УДК 342.7
DOI https://doi.org/10.24144/2788-6018.2024.01.20

REGIME OF MILITARY OCCUPATION, HUMAN RIGHTS, ELECTIONS AND REFERENDUMS: CASE OF UKRAINE

Deshko L.M.,
Doctor of Law, Professor,
Professor of Constitutional Law Department
of Taras Shevchenko National University of Kyiv
ORCID: 0000-0001-5720-4459
e-mail: deshkoL@yahoo.com

Vasylchenko O.P.,
Doctor of Law, Professor,
Head of the Institute of Law
of Taras Shevchenko National University of Kyiv
ORCID: 0000-0002-4464-3708
e-mail: o_vasilchenko@ukr.net

Дешко Л., Васильченко О. Режим військової окупації, права людини, вибори та референдуми: досвід України.

З 2014 року і до сьогодні частини Донецької, Херсонської, Луганської та Запорізької областей України перебувають у міжнародно-правовому режимі військової окупації. Для реалізації одного зі своїх намірів – змінити територіальний статус-кво силою зброї – Росія використовує такі інструменти, як вибори та референдуми на тимчасово окупованих частинах України. У статті характеризується правовий режим військової окупації, акцентується увага на забезпеченні прав і свобод громадян та правовому режимі на тимчасово окупованій території України, наголошується на тому, що вибори та референдуми, які проводить Росія, не мають нічого спільного з прямими формами демократії. Це юридично недійсні заходи, організовані окупаційними адміністраціями як спроба незаконної анексії українських територій Російською Федерацією. Їх результати не мають жодних правових наслідків і не можуть бути прийняті та визнані міжнародним співтовариством. Також акцентуючи увагу на режимі військової окупації, автори статті наголошують, що окупація не означає втрату суверенітету окупованої території. Територіальне верховенство держави безпосередньо пов'язане з державним суверенітетом і є одним із його складових елементів. Для окупації характерні збереження владних структур та продовження опору і військових операцій проти держави-окупанта.

Проаналізовано рішення Міжнародного суду ООН та Міжнародного військового трибуналу (Нюрнберг). Наголошується, що методи, які застосовувала РФ для досягнення мети – включення територій України, на яких РФ проводила «референдуми» та вибори – були агресивними, вирішальним фактором була військова міць РФ, яка вступила в дію і зустріла опір суверенної незалежної України та українського народу. Наголошується, що Росія вчиняє військові злочини та використовує «засоби тероризму», одним із яких є фінансування так званих виборів і референдумів на тимчасово окупованих Росією територіях України. Україна здійснює збройний опір прийняттю до складу рф територій України, на яких рф провела «референдуми» («референдуми» в Херсонській, Запорізькій, Донецькій та Луганській областях), негативно реагує на прояви територіального суверенітету з боку рф, а також Україна своєю поведінкою демонструє, що референдуми, проведені рф в Херсонській, Запорізькій, Донецькій та Луганській областях, є неконституційними, а їх результати та прийняття територій України до складу рф - не мають юридичної сили.

Ключові слова: військова окупація та державний суверенітет, правовий режим на тимчасово окупованій території України, прямі форми демократії, вибори та референдум, фінансування виборів та референдумів, анексія, принцип ex injuria jus non oritur, територіальне верховенство держави, злочин проти миру, військова міць, права людини.

Deshko L., Vasylchenko O. Regime of military occupation, human rights, elections and referendums: case of Ukraine.

From 2014 until today, parts of the Donetsk, Kherson, Luhansk and Zaporizhia regions of Ukraine are under international legal regime of military occupation. To realize one of its intentions - to change the territorial status quo by force of

arms - Russia uses such tools as elections and referendums in the temporarily occupied parts of Ukraine. The article characterizes the legal regime of the military occupation, focuses attention on ensuring the rights and freedoms of citizens and the legal regime on the temporarily occupied territory of Ukraine, emphasizes that the elections and referendums held by Russia have nothing to do with direct forms of democracy. These are legally invalid measures organized by the occupation administrations as an attempt to illegally annex Ukrainian territories by the Russian Federation. Their results do not have any legal consequences and cannot be accepted and recognized by the international community. Also focusing on the regime of military occupation, the authors of the article emphasize that occupation does not mean the loss of sovereignty of the occupied territory. Territorial supremacy of the state is directly related to state sovereignty and is one of its constituent elements. The occupation is characterized by the preservation of power structures and the continuation of resistance and military operations against the occupying state.

The decisions of the UN International Court of Justice and the International Military Tribunal (Nuremberg) are analyzed. It is emphasized that the methods used by the Russian Federation to achieve the goal of including the territories of Ukraine, in which the Russian Federation held «referendums» and elections, were aggressive, the decisive factor was the military power of the Russian Federation, which came into force and met the resistance of sovereign independent Ukraine and the Ukrainian people. It is emphasized that Russia commits war crimes and uses «means of terrorism», one of which is the financing of so-called elections and referendums in the territories of Ukraine temporarily occupied by Russia. Ukraine carries out armed resistance to the inclusion of the territories of Ukraine in which the Russian Federation held «referendums» («referendums» in the Kherson, Zaporizhzhya, Donetsk and Luhansk regions), reacts negatively to manifestations of territorial sovereignty on the part of the Russian Federation, and Ukraine also demonstrates by its behavior, that the referendums held by the Russian Federation in the Kherson, Zaporizhzhya, Donetsk, and Luhansk regions are unconstitutional, and their results and the acceptance of the territories of Ukraine into the Russian Federation do not have legal force.

Key words: military occupation and state sovereignty, legal regime in the temporarily occupied territory of Ukraine, direct forms of democracy, elections and referendums, financing of elections and referendums, annexation, principle ex injuria jus non oritur, territorial supremacy of the state, crime against peace, military power, human rights.

Formulation of the problem. Since February 24, 2022, an active phase of hostilities has been going on in Ukraine, connected with repelling the aggressor - the Russian Federation. This was preceded by the Russian Federation's aggression against Ukraine since 2014. From 2014 until today, part of the territory of Ukraine is temporarily occupied by the Russian Federation, part of the territory of Ukraine was temporarily under the illegal control of the Russian Federation. Russia held so-called "referendums" and "elections" in these territories of Ukraine. This tool was used by the Russian Federation to achieve one of its intentions - to change the territorial status quo by force of arms.

Thus, since 2014, part of the territory of Ukraine has been occupied by the armed forces of the Russian Federation with the establishment of occupation authorities. Until now, parts of the Donetsk, Kherson, Luhansk, and Zaporizhia regions of Ukraine are under international legal regime of military occupation. Russia began the "legal formalization" of the annexation of these territories by holding so-called "referendums" and "elections" in certain territories, declaring so-called "independence" in these regions of Ukraine, concluding so-called "international" treaties with them, adopting "laws" and their so-called "assessment" of compliance with the Constitution of the Russian Federation.

At the same time, after the dissolution of the USSR, within its borders, the former union republics delineated their borders, guided, in fact, by the principle of uti possidetis juris. The revision of the specified borders contradicts the specified norm, which today is equivalent to the principle of territorial integrity and inviolability of borders.

The territorial integrity of Ukraine within its internationally recognized borders, including the borders between Ukraine and the Russian Federation, is confirmed by the following international treaties: Agreements establishing the Commonwealth of Independent States, December 8, 1991 [1], Almaty declaration of December 21, 1991 [2], Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, 1994 [3], Agreement on friendship, cooperation and partnership between Ukraine and the Russian Federation, 1997 [4], Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State border, 2003 [5], Intergovernmental agreements of 2011 on the crossing of the Ukrainian-Russian border, Agreements regarding the stay of the Black Sea Fleet of the Russian Federation on the territory of Ukraine etc.

The purpose of this article. The purpose of the article is to characterize the regime of military occupation, to provide a legal assessment of the

Russian Federation's attempt to seize the territory of Ukraine and to accept the territories of Ukraine on which the Russian Federation held "referendums" into the Russian Federation.

Presenting main material. According to Article 3 of the Constitution of Ukraine, an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value [6]. Human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State.

According to parts two and three of Article 22 of the Constitution of Ukraine The constitutional rights and freedoms shall be guaranteed and shall not be abolished. The content and scope of the existing rights and freedoms shall not be diminished by an adoption of new laws or by introducing amendments to the effective laws.

Citizens shall have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to the bodies of State power and local self-government (part one of Article 38 of the Constitution of Ukraine). According to Article 69 of the Constitution of Ukraine, the popular will is expressed through elections, referendums and other forms of direct democracy. Elections to the State and local self-government bodies shall be free and shall be held on the basis of universal, equal and direct suffrage by secret ballot (part one of article 71 of the Constitution of Ukraine). The Verkhovna Rada of Ukraine shall have the following power - to call regular and extraordinary elections to local self-government bodies (clause 30 of Article 85 of the Constitution of Ukraine).

Donetsk, Kherson, Luhansk, and Zaporizhia regions of Ukraine are an integral part of the territory of Ukraine within its internationally recognized borders. Russia's military occupation of part of the territory of these regions took place in the context of an international armed conflict [7]. The armed aggression of the Russian Federation against Ukraine is an internationally recognized fact, which is reflected in particular in UN General Assembly Resolution ES-11/2 "Humanitarian consequences of the aggression against Ukraine", March 24, 2022 [8]. Therefore, the provisions of the Geneva Conventions of 1949 and Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 1907, apply [9].

That is, there is a regime of military occupation. All measures of the state authorities of the Russian Federation related to the so-called «legalization» of the inclusion of the Donetsk, Kherson, Luhansk, and Zaporizhia regions of Ukraine into the Russian Federation using the tools of the so-called elections and referendums took place and are taking place under the conditions of such territories being under military occupation.

In modern international law, none of its sources allows the state as a subject of international law, state authorities, their officials and officials to take actions aimed at the forcible acquisition by one state of a certain territory of another state (annexation), using elections as a tool for this and the referendum. Moreover, in accordance with Clause 4 of Art. 2 of the UN Charter, it is forbidden to forcibly change the territory of the state. This prohibition has long acquired customary law validity (UN International Court of Justice, Nicaragua v. United States of America [10]) and belongs to the imperative norms of international law (ius cogens).

According to Stimson's doctrine of non-recognition of changes in territory - changes in territory that occurred based on the use of violence - contradict the requirements of international law for such actions. A similar approach is contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970 [11].

An important aspect is that the occupation does not mean the loss of sovereignty of the occupied territory. The regime of military occupation is regulated by Chapter IV of the Convention on the Laws and Customs of War on Land and its annex: Regulations on the Laws and Customs of War on Land of 1907, the Geneva Conventions of 1949 and Additional Protocols I and II to them of 1977 of the Regime of Military Occupation devoted to Section III "Military leadership on the territory of an adversary state" of the IV Convention on the Laws and Customs of War on Land and its annex: Regulations on the Laws and Customs of War on Land 1907. According to Art. 42 of this Convention, an occupied territory is considered a territory if it is actually under the power of the enemy's army. In this case, it does not matter whether the occupation was carried out with or without the use of force. An important aspect is that the occupation does not mean the loss of sovereignty of the occupied territory. The occupation is characterized by the preservation of power structures and the continuation of resistance and military operations against the occupying state.

Possession of foreign or disputed territory without a corresponding treaty is legal only when there is an undisturbed, continuous and undisputed exercise of dominion, as was noted in the American-Mexican arbitration decision on the "El Chamizal" case of June 15, 1911 [12]. Due to these circumstances, both the British declaration on the annexation of the Boer Republic and the Italian declaration on the annexation of Tripolitania and Abyssinia, which

were published by the annexing states even before the end of hostilities, were invalid in the sense of international law.

The same principle was established by the verdict of the International Military Tribunal (Nuremberg) on October 1, 1946. In particular, it was argued before the Tribunal that the annexation of Austria was justified by a strong desire for an alliance between Austria and Germany, which was expressed in many circles. It was also argued that these peoples had many features in common that made such an alliance desirable, and that as a result the goal was achieved without bloodshed. The court concluded that these allegations, even if true, were factually immaterial because the facts clearly established that the methods used to achieve this goal were aggressive. The decisive factor was the military power of Germany, which was ready to act in the event that it met resistance.

In the situation of Russian aggression against Ukraine, the facts recorded in the decisions of international judicial institutions, resolutions of the UN, PACE, etc. confidently prove that the methods used by the Russian Federation to achieve the goal of accepting into the Russian Federation the territories of Ukraine on which the Russian Federation held «referendums» («referendums» in Kherson, Zaporizhzhia, Donetsk and Luhansk regions) were aggressive, the decisive factor was the military power of the Russian Federation, which came into force because it met resistance from the sovereign independent Ukraine and the Ukrainian people.

Thus, any attempts to seize the territory of another state are not recognized as legitimate in international law. Accordingly, international law recognizes that the Russian Federation's attempts to seize the territory of Ukraine are not legitimate, and the use of such tools as elections and referendums in the occupied territories for this purpose is not legitimate.

On 23 May 2008, the UN International Court of Justice ruled in the Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) sovereignty case that any transfer of sovereignty can be implemented only by agreement between the two states concerned, for example in the form of a treaty [13]. There is no such agreement between the Russian Federation and Ukraine. Also in this decision, the UN International Court of Justice noted that an agreement can also be implied and derived from the conduct of the parties. Sovereignty over the territory may, under certain circumstances, be transferred as a result of the fact that the owner state did not respond to manifestations of territorial sovereignty by another state. A lack of reaction may indicate tacit consent. Ukraine carries out armed resistance to the inclusion of the territories of Ukraine in which the Russian Federation held «referendums» («referendums» in the Kherson, Zaporizhzhya, Donetsk and Luhansk regions), reacts negatively to manifestations of territorial sovereignty on the part of the Russian Federation, and Ukraine, by its behavior, demonstrates that the referendums held by the Russian Federation in the Kherson, Zaporizhia, Donetsk and Luhansk regions are unconstitutional, and their results and the acceptance of the territories of Ukraine into the Russian Federation do not have legal force [14; 15].

Conclusions. In the temporarily occupied parts of the territories of Donetsk, Luhansk, Zaporizhzhya and Kherson regions, the so-called elections and referendums are legally void measures organized by the occupation administrations as another attempt at the illegal annexation of Ukrainian territories by the Russian Federation. Their results do not have any legal consequences and cannot be accepted and recognized by the international community.

The facts recorded in the decisions of international judicial institutions, resolutions of the UN, PACE, etc. confidently prove that the methods used by the Russian Federation to achieve the goal - the acceptance into the Russian Federation of the territories of Ukraine on which the Russian Federation held "referendums" ("referendums" in Kherson, Zaporizhia , Donetsk and Luhansk regions), the elections were aggressive, the decisive factor was the military power of the Russian Federation, which came into force because it met resistance from sovereign, independent Ukraine and the Ukrainian people.

No source of international law allows Russia to rely on it as an opportunity to make a decision on the inclusion of territories of Ukraine in which the Russian Federation held so-called "referendums" ("referendums" in the Kherson, Zaporizhzhya, Donetsk and Luhansk regions), elections. Also, the Russian Federation could not use its national legislation for this.

Russia commits war crimes and uses "means of terrorism", one of which is the financing of so-called elections and referendums in the territories temporarily occupied by Russia in Georgia, Ukraine, and Moldova.

REFERENCES:

1. Agreements establishing the Commonwealth of Independent States. URL: https://www.venice.coe.int/webforms/documents/?pdf=CDL(1994)054-e.
2. Almaty declaration of December 21, 1991. URL: https://digitallibrary.un.org/record/197253?ln=fr.
3. Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons. URL: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280401fbb.

4. Agreement on friendship, cooperation and partnership between Ukraine and the Russian Federation (The Agreement has been terminated) URL: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002803e6fae&clang=_en.
5. Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State border URL: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002803fe18a.
6. Constitution of Ukraine. URL: https://rm.coe.int/constitution-of-ukraine/168071f58b.
7. Deshko L., Vasylchenko O., Lotiuk O. Crimean Tatar National-Territorial Autonomy: Regulatory and Legal Guarantees of the Rights and Freedoms for the Indigenous Peoples of Ukraine. Visegrad Journal on Human Rights. 2023. №3. №24 – 28.
8. Resolution adopted by the General Assembly on 24 March 2022, Humanitarian consequences of the aggression against Ukraine. URL: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es-11_2.pdf.
9. Hague Convention IV - Laws and Customs of War on Land: 18 October 1907. URL: http://hrlibrary.umn.edu/instree/1907c.htm.
10. Nicaragua v. United States of America. URL: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.
11. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970. URL: https://digitallibrary.un.org/record/202170.
12. The Chamizal Case (Mexico, United States*).* URL: https://www.internationalwaterlaw.org/cases/Chamizal_Arbitration.pdf.
13. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore). URL: https://www.icj-cij.org/case/130.
14. The Central Election Commission of Ukraine adopted the resolution "On the nullity of pseudo-referendums in the temporarily occupied territories of Ukraine" on September 27, 2022. URL: https://dn.gov.ua/news/cvk-prijnyala-postanovu-pro-nikchemnist-psevdoreferendumiv-na-timchasovo-okupovanih-teritoriyah-ukrayini.
15. The Verkhovna Rada of Ukraine has endorsed a statement related to another stage of escalation in the global security situation, caused by the latest decisions of the criminal authorities of the Russian Federation, and urged the international community not to recognize the so-called pseudo-referenda held by Russia within the territory of Ukraine. URL: https://www.ukrinform.net/rubric-polytics/3576501-parliament-calls-on-global-community-not-to-recognize-russias-sham-referenda-in-ukraine.html.