexation of Crimea violates international law and Russia’s international obligations... (it) considers the annexation of Crimea illegal and refuses to recognize the actual authority of Russia over the peninsula” (Law of the Parliamentary Assembly of the Council of Europe, 2014).

Similarly, “NATO foreign ministers, united in their condemn of Russia’s illegal military intervention in Ukraine and Russia’s violation of Ukraine’s sovereignty and territorial integrity, do not recognize Russia’s illegal and illegitimate attempt to annex Crimea” (Law of the Parliament of Europe, 2014).

In its turn, the Verkhovna Rada of Ukraine on 15 April, 2014 adopted the Law of Ukraine “On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine”, taking into account further changes to be brought, this law defines the accession of Crimea and the city of Sevastopol to Russia as a temporary occupation (Law of Ukraine, 2014).

Thus, the question arises as to whether Crimea and the city of Sevastopol are in fact occupied or still annexed territories of Ukraine in terms of the international law. Hereinafter we are going to use the notion of the territory of Crimea as such that also includes the city of Sevastopol.

2. Materials and methods

The research is based on the works of foreign and Ukrainian researchers, as well as on Theon the empirical material of national and international legal acts and juridical (forensic) practice.

Comparative analysis and dialectical method of cognition made it possible to comprehensively study various forms of international legal regimes of foreign military presence on the territory of a state. With the help of the synthetic method the international legal regime of the territory of Crimea from the point of view of the international law has been determined.

3. Results and discussion

According to Max Planck Encyclopedia of Public International Law, the regime known as military occupation refers to a situation when forces of one or more states exercise effective control over the territory of another state without the will of the latter. Since such control was often the result of using military force, this regime was defined as “military” occupation, while an occupation which received the consent of the occupied sovereign, is called “peaceful” occupation (Planck, 2021).

Peaceful occupation is characterized by exercising an effective control by one state over the territory of another state when there is no war status between these states. This type of occupation differs from the military occupation (Planck, 2021) which in its turn arises as a result of the use of force in war, and from the so-called “armistice occupation” (occupation based on armistice agreements).

Occupation regime is mainly governed by the Hague Regulations on Laws and Customs of War on Land (the Hague Convention IV) and the Convention on Protection of Civilian Persons in Time of War 1949 (the

Fourth Geneva Convention) (Law of international committee of the red Cross, 1949). According to contents of Article 42 the Hague Convention IV, occupation begins with establishment of actual control over the occupied territory by the hostile army, and ends when the hostile army has lost the actual control over the territory (Leheza *et al.*, 2020).

Thus, while the territory of the state is under the power and control of an invader, and while the latter has an opportunity to exercise its will everywhere in this territory for a certain period of time, the military occupation exists from the international legal point of view.

Article 55 of the Hague Convention IV recognizes an occupying State only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. Therefore, the title to these objects does not pass to the occupying state, i.e., the inclusion of the occupied territory in the occupying state is excluded (Leheza *et al.*, 2018).

In addition, articles 2 and 6 of the Fourth Geneva Convention provide that it shall to all cases of partial or complete occupation, even if this occupation does not result in any armed conflict, from the very beginning of any conflict or occupation, until expiration of a single-year period after the general cessation of hostilities.

Thus, the presence or absence of armed resistance does not matter for the international legal qualification of occupation, but the emphasis is made on existence of a conflict between two states, presence of armed forces of one state in all or in a certain part of the territory of another state and the protracted nature of the conflict between these states, i.e., its temporary nature. In view of this, the phrase “temporary occupation” is a tautology.

Military occupation, which occurs outside the state of war, includes *occupatio pacifica* or occupation upon consent. The term “*pacific*” does not mean that occupation is “peaceful” in the usual meaning of the word, or that it is executed without the use of force; this term means only that from the legal point of view such occupation is carried out outside the context of the formal state of war, in accordance with the terms of an agreement, invitation or consent of the occupied state for occupation, within the limits of humanitarian intervention, occupation of the failed state or actual military occupation of a territory with uncertain status (Leheza *et al.*, 2021).

Thus, occupation (from the lat . *occupatio*– possession, seizure) is a temporary seizure by the armed forces of one state (occupant, invader) a part or the entire territory of another state, with occupant’s taking over all functions of state administration on itself without obtaining sovereign rights to the occupied territory.

It should be noted that various forms of foreign military presence on the territory of a state cannot be equal to occupation. Occupation should be distinguished from conquest, deployment of military bases, peacekeeping forces and peace enforcement forces.

Conquest or subjugation involves acquisition of a territory by force, complete subordination of the defeated side to the victor, which entails the end of the war and the cessation of existence of the defeated state. The occupation is on the contrary characterized by preservation of the power structures of the defeated state (even in exile) and the continuation of resistance and military action against the occupying state. The norms relating to occupation, in particular articles 42-56 of the Hague Regulations, and articles 27-34 and 47-78 of the Fourth Geneva Convention, are not applicable to the situation of subjugation.

According to the generally accepted view formed back in the 19th century, incorporation of the occupied territory (subordination or seizure) has long been a legal way to end occupation. In the legal doctrine there was a clear distinction between the three consecutive stages: military invasion, occupation of the territory and its annexation (Mälksoo, 2005).

However, if a war is outlawed by the international law, then the whole logic of subordination or conquest as ways to end the occupation regime and transfer rights to the respective territory becomes unthinkable. Thus, the international law does not presuppose legal transfer of sovereign rights to an aggressor through annexation. Nevertheless, the practice of the Second World War and even that of the period following it, up to the latest events in Ukraine, gives only ambiguous signals about reaction of international law to the situation when an illegal annexation was performed and the situation stabilized (this is especially true with regard to the Israeli occupation of the Golan Heights or the Russian occupation of Crimea).

This clash between the norms of international law, not backed by an adequate system of preventive and reactive measures, and reality, has given rise to the Russia's impunity for its actions in Crimea, and today this impunity has escalated into a full-scale war (Leheza *et al.*, 2021).

Presence of foreign military bases on the territory of a state cannot also be equated with occupation, especially when these bases are located in accordance with the respective agreement concluded between the owing state and the host state providing absence of any conflict armed confrontation or coercion. For example, the deployment of American military bases in Germany, Italy, etc. within NATO, or presence the Russian Black Sea Fleet in Sevastopol until 2014 (Law of international committee of the red cross, 1949).

Presence of peace-supporting forces in the territory of a certain state entrusted with an international mandate to undertake enforcement

measures, (such as the UN International Armed Forces (UNEF), the United Nations Peacekeeping Forces in Cyprus (UNFICYP), United Nations Disengagement Observer Force (UNDOF) etc.) can neither be determined as occupation (Law of The Parliamentary Assembly of the Council of Europe, 2014). On the one hand, a foreign military presence stems from an agreement between the host State and the organization that issues a mandate, and on the other hand it stems from the absence of an armed conflict between these forces and the host State.

A distinction should also be made between the occupation defined in the Hague Convention IV regulating the rules of war, and the occupation referred to in the Protection of Civilian Persons in Time of War.

The concepts of “international territorial management”, “direct control” or “international territorial control” should also be distinguished from the concept of occupation. The mentioned concepts refer to situations where the governmental functions on a particular territory are carried out not by a territorial state, but by a body authorized to do so under the international law, i.e. by an international organization, a separate state or a group of states under an international mandate (Leheza *et al.*, 2018).

According to the international law, the principle of the permanent status of an occupied territory consists in the fact that:

occupation of a territory does not entail transfer of sovereignty over this territory to the occupying state:

- an occupying state must respect the rights of persons in the occupied territories;
- an occupying state must comply with the laws of the occupied state, except for cases of an “absolute obstacle”;
- an occupying state must respect the duty of loyalty (faithfulness) and belonging of the local population to the occupied state;
- an occupying state is obliged to respect the state property and private property located in the occupied territory;
- the legal effect of measures taken by an occupying state is terminated with the end of occupation (Leheza *et al.*, 2020).

On a more detailed consideration, invariability of sovereignty during occupation provides that:

- 1) occupation of a territory does not mean annexation of this territory;
- 2) the laws of an occupied state continue to be applied throughout its territory;
- 3) exiled government of the occupied state represents this state abroad.

Concerning the first point, it should be noted that the fact of occupation of a territory under *jus in bello* does not give rise to the right to annex that territory, because *jus contra bellum* prohibits any seizure of a territory based on the use of force. This classic formula is often emphasized by both judicial practice and legal science. In defense of this position one can also mention the decision of the Supreme Court of India dated 29 March, 1969 concerning annexation of Goa territory.

This decision stipulated that “military occupation is a temporary situation, which exists *de facto*, and does not deprive the occupied state of its sovereignty and statehood. (...) On the other hand, annexation happens when an occupying state takes possession of a certain territory and makes the occupied territory its property. (...) Military occupation should be differentiated from conquest, when the territory is not only conquered, but also annexed by the conqueror (Law of judgment of the supreme court of India, 1969).

Concerning the second point, continued application of the laws of an occupied state throughout its territory implies that the subjugation of the population to the occupying state should not mean forgetting the obligation to remain loyal to the state of origin (Law of international committee of the red cross, 1949).

Concerning the third point, legal representation of an occupied state by its exiled government abroad provides that the laws and measures taken by the exiled government of the occupied state during the period of occupation shall apply to the occupied territory, because the occupied state retains its sovereignty over the territory despite the occupation.

Moreover, according to Article 42 the Hague Regulations a situation of occupation also take place when the entire territory of a state or a certain part of it is under the authority of rebel forces, which are held there only through the fact of presence (even limited presence) of foreign troops supporting the rebels (Leheza *et al.*, 2020).

This definition especially clearly defines the status of the territories in the zone of the Anti-Terrorist Operation/Operation of United Forces (ATO/OUF), which is under control of the United Russian-separatist forces of the so-called “people’s militia” of the LDPR, and in fact this zone is controlled by the First and Second army corps of the Southern Military District of the Armed Forces of Russia.

According to the Encyclopedia “Britanica”, annexation is a unilateral a formal act whereby a state proclaims its sovereignty over territory hitherto outside its domain which comes into force by means of actual possession and is legitimized through general recognition. This is often preceded by conquering or threat of the use of force without active hostilities and by military occupation of the conquered territory (Leheza *et al.*, 2018).

According to the international law, annexation is a form of aggression, and therefore entails international legal liability. This legal liability was first applied to Nazi criminals' accordance with the verdict of the Nuremberg Military Tribunal dated 01 October, 1946.

In addition, the Fourth Geneva Convention distinguishes between occupation and annexation, speaking of "annexation by an occupying state of all or a part of the occupied territory." It follows that the annexation of the territory is preceded by its occupation.

As a rule, as a result of annexation, the local population of the annexed territory within the respective annexing state forms an ethnic (national) minority, and in relation to the ethnic (national) core it is separated from it forms a diaspora of autochthonous origin.

Conclusions

1. Forms of foreign military presence on the territory of a state include peaceful or military occupation, conquest, deployment of foreign military bases, peacekeeping forces and peace enforcement forces, international territorial control and annexation. Each of these legal regimes has its own specific characteristics and influence on preservation or transfer of sovereignty over the respective territories.
2. The international legal regime of the territory of Crimea and the city of Sevastopol is divided into two stages:
 - From 20 February 2014 to 18 March 2014 – from the moment the Russian troops entered the territory of the Crimean Peninsula without distinctions and established actual control over its territory with the simultaneous loss of Ukraine's opportunity to exercise its powers there until the unilateral proclamation of internationally unrecognized sovereignty of the Russian Federation over the territory of Crimea. - this stage unambiguously falls under the features defined by the international law as occupied territory;
 - From 18 March 2014 until now – from the moment of the actual accession of Crimea to Russia - from the point of the international law it should be qualified as an actual internationally unrecognized annexation, and on the part of Ukraine it can be qualified as a continued occupation of its territory by Russia without a universally recognized transfer of sovereignty.

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