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LEGAL AND POLITICAL ASPECTS OF WAR IN UKRAINE: PHILOSOPHICAL REFLECTION ON THE SCENE OF BATTLES

Abstract. Purpose. The research deals with philosophical, military, political and legal issues for the comprehensive assessment of the situation around Russia's armed aggression against Ukraine. Among them, the most challenging issues touch upon reasonableness and reality of certain political and military actions. These problems have acquired an international character in modern jurisprudence.

Research methods. From a methodological point of view, this study represents as a further development of an idea of Prussian military theorist Carl Philipp Gottlieb von Clausewitz (who said: "War is merely the continuation of policy with other means") in a modern context. The possibilities of this method have demonstrated an example of the systematic analysis of the related political and military acts.

Results. This analysis allows making a preliminary conclusion that many international and domestic political reasons or factors caused this war in Ukraine. But this armed aggression was prepared and ideologically substantiated for a long time within the framework of the doctrine, the so-called "Russian world". Most importantly, each of the warring factions has not only a different goal setting but also operates with a fundamentally different type of moral and legal thinking. The mindset based on the principles of natural law is opposed to the philosophy of primitive positivism. An irreconcilable antagonism of good and evil is the essence of this epistemological conflict. It determines the eschatology of this war, which entails the global catastrophe of the old law and order based exclusively on the power of the states. The victory over the latest attempt of dictatorial political regimes to get revenge by will raise the birth of a new democracy – human-centered. This is exactly defining the course and outcome of this war.

Conclusions. The most important conclusion is that this war will definitely be victorious for Ukraine. This is because the policy determines the war, not vice versa. Great military scientist Carl von Clausewitz was right. Putin lost this war politically on the day when he began it. Separate and partial military successes will not change this logic, they only pull off the shameful end of this big *gamble* with no payoff.

Key words: legal philosophy, reasonableness, common sense, law, politics, war, armed aggression.

What is reasonable is real;
that which is real is reasonable.

G. Hegel "Elements
of the Philosophy of Right" (1820)

1. Introduction

This article is written by two philosophizing scientists, a political scientist and a law theorist, who both were colonels far back in the past. One

of them served in the Investigation and Operational bodies of the Ministry of Internal Affairs, and the latter – in the Armed Forces of Ukraine. Therefore, they are trying to find a systematic association between law, politics and war, which are so specifically represented in modern warring Ukraine.

It's the definite and indefinite article simultaneously, because its object is allegedly known

to all, but, as it turned out, is not completely clarified. Law, Politics and War are specific and unspecific (generic) things at the same time. The authors do not claim a complete solution to the problem. This is reflection of theorists. The problem must be solved by our soldiers on the battlefield. Our warriors are not observers, but main actors of this terrible tragedy, which was not considered to write either William Shakespeare nor Dante Alighieri. Notorious “obscure poet” Putin, as murderous imperator Nero, dared. But actors, from both sides, have their own scenarios. Russian soldiers cannot win, the Ukrainian ones cannot lose.

This article was written at the beginning of a full-scale attack by the Russian Federation on Ukraine and during peace negotiations in Turkey. Given the time frame, the authors avoided short-term forecasting and final conclusions.

It may sound pathetic, but they tried once again to understand the infinite, eternal essence of the short-term local phenomena under some extreme conditions, but in the context of global concerns.

Thus, let's try and figure out what makes up the essence of this emergency that is Russia's armed aggression against Ukraine. This requires clearing the “fog of the war” or the uncertainty of the battlefield information, which hides the main reasons and perspectives for the war.

At the same time, it is necessary to take into consideration that “the legal and regulatory basis of the operation of the security and defence sector is covered by many legal regulations of different jurisdictions, indicating the complexity of the relevant sector of public policy” (Beikun, Pryimak, 2021, pp. 29–34).

That is why, the related problems of domestic and international law should be carefully addressed, and military legislation should be continuously monitored.

The special relevance and timeliness of the research subject put pressure on us, so theoretical and methodological reasoning of it will be brief.

This is a predominantly philosophical analysis, not within the philosophy of law (as Philosophers “Legal Philosophy”) but in terms of Legal Philosophy (as Jurists’ Legal Philosophy). A modern Spanish scientist Jesús Vega wrote about these differences (Vega, 2018, p. 29).

However, as a basic methodological principle, we use statements by a Prussian military theorist, major general Carl Philipp Gottlieb von Clausewitz (1780–1831): “War is merely the continuation of policy with other means”. In particular, in his famous work, “On War” (1832), he has so launched this idea: “*When whole communities go to war – whole peoples, and especially*

civilized peoples – the reason always lies in some political situation, and the occasion is always due to some political object. War, therefore, is an act of policy” (Clausewitz, 1989, pp. 86–87).

In this context, it is important to note that these words absolutely do not lose its justice for almost 200 years. Put it more bluntly, truths are not growing old. It is the eternal realism of absolute ideas and the major force of practical philosophy.

2. Political aspects of Russia's war against Ukraine

Many international and domestic political reasons or factors caused this war in Ukraine. It is most unfortunate that our warnings were confirmed: “From the end of the second – the beginning of the third millennium, the world community is increasingly convinced that the system of institutions and legal mechanisms of international security are inefficient and incapable of eliminating arising threats and regulating regional conflicts that threaten serious consequences for human civilization” (Shulzhenko, 2019, pp. 16–17).

This armed aggression was prepared and ideologically substantiated for a long time within the framework of the doctrine, the so-called “Russian world”. For the first time, V. Putin officially applied this term in 2001 during his speech at the Congress of compatriots. He then immediately noted that its content goes far to the geographical boundaries of the Russian ethnos. After the Orange Revolution of 2004–2005, this theory was supplemented by the idea of V. Putin “On the Division of the Russian People”, “The Community of Slavic Peoples”, etc. (Shulzhenko, 2019, p. 18).

As already stated, political and legal arbitrariness carried out by puppets of oligarchic financial groups destabilized Ukrainian society. It also provoked the Russian political leadership to full-scale armed aggression, which began on February 24, 2022 (Shulzhenko, 2021, pp. 10–11).

Most importantly, each of the warring parties has not only a different goal setting but also operates with a fundamentally different type of moral and legal thinking.

The mindset based on the principles of natural law is opposed to the philosophy of primitive positivism. Russian political leadership, Leviathan, professes the philosophy which solves all problems by the violent pressure of the state.

Paradoxically, but a modern ruling regime in Moscow, which proclaimed “denazification of Ukraine” completely forgot the warning to the founder of the Soviet State in relation to Great Russian chauvinism, which fairly believed that people who humiliate others cannot be free.

The main features of the mentality of the Ukrainian people are the natural denial of violence, gravity to freedom, participation of the people in solving national and regional affairs, solidarity and justice.

The essence of this epistemological conflict is an irreconcilable antagonism of good and evil. It determines the eschatology of this war, which entails the global catastrophe of the old law and order based exclusively on the power of the states. The victory over the latest attempt of dictatorial political regimes to get revenge by will raise the birth of a new, human-centric, democracy. This defines the course and outcome of this war.

It is really inspiring that the head of our state correctly specifies the most viable means for bringing an end to the conflict. Thus, Ukrainian President Volodymyr Zelensky told CNN in an exclusive interview about his attempts to dwell with Putin to stop Russia's War in Ukraine: "I'm ready for negotiations with him. I was ready for the last two years. And I think that without negotiations we cannot end this war... I think that we have to use any format, any chance in order to have a possibility of negotiating, possibility of talking to Putin. But if these attempts fail, that would mean that this is a third World War" (Collinson, 2022).

Political issues are organically connected with legal problems. As it is well known, building a solid foundation based on law and justice is of significant importance to ending armed conflict and post-conflict reconstruction. First of all, it should be taken into account that the Rule of Law Principle provides stability and coherence of the legal system (Allan, 1995).

3. War as it is: a mental trap from positivists

However, most commentators and analysts were immersed in the tactics of military events and left strategic problems at the discretion of politicians. Military experts are in danger of falling into a tactical lagoon.

For instance, it is essential to analyse the conclusions by the former UN Inspector Scott Retter, who studied for over 35 years the Soviet and Russian military doctrines, the equipment of the Armed Forces of the USSR, and their tactics.

In particular, in numerous television interviews, he came to a completely defined unified solution. It says that the so-called "military operation" of Russia is an example of the outright full-scale military invasion of a neighboring country. He notes "everybody knows that the invasion is not going according to plan, but this is classic multi-axis invasion, a non-smooth, but successful operation". In his opinion, "the Ukrainians are putting up a very solid fight

but they're losing, they're losing decisively" (Moment of Clarity with Lee Camp, 2022).

Scott Retter is a metaphysically very close-minded military expert. His philosophical way of looking at things is a very limited by own considerable military experience.

But common sense is not a collection of prejudices acquired by life experience. A common-sense belief is not produced in a certain way but rather a particular sort of belief, that is, one that is available to people in general on account of its triteness, its palpable obviousness (Rescher, 2020, pp. 208–224).

A particularly striking example of the politics' primacy is the maneuver of the Russian troops in the north of Ukraine after the month offensive actions in the direction of Kyiv. How can some experts feel military necessity where it lacks? From a tactical point of view, such indentation of troops is absolutely "unprofitable", because it depreciates all previous losses and successes. Only crazy or lunatic on the roof of his combat experience cannot see that the so-called redeployment of troops is due to the considerations of political negotiations, and not purely military necessity. It is no accident that in the statement by Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation, about the withdrawal of Russian forces from the North of Ukraine, there was such a value judgment as a "gesture of good will" (Hindustan Times, 2022).

Therefore, the logic of common sense dictates the need for an individual analysis of these negotiations.

4. What an illegal agreement is worth?

Legal reality is always intelligent. Therefore, common sense (including the judgements of lawyers) claims that any contracts, which are outside the law and are determined by quick-fix conditions, are not worth the paper they are written on.

This scientific analysis of the current legislation showed that a peace agreement, which can end a military conflict between Russia and Ukraine, would not be concluded in the foreseeable future.

Such preliminary but categorical conclusion may be attributed to a number of causes, as explained below.

Firstly, in the Ukrainian legal system, international treaties concluded by the country rank second after the Constitution. It means an agreement on Ukraine's neutrality, similar to Finland, is unlawful. It is contrary to the Constitution, which consolidated the North Atlantic integration process of our country (preamble, paragraph 5 of the first part, article 85, article 102, and paragraph 11 of article 116 of Constitution of Ukraine (Verkhovna Rada

of Ukraine, 1996)). The 5 preambular paragraph specifically recognizes the immutability of the policy and it declared that the “Verkhovna Rada of Ukraine, on behalf of the Ukrainian people – citizens of Ukraine of all nationalities <...> adopts this Constitution – the Fundamental Law of Ukraine”:

“<...> caring for the strengthening of civil harmony on Ukrainian soil, and confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine” (Verkhovna Rada of Ukraine, 1996).

Secondly, regarding the legal mechanism for implementing such an agreement on denial of NATO accession, there are also direct legal limits. Thus, Article 3 of the Law of Ukraine “On the All-Ukrainian Referendum” dated January 26, 2021 (the subject of an all-Ukrainian referendum) attributes that:

“<...> are contrary to the provisions of the Constitution of Ukraine, the universally recognized principles and norms of international law” (Verkhovna Rada of Ukraine, 2021).

Thirdly, such a referendum can be held only in peace time, which involves a cease-fire and the full withdrawal of the aggressor’s troops from the territory of Ukraine. This follows from Article 19 of the Law of Ukraine “On Legal Regime of Martial Law” dated May 12, 2015, № 389-VIII:

“1. The following is prohibited martial law: Changing the Constitution of Ukraine; holding all-Ukrainian and local referendums” (Verkhovna Rada of Ukraine, 2015).

The latter position directly follows from Article 52 (Coercion of a State by the threat or use of force) of Vienna Convention on the Law of Treaties on 23 May 1969:

“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations” (United Nations, 1969).

In concluding, it is necessary to add to the legal argument against the viability of a peace agreement with the Russian Federation, the next moralistic statement that belongs to the British commander and the state figure, the winner in the battle of Waterloo (1815) Field Marshal Arthur Wellesley, 1st Duke of Wellington (1769–1852):

“I mistrust the judgement of every man in a case in which his own wishes are concerned” (Gurwood, 1852).

As it turned out, our interests are antagonistic in modern reality. The Ukrainian people will

never pander to the aggressive plans of Russian political leadership.

Mass suicide is a complete absurd. Moreover, such mental perversion is not inherent in Ukrainian consciousness.

We do not want to be drawn into a new international agreement, which repeats the principal drawback of the Minsk agreements.

All the previous arrangements concluded under military pressure of the Russian Federation, with a tacit agreement of the Western leaders and NATO, resulted in war.

In political essence, it is a reproduction of the principle of appealing to the aggressor, a traditional solution of such armed conflicts by their ‘freezing’ over many years.

5. Conclusions

Despite any military result in the theater of operations, the political reign of Zelensky (in the sense of the people’s support for state power) will become stronger. On the contrary, Putin’s power will become much weaker, not only on the international arena, but also in his country.

This war can last a few months or even years, but it will definitely be victorious for Ukraine. This is because the policy determines the war, not vice versa. Great military scientist Carl von Clausewitz was right. Putin lost this war politically on the day when he began it. Separate and partial military successes will not change this logic, they only pull off the shameful end of this big gamble with no payoff.

Positivist analysts, who ignore the war’s moral and spiritual components, will be shocked. Contrary to all the laws of armed struggle, the Russian “Armada Invincible” will be eventually destroyed, like the Spanish one in 1588.

Ukraine finally stops to be an “anti-scientific state” (Academician O. Kostenko). The adoption of main political decisions in our country should be carried out through comparing alternative versions of various scientific schools and experts, and not only the nearest environment of the President must be endowed with such a competence. It is now real like never before amidst the unification of the entire Ukrainian people during the war.

The specific nature of the reasonableness as a means of achieving the flexibility of legal regulation has made this academic exchange of positions extremely relevant (Halkevych, Nykyforak, 2021, pp. 125–129).

According to Francis Bacon, knowledge itself is power. We hope these thoughts on the raised issues will make us stronger and better to win a glorious victory.

References:

- Allan, T. (1995). *The Rule of Law in Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press, 314 p. [in English].
- Beikun, A., Pryimak, V. (2021). Legal and regulatory basis for security and defence sector operation: conceptual approach. *Pidprijemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 7, pp. 29–34 [in English].
- Clausewitz, C. von (1989). *On War* / ed. and transl. by M. Howard, P. Paret. New Jersey: Princeton University Press, 752 p. [in English].
- Collinson, S. (2022). Analysis: Why Putin is mercilessly targeting civilians even as Zelensky pleads for peace talks. *CNN*, March 21. Retrieved from: <https://edition.cnn.com/2022/03/21/politics/zelensky-ceasefire-talks-ukraine-war-analysis/index.html> [in English].
- Gurwood, J. (ed.) (1852). *The Dispatches of Field Marshal the Duke of Wellington, During His Various Campaigns in India, Denmark, Portugal, Spain, the Low Countries, and France. Volume 2*. London: John Murray, 772 p. [in English].
- Halkevych, S., Nykyforak, V. (2021). Discretionary nature of subjective reasonableness. *Pidprijemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 9, pp. 125–129. Retrieved from: <https://doi.org/10.32849/2663-5313/2021.9.18> [in English].
- Hindustan Times (2022). Russia lists “goodwill gesture” for talks, has a condition to end Ukraine war. Retrieved from: <https://www.hindustantimes.com/world-news/ukraine-russia-lists-goodwill-gesture-for-talks-but-has-a-condition-to-end-war-101649239938256.html> [in English].
- Moment of Clarity with Lee Camp (2022). Former UN Inspector Scott Ritter on What The Hell Is Happening. *YouTube*. Retrieved from: <https://www.youtube.com/watch?v=rRFjInoMCeE&list=TLPQMjkwMzIwMjJdbWx5Pajlsg&index=7> [in English].
- Rescher, N. (2020). Common-Sense Realism. *The Cambridge Companion to Common-Sense Philosophy* / ed. by R. Peels, R. van Woudenberg. Cambridge: Cambridge University Press, pp. 208–224. Retrieved from: <https://doi.org/10.1017/9781108598163.010> [in English].
- Shulzhenko, F. (2019). “Ruskyi mir” u systemi zahroz rehionalnii ta hlobalnii bezpetsi [“Russian world” in the system of threats to regional and global security]. *Yurydychnyi visnyk Ukrainy – Legal Newsletter of Ukraine*, no. 24–25, pp. 16–18 [in Ukrainian].
- Shulzhenko, F. (2021). Polityko-pravove svavillia yak komponent hibrydnoi viiny [Political and legal arbitrariness as a component of a hybrid war]. *Yurydychnyi visnyk Ukrainy – Legal Newsletter of Ukraine*, no. 11(1340), pp. 10–11 [in Ukrainian].
- United Nations (1969). Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969. Retrieved from: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [in English].
- Vega, J. (2018). Legal philosophy as practical philosophy. *Journal for Constitutional Theory and Philosophy of Law*, no. 34, pp. 20–44. Retrieved from: <http://journals.openedition.org/revus/3859> [in English].
- Verkhovna Rada of Ukraine (1996). Konstytutsiia Ukrainy: Zakon Ukrainy vid 28 chervnia 1996 r. № 254к/96-ВР [Constitution of Ukraine: Law of Ukraine of June 28, 1996 № 254к/96-ВР]. Retrieved from: <https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=254%EA%2F96%2D%E2%F0#Text> [in Ukrainian].
- Verkhovna Rada of Ukraine (2015). Pro pravovyi rezhym voiennoho stanu: Zakon Ukrainy vid 12 travnia 2015 r. № 389-VIII [On Legal Regime of Martial Law: Law of Ukraine of May 12, 2015 № 389-VIII]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/389-19?lang=uk#Text> [in Ukrainian].
- Verkhovna Rada of Ukraine (2021). Pro vseukrainskyi referendum: Zakon Ukrainy vid 26 sichnia 2021 r. № 1135-IX [On the All-Ukrainian Referendum: Law of Ukraine of January 26, 2021 № 1135-IX]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1135-20#Text> [in Ukrainian].

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ПРАВОВІ ТА ПОЛІТИЧНІ АСПЕКТИ ВІЙНИ В УКРАЇНІ: ФІЛОСОФСЬКІ РОЗДУМИ З ТЕАТРУ ВОЄННИХ ДІЙ

Анотація. Мета. Дослідження стосується філософських, військових, політичних та правових питань для комплексної оцінки ситуації навколо збройної агресії Росії проти України. Серед них найбільш складні питання торкаються розумності й реальності певних політичних і військових дій. Ці проблеми придбали міжнародний характер у сучасній юриспруденції.

Методи дослідження. З методологічної позиції дослідження являє собою розвиток ідеї пруського військового теоретика Карла Філіпа Готліба фон Клаузевіца (який говорив: «Війна є лише продовженням політики іншими засобами») у сучасному контексті. Можливості цього методу були продемонстровані на прикладі систематичного аналізу пов'язаних політичних та військових дій.

Результати. Проведений аналіз дає змогу зробити попередній висновок про те, що війну в Україні викликали багато міжнародних і внутрішніх політичних причин чи факторів. Однак ця збройна агресія була підготовлена та ідеологічно обґрунтована впродовж тривалого часу в межах доктрини так званого «руського мира». І найголовніше, що кожна з воюючих сторін не лише має відмінну цільову установку, а й діє на основі принципово різних типів морального та правового мислення. Мислення на основі принципів природного права виступає проти філософії примітивного позитивізму. У непримиренному антагонізмі добра і зла полягає суть цього гносеологічного конфлікту. Він визначає есхатологію цієї війни, яка полягає у глобальній катастрофі старого правопорядку, заснованого виключно на владі держав. Перемога над останнім реваншем диктаторських політичних режимів сприятиме народженню нової демократії – людиноцентричної. Саме це визначає перебіг і результат цієї війни.

Висновки. Найважливіший висновок полягає в тому, що нинішня війна обов'язково буде перемогою для України, оскільки політика визначає війну, а не навпаки. Великий військовий учений Карл Клаузевіц мав рацію. Політично цю війну Путін програв у той день, коли він її почав. Окремі військові успіхи не змінюють цю логіку, вони тільки відтягують ганебний кінець цієї великої авантюри без виграшу.

Ключові слова: правова філософія, розумність, здоровий глузд, право, політика, війна, збройна агресія.

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