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Foreword

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FOREWORD

Judge Mykola Gnatovskyy[*]

I was genuinely honoured to be given the opportunity to write this short opening note for the special edition of the *Revue québécoise de droit international* on the ongoing war between Russia and Ukraine – the biggest continental war in Europe since the end of World War II. Various articles included in this volume concentrate mostly on international humanitarian law (IHL), a subject that has occupied a significant part of my academic life, as well as a few closely related subjects. At the same time, my task was not at all easy. What exactly can I say about IHL and its relevance now, amidst the terrible war, which is destroying my motherland and claiming the lives of my compatriots daily, almost as a matter of routine? Should I limit myself to reproducing a set of well-known truths or, perhaps, speak my mind at the risk of appearing insufficiently balanced – or even emotional? In any case, this text can only be very personal.

Having taught public international law, and more specifically IHL and related disciplines in Ukraine and elsewhere for some twenty years and having benefited from numerous opportunities to cooperate academically with the International Committee of the Red Cross (ICRC), in particular through summarising my country's practice for two updates of the ICRC's study on customary IHL, peer reviewing their new commentary to the *Geneva Conventions* or serving on the editorial board of the International Review of the Red Cross, do I still believe in the potential of IHL to fulfil its mission? Or even more generally, what is international law worth in the face of the unfolding tragedy that manifests itself in numerous violations of its most important rules?

My studies of the law of armed conflict that had generally been viewed by my Ukrainian colleagues as purely theoretical for our peaceful country, have become more than topical since 2014. Just like those colleagues, I too used to take for granted that I would remain far from war, theorising about fragmentation of international law and how autonomous IHL has been as a (self-contained?) legal regime (what an unhelpful discussion, I would say now!), about various models of interaction between IHL and human rights law or (re)conceptualising the relationship between state and individual responsibility for violations of the laws and customs of war. One would have very much preferred that things remained exactly like this. Obviously, the war that came to Ukraine changed this drastically. The trauma inevitably accompanying the war has been growing and deepening in Ukraine's society, leaving no one unconcerned, for now and for many generations ahead. Personally, the tragic opportunity of being able to apply my knowledge of IHL in practice has proven to be a way to remain sane and relevant amidst the war.

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My concerns about or even frustrations with the discipline and its practical application have been growing steadily since the beginning of the international armed conflict between the Russian Federation and Ukraine, that is since late February 2014, when the former began its operation to take over control in Ukraine's Autonomous Republic of Crimea. With every new development, revelations came. The simple logic that annexation of foreign territory amounted to an act of aggression and the territory in question could only be considered as occupied ("[t]here is not an atom of sovereignty in the authority of the occupant", as Lassa Oppenheim famously put it in 1917),[1] and that belligerent occupation always signifies the existence of an international armed conflict between the states concerned, as per common Article 2 of the *1949 Geneva Conventions*, to my huge surprise did not come across as something evident not simply to the general public. Making such a statement was carefully avoided by most international organisations and high-level officials, even after this was clearly spelled out in the annual reports of the Office of the ICC Prosecutor on preliminary examination activities concerning the situation in Ukraine, starting from 2016.[2] It would seem that, for example, for the ICRC actually saying publicly anything of the kind would mean seriously compromising its neutrality. But would it, really?

Still, let's accept that the ICRC has had valid reasons to behave the way it has. However, for other actors, who do not have any constraints similar to those that has the biggest humanitarian organisation, ignoring the obvious was a convenient way of continuing their business as usual. Even now there is a strong tendency to continue talking about 'the war in Ukraine' or, even worse, 'the Ukrainian crisis' and avoid mentioning the other party of this international armed conflict as much as possible. This tendency does inevitably have repercussions also for the international legal discourse.

There are many IHL-related concepts that appear to be well-settled, especially if one simply follows the mainstream narrative, in particular the one propagated by the ICRC. Concepts such as using allegiance instead of nationality in defining the *ratione personae* applicability of IHL, in particular the *Fourth Geneva Convention*, the scope and meaning of precautionary measures taken by the defending party, responsibility of states for 'private military and security companies', direct participation in hostilities and many others might, in their practical application, look rather different from the simplified version of the official doctrine as presented to students and used by the ICRC for a wider dissemination of knowledge about IHL.

More generally, the role of legal academia during an armed conflict is multifaceted and very much depends on the situation of each academic. A fundamental question here is that of objectivity. Supporting the victims in finding best legal responses to the damage they have suffered would, in my view, be perfectly compatible with by the principle of academic objectivity. This is, however, not the

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1 Lassa Oppenheim, "The Legal Relations Between an Occupying Power and the Inhabitants" (1917) 33:4 Law Q Rev 363 at 364.

2 International Criminal Court, "Report on Preliminary Examination Activities (2016)" (14 November 2016), online (pdf): *ICC* <icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf>.

position that everyone would take. A perfect example of difference between different notions of academic objectivity in the case of the ongoing war is presented by the discussion about the idea to create a special tribunal for the crime of aggression against Ukraine. While a significant number of academics have worked on how best to achieve the punishment of those responsible for initiating and waging the war, including by developing international law, others have spent much time and energy explaining why this could not be done or simply engaging in whataboutism.

The role of its own international lawyers in today's Ukraine would certainly first and foremost consist in helping their country. They should remain objective – but requiring them to display neutrality would be nothing short of absurd. Academics have the moral duty to engage in advising government officials, parliamentarians or judges and prosecutors about IHL – in other words, whoever requires this advice. Over and above this, already at the beginning of the armed conflict, in 2014, there suddenly was a great demand of having the voices of international lawyers heard in the Ukrainian media. Professors of international law became public figures – that is much more than they had been before.

Explaining the basics of IHL to the public has always been a challenging endeavour. In a way, it also tests how well one understands the concepts underlying the law of armed conflict. In my experience, two of those concepts have been the most difficult to explain to people endowed with strong common sense but without the knowledge of the international legal doctrine. These two have been (1) the requirement to draw and always maintain a clear distinction between *ius ad* (or *contra*) *bellum* and *ius in bello*, and (2) the need to qualify the armed conflict as international (IACs) or non-international (NIACs) before engaging in any further assessment of rights and obligations conferred by the IHL on the relevant actors, or even the option of using both qualifications almost simultaneously.

Let me briefly zoom in on these two concepts and misconceptions surrounding them. In 2014, with the armed conflict developing in the two regions in the eastern part of Ukraine, Donetsk and Luhansk, there had been a lot of talk about the 'non-international' nature of the conflict. In 2023, with the benefit of hindsight, not many would still stick to that view but at the outset it could possibly not be ignored, following the notorious and oft-repeated, since 2014, Putin's answer to the question of the presence of the Russian military, first in Crimea and then in the east of Ukraine: "There are none". The ensuing discussion provided a good example of something that has been more or less universally accepted by academics but remains extremely difficult to explain to the general public. One has to return to the roots, so to say, and to admit that the very distinction between the two types of armed conflict, let alone the idea of a 'double qualification' is a result of the reluctance of states to provide for a fully-fledged framework for regulating non-international armed conflicts. Initially built on the reluctance of states to admit international law too far into their *domaine réservé* when it came to quelling internal riots, it turned itself into a perfect breeding ground for the so-called 'hybrid warfare'.

The requirement to keep '*ius ad bellum*' and '*ius in bello*' arguments totally separate proved to be an even bigger challenge. The rationale of this separation is well-known and supported by evidence. That said, this separation can only work well in the real world of the 21st century if the violation of fundamental rules governing the use of force is met by the international community with an adequate response. The 19th-century perception of war as an inevitable evil, that influenced the development of the ethos of laws and customs of war and the relevant ICRC legal doctrine, is hardly sustainable nowadays.

The fact that Russia occupies a permanent seat – the one allocated in 1945 to the Union of Soviet Socialist Republics – in the UN Security Council renders this key organ incapable of coming up with the necessary decisions. IHL being part and parcel of public international law, it strikes me that if the part of the international legal response to the act of aggression is missing, the remaining discussion concentrates on IHL arguments only. With the lack of a functional compulsory fact-finding body (one might recall Russia conveniently withdrawing, in 2019, its consent to be bound by Article 90 of *Additional Protocol I to the Geneva Conventions*, which envisages the powers of the International Humanitarian Fact-Finding Commission), it remains entirely within the remit of the state propaganda machine to claim that all their military actions in Ukraine were directed against military objectives. The argument is then further stretched to claim that IHL actually permits their military action in Ukraine, i.e., it is perfectly lawful. It is however the *ius ad bellum* dimension that makes it clear that there can be not a single lawful instance of the use of military force in pursuance of an act of aggression, regardless of whether a particular act complies or fails to comply with IHL.

There is another aspect of IHL that strikes those discovering it: this legal regime does not provide any individual remedy for victims of its violations. The related frustration is somewhat mitigated though in the particular context of Russia's war against Ukraine. The war in question is happening within l'*espace juridique européen*, with Ukraine being bound by the *European Convention on Human Rights* (*ECHR*) and the jurisdiction of the European Court of Human Rights (ECtHR) and Russia being party to the *ECHR* until 16 September 2022 (i.e., six months after its expulsion from the Council of Europe that set in motion its leaving the *Convention*). The ECtHR's case-law concerning situations of armed conflict and application of IHL is far from straightforward. However, it is a primary international court which could potentially consider allegations of human rights violations – many of which would also be violations of IHL – in the course of the war, with the above-mentioned time limitations. Several interstate applications lodged by Ukraine against Russia, as well as thousands of individual applications against either or both states are being processed by the ECtHR. It remains to be seen what exactly this international court would be in a position to say and how this might influence the implementation of the law of armed conflicts.

The war changes one's optics; it makes one adopt a more focused and sober approach to matters that previously appeared to be only theoretically interesting, with the emphasis on their practical implications. It also makes one realise with more

clarity that law, and even more so international law is far from being a set of norms cast in stone – it is indeed, as many eminent scholars and practitioners – from Dame Rosalyn Higgins, the first female president of the International Court of Justice to Professor Volodymyr Butkevych, the first Ukrainian judge at the European Court of Human Rights have underlined, is a process rather than simply a set of rules.[3] The decisions taken and implemented during this war will certainly have changed IHL and international law as such, at least the way their norms are perceived and applied.

Strasbourg, July 2023

[3] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995) at 1–12; Volodymyr Butkevych, "Poniattia, pryroda ta sfera dii mizhnarodnoho prava" [*The Concept, Nature and Sphere of Application of International Law*], in Volodymyr Butkevych, Vsevolod Mitsik, Oleksandr Zadorozhniy, eds, *Mizhnarodne pravo* [*International Law*] (Kyiv, Lybid Publishing House, 2002) 15 at 22–25 [in Ukrainian].