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Legal Status of Belarus in Russia-Ukraine War

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Summary

On 13 April 2022, the OCSE published a «Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022». The document, among other things, gives a legal assessment of the hostilities on the Ukrainian territory and the role of third countries, including Belarus.

The report was prepared by an OSCE Expert Mission (composed of three experts) within the framework of the Moscow Mechanism, which was invoked on 3 March at the request of Ukraine and with the support of 45 OSCE member states. The Moscow Mechanism is designed to help investigate allegations of serious violations of OSCE commitments by states and identify ways to stop them. Therefore, the purpose of the report was to establish the facts and circumstances of a) violations and abuses of international human rights law and international humanitarian law and b) possible cases of war crimes and crimes against humanity. The authors of the report had to collect, consolidate and analyse all relevant information in order to present to pertinent accountability mechanisms of states for violations of international law. The document also contains a separate commentary by Ukrainian officials regarding the information contained in it.

Status of Belarus

In section B, the authors of the report qualify the war as an armed conflict of an international character (IAC) with two parties involved: Russia and Ukraine. At the same time, neither NATO countries nor Belarus are parties to the armed conflict.

Explaining the status of Belarus in the conflict, the authors stress: *«Although Belarus allows its territory to be used to launch Russian attacks on Ukraine, the Mission considers that as of 1 April, it is not a party to the IAC, as long as it does not itself commit acts of violence or other acts that would constitute direct participation in the*

hostilities by persons attributable to Belarus». A parallel is drawn with the role of the countries of the North Atlantic Alliance in the conflict: *«Similarly, NATO Member States are not parties to the IAC by the mere fact that they supply weapons or share general intelligence information.»* At the same time, the report emphasizes that *«both Belarus and NATO Member States have a heightened responsibility to "ensure respect" of IHL by the parties they support.»*

The authors, in their explanations, refer to the Commentary of the International Committee of the Red Cross on the Geneva Convention III relative to the Treatment of Prisoners of War. Paragraph 278 of the Commentary to Article 2 states that the status of a state sending its foreign military contingent (multinational forces) to participate in an armed conflict is determined by the rules of international humanitarian law without exception.

Indeed, the direct participation of the Belarusian armed forces in hostilities on the territory of Ukraine would unconditionally imply the direct participation of the country in an international armed conflict. However, there are several more related legal categories that allow us to understand even more precisely the legal status of Belarus in this armed conflict.

The starting point here is the definition of an international armed conflict, which implies "resort to armed force between States." In order for the use of force to be legally attributed to a state in an international conflict, a number of conditions must be met. Thus, the state should wield overall control over the military group, not only by equipping and financing the group but also by coordinating or helping in the general planning of its military activity. As of 19 April, there is no information that the Belarusian armed forces, coordinated by state structures, are taking part in the conflict.

> Moreover, it is precisely for this reason that the supply of weapons, the provision of intelligence information, and financial assistance to the Ukrainian army by NATO countries do not characterize these countries as parties to the conflict.

The second legal category that helps characterize the role of Belarus in the conflict is neutrality. Neutrality in an armed conflict is determined by the norms of international humanitarian law. The main principle of the inviolability of the territory of neutral states is enshrined in the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Inviolability implies not only a prohibition against third countries to use the neutral territory for military operations

but also the obligation of a neutral country not to allow the movement of troops or convoys or their supplies and the location of belligerents' military communications on its territory.

Based on this provision, it can be stated that Belarus does not meet the international legal requirements in relation to a neutral state.

> However, the lack of neutrality does not mean participation in an armed conflict.

Thus, from the point of view of international law, Belarus is not a party to an armed conflict and cannot be held responsible for the actions of the armed forces of the Russian Federation on Ukrainian territory, even if these armed forces moved through the territory of Belarus or were located at military bases on the state territory. A State, in accordance with customary international law, will only be held responsible for violations of international humanitarian law committed by its official organs (armed forces), organs empowered to exercise elements of governmental authority, as well as organs under its direction and control.

Ukraine's position

The section of the report of the OSCE Mission, which contains comments by representatives of Ukraine, includes, among other things, the Ukrainian position on the issue of Belarus' participation in the armed conflict. Ukraine refers to the Resolution of the UN General Assembly 3314 (XXIX) "Definition of aggression". Article 3 of the Resolution classifies aggression as, *inter alia*, "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State." Ukraine pointed out that the Belarusian authorities deliberately decided to allow Russian troops to stay in Belarus, and also allowed the transfer of military equipment from the south-west of Belarus.

Aggression itself constitutes a crime under international criminal law, while responsibility for it is strictly individual and can come after the relevant decision of the International Criminal Court. However, the concepts of "aggression" and "use of military force" are not equivalent. It is the use of force that is considered the trigger for the outbreak of an armed conflict and determines its participants. Thus, the position of Ukraine is not legally incorrect. However, in accordance with the provisions of international humanitarian law, Belarus is not a party to the military conflict.

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