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EU Association Agreement with Ukraine and Unrecognized Territories

1. Status of Ukrainian Territories and International Law

In the modern international system sovereign states co-exist along with unrecognized territories. Sovereign states can also be called recognized states. Currently, unrecognized territories constitute quite a number of political entities. They have appeared mainly as the result of armed conflicts and often have de facto control of their territory. To become a part of the international community as de jure sovereign states, they usually require diplomatic recognition. However, other states are not obliged to recognize these new claimants to statehood.

On the other hand, diplomatic recognition of unrecognized territories by other states and their integration in the world community may become a problem for them and the states that supported them because of the doctrine of the U.S. Secretary of State Henry Stimson regarding the non-recognition of situations created as a result of aggression.¹

With regard to Ukraine, territories in which the change of status was the result Russia's gross violation of international law² include Crimea and the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR).³

After the Association Agreement (AA) between the EU and Ukraine was signed in 2014, Crimea was invaded by Russia and annexed to it. An illegal "referendum" was held and a so-called Declaration of Independence was adopted, and Crimea became

¹ D. Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, "Chinese Journal of International Law" 2003, Vol. 2, Issue 1.

² UN Charter Art. 2.4.

³ United Nations General Assembly Resolution 3314 (XXIX). See also Responsibility of States for Internationally Wrongful Acts. Article 40 United Nations, International Law Commission, *Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)*, Official Records of General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf [accessed: 2023.02.04].

a part of Russia.⁴ This act of accession or inclusion was not recognized by the international community.⁵ Thus, in fact, for the international community Crimea remains a territory that is outside legal jurisdiction having been annexed by another state.⁶

On the other hand, parts of the Donetsk and Luhansk areas have broken away from Ukraine as the result of the military conflict between Russia and Ukraine, and the so-called DPR and LPR have been created in these territories. Despite the fact that the legal status of the unrecognized states must be determined solely from the standpoint of international law and in accordance with the national law of Ukraine, the so-called DPR and LPR held “presidential” and “parliamentary” elections called by the self-appointed authorities, which were gross violations of Ukrainian legislation. These territories fall to a large extent under the common name of the regions that have declared themselves sovereign states and possess such attributes of statehood, as their names, state symbols, population, territorial control, system of authorities and law (i.e., some legal acts and others organizational documents). However, they do not have diplomatic recognition by UN Member States, and their territories, as a rule, are seen by UN Member States as being under the sovereignty of Ukraine.

1.1. International Community’s Position and Sanctions Against Russia

Since all this happened in brutal violation of the principles and norms of international law, these actions on behalf of Russia have been condemned by the international community and international sanctions have been introduced against Russia and the territories.⁷

United Nations General Assembly Resolution No. 68/262, which was supported by 100 United Nations Member States, affirmed the General Assembly’s commitment to the territorial integrity of Ukraine within its internationally recognized borders and called upon all states, international organizations, and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol based on the above-mentioned referendums and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.⁸ The adoption of the resolution was preceded by unsuccessful attempts of the Unit-

⁴ R. Slyvka, I. Zakutynska, *How Do State and Military Borders Divide the Urban Spaces of Donbas? Cases of Milove/Chertkovo and Zolote* [in:] *Spatial Conflicts and Divisions in Post-socialist Cities*, ed. V. Mihaylov, Cham 2020.

⁵ K. Ivaschenko-Stadnik, *What’s Wrong with the Donbas? The Challenges of Integration Before, During and After the War* [in:] *Ukraine in Transformation*, eds. A. Veira-Ramos, T. Liubyva, E. Golovakha, Cham 2020.

⁶ J. Bering, *The Prohibition on Annexation: Lessons from Crimea*, “New York University Journal of International Law and Politics” 2017, Vol. 49, No. 3, pp. 748–832.

⁷ A. Ali, *The Parliamentary Assembly of the Council of Europe and the Sanctions Against the Russian Federation in Response to the Crisis in Ukraine*, “The Italian Yearbook of International Law” 2018, Vol. 27, Issue 1, pp. 77–90.

⁸ Resolution adopted by the General Assembly on 27 March 2014, https://www.securitycouncilreport.org/atf/cf/_res_68_262.pdf [accessed: 2019.12.24].

ed Nations Security Council, which convened seven sessions to address the Crimean crisis, because Russia vetoed draft resolution S/2014/189, which was sponsored by 42 countries.⁹

The European Union did not recognize either the annexation of Crimea and Sevastopol to the Russian Federation or attempts to separate the so-called DPR and LPR from Ukraine. In the European Council Conclusions of 23–24 October 2014 the EU underscored that the holding of “presidential” and “parliamentary” elections called by the self-appointed authorities of the so-called DPR and LPR should not be recognized and that they expected the Russian Federation to respect Ukraine’s national sovereignty and territorial integrity and to contribute to the political stabilization and economic recovery of Ukraine. The European Council reiterated that it will not recognize the illegal annexation of Crimea.¹⁰

1.2. EU-Ukraine Association Agreement and Unrecognized Territories

The annexation of Crimea and the unrecognized status of so-called DRP and LPR largely determines the effect of the AA between the EU and Ukraine on these territories.

With this regard, it might be underlined that the association is a form of collaboration, a kind of international organization, based on a free trade area.

By concluding the AA, the EU develops around itself an area of stability and economic, political, and legal cooperation.¹¹ The Eastern Partnership policy proclaimed by the European Union in 2008 foresees a substantial upgrading of the level of political engagement with eastern partners, including the prospect of a new generation of Association Agreements, far-reaching integration into the EU economy, easier travel to the EU for citizens providing that security requirements are met, enhanced energy security arrangements benefiting all concerned, and increased financial assistance.¹²

The AA with Ukraine is of this kind.¹³ A very important aspect of this association is that it was established after the Lisbon agreements on the EU and the functioning of the EU came into force. This means that new association agreements cover many new areas of collaboration and are aimed at forming deep, comprehensive free trade areas. The new developing free trade areas with associated states are based on extending to them four freedoms of the internal market.

⁹ Draft Resolution UN Doc. S/2014/189, <https://undocs.org/pdf?symbol=en/S/2014/189> [accessed: 2019.12.24].

¹⁰ European Council (23 and 24 October 2014), Conclusions, <https://www.consilium.europa.eu/media/24561/145397.pdf> [accessed: 2019.12.24].

¹¹ M. Cremona, G. Meloni, *The European Neighbourhood Policy: A Framework for Modernization*, “LAW EUI Working Paper” 2007, No. 2, pp. 129–135.

¹² Communication from the Commission to the European Parliament and the Council (2008), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008DC0823> [accessed: 2019.12.24].

¹³ Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part (2014), <https://eur-lex.europa.eu/legal-content/801%29> [accessed: 2019.12.24].

The AA with Ukraine comprises all Ukrainian territory, including Crimea and the Donetsk and Luhansk areas separated from Ukraine. Article 483 of the AA stipulates that this Agreement shall apply, of the one part, to the territories in which the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty establishing the European Atomic Energy Community are applied, under the conditions laid down in those Treaties, and, of the other part, to the territory of Ukraine.

The Final Act to the AA states that the Agreement shall apply to the entire territory of Ukraine as recognized under international law and shall engage in consultations with a view to determine the effects of the Agreement with regard to the illegally annexed territory of the Autonomous Republic of Crimea and of the City of Sevastopol in which the Ukrainian Government currently does not exercise effective control.¹⁴

As the AA implies, such consultations should be conducted with the understanding that the principle of territorial integrity is enshrined in the text of the agreement, in particular, in Articles 2, 4, and 7.

The introduction of sanctions by the EU, the USA, and other states against Crimea and the so-called LPR and DPR has created very unfavorable conditions for their existence. The AA cannot be implemented with regard to these unrecognized territories. They are not able to maintain normal economic relations with other states, with the exception of Russia. Neither Ukrainian nor Russian legislation extend to the so-called LPR and DPR. The only state that helps them is Russia, which bears the full responsibility for the creation of this situation.

One should bear in mind that the territories of Crimea and the so-called LPR and DPR are subsidized regions. Formerly, Ukraine donated to these areas far more than it earned from them for the Ukrainian budget.

Crimea has always been a subsidized region. In general, before the Russian invasion, the Autonomous Republic of Crimea was only 34% financially independent and Sevastopol only 20%.¹⁵ The rest, approximately three billion hryvnias annually, was provided from the Ukrainian state budget.¹⁶ This was one of the reasons why Crimea was transferred to Ukraine in 1954. Ukraine also supplied Crimea with water, electricity, food, etc. The very short resort season together with the old infrastructure and the Soviet-minded mentality of the majority of the people were not able to alter the Crimean economic situation for the better. Crimea needs investment urgently. Turkey has demonstrated the role investment in resort businesses can play; however, sanctions are hampering investment.

¹⁴ Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:278:FULL&from=FR> [accessed: 2019.12.24].

¹⁵ A. Zanuda, *Crimea: No one can afford 7 March 2014 BBC Ukraine*, <https://www.bbc.com/news/world-europe-26483818> [accessed: 2023.02.04].

¹⁶ O. Tischuk, *Krim subsidized: The peninsula annually costs Ukraine 3 billion hryvnias*, 1 March 2014, <https://fakty.com.ua/ru/ukraine/ekonomika/20140301-1506238> [accessed: 2023.02.04].

Since the AA was concluded before the beginning of the Russian invasion of Crimea and Donetsk and Luhansk areas, the status of these territories and their populations were not specifically mentioned in the agreement. This created some legal problems as to the territorial application of the agreement. At the same time, some provisions of the AA are applicable to these territories and their populations.

Trade in goods for these territories has been stopped, and there is no chance for it to be renewed until the economic sanctions imposed by the EU in 2014 are lifted. International and Ukrainian sanctions exclude any possibility of trade between these territories and the EU. If goods from the unrecognized territories enter Ukraine, they cannot in any instance go further to the EU since they require certificates of origin obtained from the Ukrainian Ministry of Economic Development and Trade. Goods that have certificates of origin issued by the authorities of the unrecognized territories are not accepted by the EU.¹⁷

The same applies to the free movement of services, which cannot be extended to these territories because of sanctions.

As far as the free movement of people is concerned, the situation in this area is different to some extent. Many Ukrainians living in the occupied territories still have Ukrainian passports despite the pressure exerted on them to change their citizenship. Ukrainian citizens can use the visa-free regime to travel to the EU as is foreseen by Articles 17–19 of the AA. The only problem for them is that they must go to their motherland, Ukraine, and apply for a biometric passport in Kyiv.

Those who do not have a Ukrainian passport and are thus unable to confirm their Ukrainian citizenship, have no a chance of obtaining biometric passports to travel to the EU. This is why people who changed their Ukrainian citizenship even against their will to do so have lost the chance to enjoy the visa-free regime between the EU and Ukraine.

Although the AA contains a few provisions on the free movement of capital, some provisions of the Lisbon consolidated Treaty on European Union and the Treaty on the Functioning of the European Union prohibit all restrictions on the free movement of capital between the EU member-states and third countries (Article 63).

However, there are many exceptions from this regime in the AA with Ukraine. Therefore, capital movement in the AA is practically reduced to investments. One can easily surmise that investments in the unrecognized territories are banned by sanctions. So one can speak mainly about the protection of foreign investments that were made before the annexations.

The question is who will protect foreign investments in these territories. Ukraine cannot do it, since its legislation is not valid there. This could mean that Russia is in charge of protecting these investments if they were not withdrawn, of course. So, there is also no free movement of capital to or from these unrecognized territories.

¹⁷ Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others*, 1994, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0432> [accessed: 2019.12.24].

The annexation of Crimea and the so-called DPR and LPR will not be recognized in the foreseeable future. They can only survive with Russia's military and economic support. They will cease to exist as soon as Russia ceases supporting them.

However, the AA opens up some prospects for them in the future. When the Russian army leaves these territories, they will be reintegrated gradually into the Ukrainian economy. This will not take a lot of time since the economies of these territories and the economy of Ukraine are very closely integrated.

1.3. Legal Regulation of Temporarily Occupied Territory of Ukraine

Ukraine has taken some legal steps for the integration of such territories. On April 15, 2014, the *Verkhovna Rada* of Ukraine enacted the Law of Ukraine on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine.¹⁸

By adopting the law, the Ukrainian parliament confirmed that the territory of the Autonomous Republic of Crimea and the City of Sevastopol are integral parts of the territory of Ukraine (Article 1).

The law sets forth a special legal regime for the territory of Crimea and Sevastopol, specifically: the definition of temporarily occupied territory of Ukraine; the activity of unlawful bodies and/or their officials; entry to and exit from temporarily occupied territory; property rights and economic activity; compensation for material and moral damages.

As far as the unrecognized territories of Donetsk and Luhansk are concerned, on January 18, 2018 Ukraine's *Verkhovna Rada* passed a law on the Peculiarities of State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories of the Donetsk and Luhansk Regions (the so-called law on Donbass reintegration).¹⁹

The bill classifies the self-proclaimed DPR and LPR as "occupied territories," labels Russia the "occupier," and officially introduces the notion of "Russian aggression."

Parts of Ukrainian territory where armed formations of the Russian Federation and the administration of the Russian occupation forces have been established and exercise general, effective control have been designated as temporarily occupied areas in the Donetsk and Luhansk regions.

The law says that the activities of the armed formations of the Russian Federation and the administration of the Russian occupation forces in the Donetsk and Luhansk regions contradict international humanitarian law and are illegal.

The law confirms that the legal status of the temporarily occupied territories in the Donetsk and Luhansk regions, the autonomous Republic of Crimea and the city

¹⁸ Law of Ukraine "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine", 2014, http://search.ligazakon.ua/l_doc2.nsf/link1/T141207.html [accessed: 2019.12.24].

¹⁹ Law of Ukraine "On Peculiarities of the State Policy on Ensuring the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions", 2018, <https://zakon.rada.gov.ua/laws/show/2268-19> [accessed: 2019.12.24].

of Sevastopol, and the legal regime in these territories is determined by this law, the law of Ukraine on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine, other laws of Ukraine, and international treaties, and the consent to be bound that is provided by the *Verkhovna Rada* of Ukraine and principles and norms of international law (Article 2).

Despite the worldwide crisis of legitimacy, Russia's practice was based on the recognition of civil status acts and other documents affecting the legal status of persons which have been issued to authorities in the so-called DPR and LPR. In June 2019, Russia started issuing Russian passports to inhabitants of the self-proclaimed DPR and LPR under a simplified procedure allegedly on "humanitarian grounds."

From 2014, Russia began using the unrecognized territories as bridgeheads for the large-scale aggression with the aim of conquering all of Ukraine. To start with, Russia formed military contingents from the local populations and resorted to military provocations against Ukraine.

On February 21, 2022, Russia recognized the self-proclaimed DPR and LPR as sovereign states within their administrative borders, which violated Ukraine's sovereignty and territorial integrity. On the same day, Russian President Putin approved decrees recognizing the DPR and LPR, and signed agreements on friendship, cooperation, and assistance with the self-proclaimed republics.

On February 22, 2022, the Federation Council of Russia authorized the use of military force, and Russian military forces openly advanced into the territories of the so-called DPR and LPR.

The large-scale Russian military invasion of Ukraine began on February 24, 2022, when Putin announced a "special military operation" to "demilitarize and denazify" Ukraine. On September 30, 2022, Putin announced the annexation of the so-called DPR and LPR.

On October 12, 2022, the United Nations General Assembly voted for Resolution ES-11/4 on the territorial integrity of Ukraine,²⁰ in which the body condemned the organization by the Russian Federation of the illegal so-called referendums in regions within the internationally recognized borders of Ukraine and the attempted illegal annexation of the Donetsk, Kherson, Luhansk, and Zaporizhzhia regions of Ukraine, following the organization of the referendums mentioned above.

Conclusions

The world community of states does not recognize the secession of Crimea and some parts of the Donetsk and Luhansk areas from Ukraine. These territories seceded from Ukraine as the result of the military invasion and the annexation of Crimea by Russia

²⁰ Resolution ES-11/4 by the General Assembly on 12 October 2022 "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations", <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/630/66/PDF/N2263066.pdf?OpenElement> [accessed: 2023.03.04].

and military support by Russia of the pro-Russian separatists that seized power in parts of the Donetsk and Luhansk regions. Although all the territorial changes were made through the gross violation of international law, the legal status of them is not similar. Russia proclaimed Crimea an integral part the Russian Federation, while the so-called DPR and LPR proclaimed themselves to be independent states.

The AA between the EU and Ukraine shall apply to the entire territory of Ukraine as recognized under international law, defined by the Constitution of Ukraine, the laws of Ukraine, and international agreements. However, the Ukrainian government currently does not exercise effective control over Crimea or the separated parts of the Donetsk and Luhansk regions. Therefore, Ukraine and the EU decided to engage in consultations with a view to determine the effects of the agreement with regard to the illegally annexed and separated territories. At the time of their occupation and annexation by Russia, these territories did not fall within the purview of the AA.

Russia's recognition of the independence of the self-proclaimed DNR and LNR states within its administrative borders, which went far beyond the existing lines of demarcation with Ukraine on that day, became one of the pretexts for Russia's military aggression against Ukraine, that Russia began on February 24, 2022.

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Summary

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EU Association Agreement with Ukraine and Unrecognized Territories

The focus of this article is a legal analysis of the status of Crimea and the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) that are parts of the Ukrainian territory that was annexed and separated as a result of the Russian invasion. The authors state that Russia brutally violated the principles and norms of international law and that Russia's military invasion has been condemned strongly by the international community. Moreover, international sanctions have been introduced against Russia and these territories. Russia's annexation of Crimea and the unrecognized status of the so-called DPR and LPR largely determines the effects of the Association Agreement (AA) between the EU and Ukraine regarding these territories. The formation of a free trade area stipulated in the AA cannot cover Crimea or the so-called DPR and LPR. These territories and their populations cannot enjoy to the full extent the preferences obtained by Ukraine after the AA came into force. Ukrainian legislation concerning the legal status of Crimea and the so-called DPR and LPR is also analyzed in detail.

Keywords: EU associate agreement, Ukraine, unrecognized territories, sanctions against Russia.

Streszczenie

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Umowa stowarzyszeniowa między Unią Europejską a Ukrainą i terytoriami nieuznanymi

Artykuł jest poświęcony analizie prawnej statusu Krymu oraz tzw. Donieckiej Republiki Ludowej i Ługańskiej Republiki Ludowej jako części ukraińskich terytoriów, które zostały zaanektowane i oddzielone od Ukrainy w wyniku rosyjskiej inwazji. Autorzy wskazują, że Rosja brutalnie naruszyła zasady i normy prawa międzynarodowego, a rosyjska inwazja wojskowa została zdecydowanie potępiona przez społeczność międzynarodową, czego wyrazem było wprowadzenie międzynarodowych sankcji przeciwko Rosji i tym terytoriom. Aneksja Krymu przez Rosję i nieuznawany status tzw. Donieckiej Republiki Ludowej i Ługańskiej Republiki Ludowej w dużej mierze determinują skutki umowy stowarzyszeniowej między UE a Ukrainą na tych terytoriach. Utworzenie strefy wolnego handlu przewidzianej w umowie stowarzyszeniowej nie może obejmować powyższych terytoriów, w związku z czym terytoria te i ich ludność nie są w stanie w pełni korzystać z preferencji uzyskanych przez Ukrainę po wejściu w życie umowy stowarzyszeniowej. Przedmiotem analizy jest również ukraińskie ustawodawstwo dotyczące statusu prawnego Krymu oraz tzw. Donieckiej Republiki Ludowej i Ługańskiej Republiki Ludowej.

Słowa kluczowe: umowa stowarzyszeniowa z Unią Europejską, Ukraina, terytoria nieuznawane, sankcje wobec Rosji.