

МІЖНАРОДНЕ ПУБЛІЧНЕ ТА ПРИВАТНЕ ПРАВО

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LEGAL MECHANISMS OF ENFORCING A NO-FLY ZONE OVER UKRAINE DUE TO RUSSIA'S AGGRESSION

On 24 February 2022, Russian Federation started a so-called special military operation. In fact it was the beginning of a large scale military aggression against Ukraine. During the first month of the warfare Ukraine's President, Volodymyr Zelensky, and other Ukrainian high-ranking politicians asked the United States and its NATO allies for military assistance, including the establishment of a no-fly zone. But as we can see, this request has been left without satisfaction.

In order to figure out whether the establishment of a no-fly zone over Ukraine was possible, we should give a proper definition to this term. As Michael N. Schmitt points out, a no-fly zone is de facto aerial occupation of sovereign airspace in which, absent consent of the entity authorizing the occupation, only aircraft of the enforcement forces may fly [4]. It is also important to bare in mind that enforcement of a no-fly zone presupposes the possible use of force in response to a violation.

Due to the fact that usage of force is the most severe sanction available in international law, there are only two circumstances under which military force can be used. The first one is pursuant to a Chapter VII mandate. Article 39 of the UN Chapter points out that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security. Article 42 provides legal basis for the use of force to maintain or restore international peace [4; 5].

Michel N. Schmitt writes that the Security Council decides to authorize military action under Chapter VII in three ways: by sending peacekeeping forces under UN command and control, by deferring to a regional organization to take lead in enforcement action, or by authorizing member States to take actions individually or collectively to implement a particular mandate.

The second circumstance under which force can be used is response to an armed attack under Article 51 of the Charter [4]. According to the Article, member States have a right of individual or collective self-defence, if an armed attack occurs against a Member of the United Nations [5].

There are some relatively recent examples of the enforcement of no-fly zones [1]. The first example was during Operation Southern Watch & Northern Watch (1991–2003). These two no-fly zones were established in northern and southern Iraq over 12-year period. A legal basis for that was Resolution 688 issued by the Security Council whose goal was to prevent the repression of the Iraqi civilian population in many parts of Iraq [10]. Mark Nevitt writes that despite the fact that no single Security Council resolution expressly authorized these no-fly zones, the USA and its allies considered Resolutions 678, 687 and 688 to be a legal basis to implement the no-fly zone [8; 9; 10].

The second case was in 1992 and 1995 in Bosnia-Herzegovina. Firstly, the UN Security Council adopted Resolution 781 to prohibit all military flights in the area. But because of repeated Serb violations of the no-fly zone, the Security Council in March 1993 issued Resolution 816 which authorized member States to take all necessary measures to enforce the ban. As the result NATO launched Operation Deny Flight, which lasted through 1995 [7].

The last example was an enforcement of no-fly zone in Libya, in 2011. The UN Security Council adopted Resolution 1973 which provided broad spectrum of legal instruments to impose an international no-fly zone [6].

As Terry D. Gill points out the clearest legal basis for a no-fly zone is a UN Security Council resolution under Chapter VII authorizing the enforcement of such a zone. Such resolution pursuant to Articles 24 and 25 of the UN charter is a decision on behalf of the UN as a whole [2].

But there were no chances of such a UN Security Council resolution being adopted in Ukraine's case. Russia would have certainly opposed the adoption of such a measure allowing for the enforcement of a no-fly zone over Ukraine, using its veto power in the UN Security Council.

Another way to enforce a no-fly zone over Ukraine could have been under Resolution 377 issued by the General Assembly [3]. "Uniting for Peace" resolution points out that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression. In such a case, according to "Uniting for Peace," the General Assembly can recommend to members "collective measures" which may even include the use of armed force when necessary but only in the case of breach of the peace or act of aggression, not a threat to the peace [11].

But as Larry D. Johnson writes, the General Assembly cannot replace the Security Council in deciding on binding enforcement of coercive measures. And it cannot recommend that States violate Article 2(4) of the Chapter. He points out that the most the General Assembly can do concerning use of force is recommend that States come to the aid and assistance of a State which has been the victim of aggression [3].

As we can see, the General Assembly cannot decide whether to use power in order to maintain or restore peace and security. All it can do is recommending all sorts of action, excluding the use of military power. States are not required to take the recommended measures but they may provide a certain degree of moral of community legitimacy of such actions as trade embargoes, economic sanctions, et cetera.

To sum up, it is worth saying that de-jure there were legal grounds to establish a no-fly zone over Ukraine, but de facto such an action was impossible due to some factors. The first and the most important is Russia's membership in the UN Security Council. Despite Ukraine's right to self-defence, according to Article 51 of the United Nations Charter and the existence of the threat to peace and the act of aggression committed by

Russian Federation, there were no chances of UN Security Council resolution being adopted.

Another possible mechanism of establishing a no-fly zone over Ukraine was also flawed due to the fact that the General Assembly cannot decide to use power in order to maintain or restore peace and security. It can only recommend all sorts of action, excluding the use of military force.

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