UDK 327(470:477) ; 341.6(470:477)

*Irina Mindova, PhD**

UKRAINE V RUSSIA: AT THE STAGE OF INTERNATIONAL JUSTICE

This article addresses the different perspectives and possible impact of Ukraine allegations towards Russia at the International Criminal Court, European Court of Human Rights and International Court of Justice.

Key words: *International law and order. – Non-liquet prohibition. – Interests of justice. – State responsibility. – Violation of human rights.*

1. INTRODUCTION

Is it possible to settle a political dispute by means of international justice. According to the doctrine of International law and order, comprised by the completeness of law and rule of law doctrines, all the disputes should be brought to court.[1]

In 2004 The UN Secretary General emphasized that justice, peace and democracy are not mutually exclusive objectives but rather mutually reinforcing imperatives.[2]

In legal theory and practice different manners to decline a case by the court exist. The most important ones are the non-liquet prohibition and the interests of justice. They represent the idea that certain political disputes cannot be settled by the court because they are non-justifiable. These options exist in international and national justice systems.

* The author is a Senior Assistant Professor at the Bulgarian "G. S. Rakovski" National Defense College, *irina_mindova@abv.bg*.

1 Completeness of Law doctrine of H. Lauterpacht and Rule of Law doctrine of A. V. Daissy. When the two doctrines work together it is not possible for the International court as an enforcement of law body to divide disputes brought to it as justiciable and non-justiciable (political).

2 Report of the Secretary General on the Rule of Law and Transitional Justice, 23 August 2004/S/2004/616.

2. UNDERSTANDING NON-LIQUET PROBLEM

In its traditional meaning non-liquet as a general principle of international law comprises a prohibition – it is prohibited for the court to reject to decide a case due to a gap of law. According to H. Lauterpacht[3] the non-liquet prohibition has a positive and a negative sense.

The second new meaning of non-liquet is placed under the widely extended notion of non-justiciability. Non-justiciability is concerned with the overriding assertion of certain state interests even when they may be contra or at least even extra legem. Non-liquet comes into argument rather when applicable rules of appropriate content and precision are simply not available for adjusting the particular clash of interests.[4] But anyway the court is not a place and time to settle tensions between the states. International court is judging only when there is a conscent between arguing parties to settle their dispute in court and when the dispute is not political. Thought it comprises a prohibition, ICJ makes non-liquet findings.

3. UNDERSTANDING THE "INTEREST OF JUSTICE" EXCEPTION

The interests of justice exception gives the prosecutor of the ICC the authority to initiate or to decline to initiate investigation or prosecution in a situation where the positive statutory facts of jurisdiction and admissibility are present. The decline related to interests of justice is possible when a balancing test is passed. It concerns the necessity for the prosecutor to take in account all the circumstances, including the gravity of crime, the interests of victims and the age or the infirmity of the alleged perpetrator and his role in the alleged crime.[5] According to the policy paper of the ICC on the interests of justice[6] they are

3 H. Lauterpacht, *International Law*, Vol 2, Cambridge Univercity Press, Cambridge, 1975, 215–216.

4 J. Stone, *Non liquet and the function of law in the international community*, 35 *Brit YBInt'l.* 124 (1959), *http://heinonline.org/HOL/LandingPage?handle=hein.journals/byrint35&div=10&id=&page=*, 6.5.2018.

5 Art. 53(2)(c) Statute.

6 Policy Paper on the Interests of Justice ICC-OTP-2007, *https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09–73422BB23528/143640/ICCOTPInterestsOfJustice.pdf*, 12.5.2018.

defined as an exceptional circumstance or a last resort course. The ambiguity of this provision has led to strong criticism against the international criminal court for focusing only on situations in Africa, for bringing one-sided prosecution and for not bringing charges in certain situations.

4. THE CRISIS BETWEEN UKRAINE AND RUSSIAN FEDERATION

The crisis between Ukraine and Russian Federation concerning the situation in the country during and after the Maidan protests, the incorporation of Crimea and the city of Sevastopol to the territory of Russian Federation and the situation in Eastern Ukraine are at the stage of international justice. Ukraine has brought allegations against Russia in three international jurisdictions: European Court of Human Rights (ECHR), International Criminal Court (ICC) and International Court of Justice (ICJ) and all of them are conducting examinations. These jurisdictions are enabled to conduct a legal and contextual analysis of the crisis and rule their decisions under different perspectives: violation of human rights committed by states, commission of grave international crimes and evocation of individual criminal liability, and disputes on interpretation and application of international conventions related to the crisis and the alleged crimes.

The cases are still pending but they come in a special moment: when the idea that justice is an essential component of the stable peace is undermined. The findings of these cases will be very important both for the settlement of the crisis between the arguing states but also for the proof of effectiveness or ineffectiveness of international justice in geopolitical clashes. These findings are expected to give another type of information on the happening – based on a contextual and legal analysis conducted on the ground of reliable information. In recent decades a lot of non-traditional legal instruments for legitimate use of force by state actors have been introduced and put in practice. But there is a huge gap in the post-coming judicial control and evaluation of the events.

5. UKRAINE V RUSSIA UNDER THE PERSPECTIVE OF EUROPEAN COURT OF HUMAN RIGHTS

Russia ratified the European convention on human rights in 1998. In 2016 the Court dealt with 7.010 applications concerning Russia, of which 6.365 were declared inadmissible or struck out. The Court delivered 228 judgments, concerning 648 applications, 222 of which found at least one violation of the ECHR.[7] From January to July 2017 – 3.451 applications were allocated and decided by judgment 495.

Ukraine crisis is also pending at the ECHR. Currently there are five inter-state applications lodged by Ukraine against Russia. They come after the allegations of Georgia against Russia in 2007, 2008 and 2009.

The first case – Ukraine v. Russia (no. 20958/14) was lodged on 13 March 2014 and it concerns the situation in Crimea from March 2014 and subsequent developments in Eastern Ukraine up to the beginning of September 2014. The ECHR uses a specific term to qualify the situation in Crimea as "the assumption of control by the Russian Federation over the Crimean peninsula", that differ to some extent from the one used by the ICC "the incorporation of Crimea to the territory of Russian Federation". The allegations of the Ukraine government towards Russia comprise that by means of exercising effective control over the Autonomous Republic of Crimea and over separatists and armed groups in Eastern Ukraine, Russia exercised jurisdiction over the situation that resulted in numerous violations of the European Convention on Human Rights for civilian population, military servicemen and law enforcement bodies.

In this situation the ECHR decided to apply rule 39 of the Rules of Court "interim measures" calling both states to refrain from taking any measures, in particular military action, that might lead to a violation of the Convention rights for civilian population, especially the right to life and prohibition of torture and inhuman or degrading treatment.[8]

7 ECHR, Russia. Press country profile, last update October 2017, *http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf*, 20.5.2018.

8 European Court of Human Rights deals with cases concerning Crimea and Eastern Ukraine, ECHR 345 (2014).

The second case Ukraine v. Russia (II) (no. 43800/14) was lodged a few months later – on 13 June 2014. It concerns the abduction of three groups of orphan children and children without parental care by armed separatist groups in Eastern Ukraine and their transfer to Russia. After the first incident the Court decided to apply again rule 39 of the Rules of Court "interim measures" indicating to Russian authorities immediately to return the children in Ukraine.

Ukraine v. Russia (IV) (application no. 42410/15) concern the situation in Eastern Ukraine and Crimea after September 2014. In 2016 the court decided to divide the case in two parts on geographic principle – a sole case on Crimea and a sole case on the situation on Eastern Ukraine.

In addition to the inter-State applications, almost 3.700 individual applications apparently related to the events in Crimea or the hostilities in Eastern Ukraine are pending before the Court.

In these inter-state cases the problems of state jurisdiction and state responsibility are posed. The situation in Crimea and Eastern Ukraine with non-state actors does not cover the existing test in international law for state responsibility based on the concept of "effective control" defined by the International Court of Justice.

The ECHR uses the term "overall effective control" and suggests an alternative standard that comprises of certain state support to non-state actors with the knowledge of wrong doing, that has been used in Court's practice in other cases: Al Nashiri v. Poland (2014) and Husayn (Abu Zubaydah) v. Poland (2014).

Noteworthy cases in which violations of human rights were found vary in scope. Some of them concern violation of political rights and freedoms of opposition political leaders and parties and their participation in the political life:

- a violation of right to liberty and security was found in the case of Kasparov v. Russia (No. 1) 11.10.2016 – concerning the detention of Mr Casparov, the former world chess champion and political activist, by Russian authorities which had prevented him from participation in an opposition political demonstration in 2007;
- a violation of the freedom of association – Kasparov and Others v. Russia (No. 2) 13.12.2016 – another case for Mr

Kasparov concerning his and Mr Averin arrest at a protest rally in Moscow and ensuing detention;

- a violation of the freedom of association was found in the case of another opposition leader – Boris Nemtsov. In the case Nemtsov v. Russia 31.7.2014 concerning his arrest and detention after his participation in a political demonstration, the court found an arbitrary interference with his right of assembly and that the proceedings against him have the serious potential to deter others from participating in demonstrations and open political debate. In the case of Frumkin v. Russia 5.1.2016 a violation of the freedom of association was concerned in the context of a political rally at Bolotnaya Square in Moscow on 6 May 2012, held to protest against "abuses and falsifications" in the elections to the State Duma and the presidential elections;
- a violation of right of a fair trial is alleged in pending cases of another opposition leader Aleksey Navalny. The pending cases of Navalny v. Russia 17.10.2017, Navalny and Yasin v. Russia, Navalny and Offitserov v. Russia – in all of these cases the opposition leader is claiming that the criminal proceedings leading to his conviction had been unfair and based on an unforeseeable application of criminal law. But these convictions eliminate his right to participate in the next presidential elections;
- a violation of the right to elect and to be elected – Yabloko Russian United Democratic Party and Others v. Russia 8.11.2016. The case concerned the cancelation of the registration of Yablako candidates for the Legislative Assembly of Karelia by the Supreme Court of Karelia in October 2006. In this case a violation of article 3, protocol 1 was found;
- a violation of the freedom of expression was found in the case of Novaya Gazeta and Milashina v. Russia 3.10.2017 concerning proceedings for defamation against an editorial house and a journalist following the publication of two articles concerning the sinking of the Russian Navy's nuclear cruise missile submarine "Kursk" and the accident investigation.

Other decisions against Russia concern the complex situation with the liquidation of Russian oil company OAO Neftyanaya Kompaniya YUKOS and conviction of the heads of the company.

In 2014 the Court ruled a decision which poses serious financial obligations for Russia related to YUKOS and the violation of rights of former share holders of the company – 1.866.104.634 euros (EUR) in respect of pecuniary damage and EUR 300.000 in respect of costs and expenses to the Yukos International Foundation.

In 2015 Russia has adopted amendments to the Constitutional Court of the Russian Federation Act.[9] With these amendments the Constitutional Court was given a new role – to be the definite authority to rule whether it is possible to comply with a decision of the ECHR or not. This final decision is pronounced under the action of a federal body of the executive power. If the Constitutional court rules impossibility to comply no further actions can be taken in Russia. Based on this law Russian Constitutional court has made a decision in 2017 not to fulfill the decision of ECHR on payments of Yukos.[10]

6. UKRAINE CRISIS UNDER THE ICC

International Criminal Court is the newest permanent international jurisdiction found in 1998 and active as of 1 July 2002. Under its jurisdiction fall the heaviest crimes that bring concern to international community – aggression, crimes against humanity, genocide and war crimes.

US, Israel, Russia and 36 other countries signed but did not ratify the Rome Statute of the ICC. According to the Vienna Convention on the Law of Treaties a state that has signed but not ratified a treaty is obliged to refrain from "acts which would defeat the object and purpose" of the treaty.

The ICC preliminary examination process is conducted in the context of the following principles: independence, impartiality and objectivity.[11]

9 Федеральный конституционный закон от 21 июля 1994 г. № 1-ФКЗ „О Конституционном Суде Российской Федерации" (последние изменения, 28 декабря 2016 г.).

10 Постоновление Конституционного Суда росийской Федерации, 19 января 2017, *http://doc.ksrf.ru/decision/KSRFDecision258613.pdf*, 5.6.2018.

11 Policy Paper on Preliminary Examinations, November 2013, ICC.

Independence concerns the action of the Office as a separate organ of the Court and the prohibition for its members to seek or act on instructions from any external sources.[12]

The scope of the examination is not bound to the information contained. Any other information will be a subject of critical analysis.

Impartiality concerns the application of methods and criteria irrespective of the States or parties, persons or groups involved. No adverse distinction is drawn on grounds of gender, age, political or other opinion, national, ethnic or social origin.

Objectivity means that in order to establish the truth there will be an equal investigation of incriminating and exonerating circumstances.[13]

Together with the general principles there are also statutory factors applied at the preliminary stage of the investigation that help to determine whether there is a reasonable basis to proceed with the investigation. According to the court 'reasonable basis' means a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the court has been or is being committed.

The situation in Ukraine has been under preliminary examination since 25 April 2014. Ukraine is not a state party to the Statute but its government lodged a declaration under article 12(3) of the Statute for temporary acceptance of the ICC jurisdiction for the period of alleged crimes committed – 21 November 2013 – 22 February 2014. Later the Ukrainian government lodged a second declaration for accepting the ICC jurisdiction on its territory from 20 February 2014 onwards. These steps give an opportunity for the preliminary examination of the alleged crimes to be extended.

Subject of preliminary examinations are alleged crimes committed during the Maidan protests in the period 21 November 2013 – 22 February 2014, the incorporation of Crimea and the city of Sevastopol into the Russian Federation and the situation at the Eastern Ukraine provinces of Kharkov, Donetsk and Luhansk.

The results from the preliminary examination of the Maidan protests with allegations for crimes against humanity committed had been reported by the prosecutor in 2015 at the Report of the preliminary examination activities 12 November 2015.

12 Art. 42 (1), Statute.

13 Art. 54 (1)(a), Statute.

As a result of the legal analysis the prosecutor comes to the conclusion that during the three month period of demonstrations in Ukraine the alleged crimes occurred sporadically, in limited instances so that the imperative necessity of widespread or systematic nature of the attack that distinguishes the crimes against humanity is not present.

The conclusion of the prosecutor is that the alleged crimes do not amount the crimes against humanity but anyway they comprise serious human rights abuses and must be punished. The prosecutor keeps the chance to rethink if any new information occurs.

6.1. The situation in Crimea

The Report of the preliminary examination published in 2016 contains no legal analysis yet but only the contextual background of the situation in Crimea and Eastern Ukraine and the alleged crimes. The prosecutor findings on the basis of available information define the situation as evolving from a non-international armed conflict to an international armed conflict between Ukraine and Russian Federation. The essence – for the ICC an armed conflict is international by nature if one or more states partially or totally occupy the territory of another state no matter of the presence or lack of armed resistance. The Prosecutor uses the term "incorporation" of Crimea and the city of Sevastopol into the Russian Federation and specifies that the results of the referendum held at the presence of armed and mostly uniformed individuals wearing no identifying insignia was declared invalid by the Ukrainian government and most of the States of the UN General Assembly.[14]

The preliminary examination is focused on the alleged crimes – harassment of Crimea Tatar population, killing and abduction, ill-treatment, detention and fair trial, compelled military service.

Contextual background reveals another problem – with the citizenship of the Crimean population. The report says that automatic Russian citizenship was given to everybody unless those who insisted to keep Ukrainian one.

The contextual background of the situation in Eastern Ukraine is far more stressing. The alleged crimes for Eastern Ukraine contain

14 ICC-CPI-20161114-PR1252 Report on Preliminary Examination Activities (2016) Press Release: 14 November 2016.

killings, destruction of civilian objects, detention, disappearance, torture – ill treatment, sexual and gender-based crimes. The office has a database for over 800 incidents that happened since 24 February 2014.

Russia withdraws from ICC in November 2016.[15] Thus a second permanent member of the UN Security Council withdraws from the Statute and the jurisdiction of the Court. The official document of the Russian president does not contain motives. But it was announced two days after the issuance of the Annual Report of Preliminary Examination Activities of the Prosecutor of International Criminal Court.[16]

It is also important to emphasize that Russian withdrawal comes at time when a process of ratification of amendments to the Statute concerning the legal definition of the crime of aggression is ongoing[17] and fifteen states have already ratified the Kampala amendments.

7. UKRAINE V. RUSSIA AT THE INTERNATIONAL COURT OF JUSTICE

On 16 of January 2017 Ukraine applied against Russia in ICJ. Ukraine brought two claims against Russia concerning Crimea – for violation of the International Convention on the Elimination of All Forms of Racial Discrimination due to deliberate campaign of cultural erasure in the Autonomous Republic of Crimea and City of Sevastopol, and the International Convention for the Suppression of the Financing of Terrorism due to Russian Federation's sponsorship of terrorism campaign in Ukraine.

The court concludes prima facie that it has the jurisdiction to deal with the case to the extent that the dispute relates to the interpretation or application of the two conventions between the parties.

15 Распоряжение Президента Российской Федерации от 16 ноября 2016 г. N 361-рп „О намерении Российской Федерации не стать участником Римского статута Международного уголовного суда".

16 ICC-CPI-20161114-PR1252 Report on Preliminary Examination Activities (2016) Press Release: 14 November 2016.

17 Amendments to the Rome Statute of the International Criminal Court Kampala, 11 June 2010 Adoption of Amendments on the Crime of Aggression, Reference: C.N.651.2010.Treaties-8 (Depositary Notification) *https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf*, 30.5.2018.

On 19 April 2017 the ICJ issued an order for indicating provisional measures pending the final decision of the case. The provisional measures concern both sides:

- Russian Federation in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination shall refrain from imposing or maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions including Mejlis and shall ensure the availability of education in the Ukrainian language.
- Ukraine and Russian Federation – non-aggravation of the dispute between the Parties.
- The court expresses its expectations that the Parties will work individually and together in order to implement "The Package of Measures for the Implementation of the Minsk Agreement", endorsed by the SC Resolution 2202 (2015), adopted and signed in Minsk by representatives of the OSCE, Ukraine, Russian Federation and representatives of "certain areas of the Donetsk and Luhansk regions".

As far as the allegations on International convention for the Suppression of the Financing of Terrorism (ICSFT) the court found that there is no need for imposing provisional measures. Ukraine submits that, under Article 18 of the ICSFT, it has a right to the Russian Federation's co-operation in preventing the financing of terrorism. As acts of financing of terrorism Ukraine points out (a) the bombing of peaceful marchers in Kharkiv; (b) the bombardment of Mariupol; (c) the attacks on Volnovakha and Kramatorsk; and (d) the shooting-down of Malaysia Airlines Flight MH17.

8. CONCLUSION

There are at least two possible impacts from the current situation.

A legal impact: International jurisdictions are enabled to give the base for legitimate actions. The legal analysis of the situation concerning the incorporation of Crimea and the city of Sevastopol and the

situation in Eastern Ukraine will give the legal assessment and possible legitimate perspectives for the crisis resolution. The courts decisions would also serve as a legal base for resolution of future political interstate crisis. The court decisions are also expected to give their added value to the legal dimension of the state and non-state actors relations in an armed conflict and peace time security.

A political impact: No matter of the fact that courts did not qualify the dispute between Russia and Ukraine as a non-justifiable their final rulings won't have the needed effect because consent for complying is missing due to certain post steps for withdrawal. The mutual consent of the arguing states to comply with the international jurisdictions decisions becomes the central point and it has its impact not only for the peaceful resolution of the crisis. The mutual consent becomes a political tool to undermine or strengthen the role of international jurisdictions as impartial arbitrary actors.

Dr Irina Mindova
Docent Nacionalnog univerziteta odbrane "G. S. Rakovski", Bugarska

UKRAJINA VS RUSIJA: NA NIVOU MEĐUNARODNOG PRAVOSUĐA

Rezime

Ovaj članak govori o različitim perspektivama i mogućem uticaju optužbi Ukrajine protiv Rusije pred Međunarodnim krivičnim sudom, Evropskim sudom za ljudska prava i Međunarodnim sudom pravde.

Ključne reči: *Međunarodno pravo i poredak. – Non-liquet zabrana. – Interesi pravde. – Odgovornost države. – Povreda ljudskih prava.*