Baltic Yearbook of International Law, Volume 22 (2023)

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Baltic Yearbook of International Law, Volume 22 (2023)

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*Lauri Mälksoo**

This volume of the Baltic Yearbook starts with a symposium, based on the European Society of International Law's "Regional Developments of International Law in Eastern Europe and Post-Soviet Eurasia" research forum, which was held on 27–28 April 2023 at the University of Tartu, Estonia. The theme of the research forum to which the contributors whose work is published here responded, was the following:

> The co-existence of universality and regionalism in international law is not always easy or self-evident. Nowadays, international law is universal but regional and national differences in its perception and application can nevertheless be considerable. Eastern Europe and post-Soviet Eurasia are partly overlapping regions. Post-Soviet Eurasia is itself smaller than the whole continent of Eurasia and we use the term 'post-Soviet' merely to narrow the geographic scope of the conference. Following the end of the Cold War, several East European countries became members of the Council of Europe and some of these also joined the European Union. However, where 'Europe' ends in Eastern Europe in political terms remained a contested issue, including in the context of the EU's Eastern Partnership policy. For example, Belarus never joined the Council of Europe and the Russian Federation heavily criticized NATO's enlargement to East European countries.
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> In 2015, the Eurasian Economic Union came into being – with Belarus, Kazakhstan and Russia as the founding members. They were later joined by Armenia and Kyrgyzstan. Several post-Soviet Eurasian countries are also members of the Collective Security Treaty Organization and the Shanghai Cooperation Organization. The Russian Federation is the dominant country in these efforts at regional integration in post-Soviet Eurasia. In turn, the Shanghai Cooperation Organization symbolizes cooperation between Russia and post-Soviet Eurasia on the one hand and China on the other hand.
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> Russia's aggression against Ukraine in 2022 was a fundamental challenge to international law in the region. The Russian Federation is no

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> longer a member of the Council of Europe and, as of September 2022, the European Convention on Human Rights will no longer apply to Russia. The year 2022 was a serious rupture. However, several earlier events had also indicated that the delimitation of geopolitical regions was ridden with conflict: for example, the 2008 Russian-Georgian war, the 2014 Russian annexation of Crimea, the 2020 war between Armenia and Azerbaijan over Nagorno-Karabakh, and the Russian-Ukrainian war in Donbas.
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> The main question for international law is whether the newly deepened geopolitical divisions in Eastern Europe have also brought (or been expressions of) different, competing understandings of international law in the region. These concepts may be primarily regional but may also be of universal and global relevance, especially in relation to the UN. They may pertain to fundamental questions of international law such as the interrelationship between state sovereignty and human rights, 'great powers' and smaller states, historical rights and civilization(s), or modes of dispute resolution.[1]

During the forum at Tartu, there was a debate about the appropriateness of the continued use of the concept 'post-Soviet' more than thirty years after the disintegration of the Soviet Union in December 1991. This is an important debate. In future, scholars and experts need to come up with a better term for the region, which in one way or another, is currently but also historically, characterized by Russia's quest for hegemony. For example, during the last decade, Russia has undertaken steps to undo some of the territorial and other consequences of the collapse of the Soviet Union, such as openly contesting the continued applicability of the *uti possidetis* principle for borders.

The first article in the symposium is by Liliya Khasanova on conceptual discrepancies in Russian and Western approaches to the international regulation of the cyber (information) space. Cyber issues related to international law are of course of special interest and relevance in Estonia and the Baltic states due to the Tallinn manual process of the CCDCOE in Tallinn.[2] Khasanova makes the observation that there is a difference in the language used by the Russian Federation and Western countries, with Russia referring to the 'information space' and Western countries using the term 'cyberspace'. She notes that the

1 *See* 2023 ESIL Research Forum, Research Forum Theme, <https://sisu.ut.ee/esil2023/research-forum-theme>, visited on 22 March 2024.

2 *See* CCDCOE, Tallinn Manual, <https://ccdcoe.org/research/tallinn-manual/>, visited on 22 March 2024.

Russian understanding of the information space encompasses not only its technical aspects, but also information itself, with all its cognitive implications for society. In contrast, the Western perspective tends to perceive cyberspace and security from a more technical viewpoint, promoting freedom of information and leaving more regulatory space for the private sector and non-state actors. Based on her study, Khasanova argues that there is a conceptual misalignment between Russian and Western approaches in terms of the legal object of regulation and its scope, as well as in the governance models applied in the ICT domain.

The second symposium article is by Rustam Atadjanov on the implementation of international human rights law in situations of violence and emergency situations in the context of Central Asia. He reviews and systematizes major situations of violence and emergency situations which have taken place on the territory of the four Central Asian States, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan (leaving out Turkmenistan due to the shortage of public data). Violent conflict situations such as civil wars and massacres, as well as natural catastrophes such as earthquakes and floods, are examined in the article. The author concludes that governments in Central Asia have not always respected their human rights obligations in these emergencies. One reason for this is also that the etatist philosophy of state and law, inherited from the Soviet Union and Russia, has dominated in the region. The author makes the conclusion that further efforts to strengthen the rule of law need to be made in Central Asia. He also addresses the role of transparency, education and other factors which, over time, should lead to the improvement of the situation with human rights in Central Asia.

The third symposium article is by Sara Eftekhar Jahromi on gaps and innovations in the Aktau convention of 2018, a regional agreement that governs the Caspian Sea. This is an example of where the disintegration of the Soviet Union had direct implications: instead of just the Soviet Union and Iran, new sovereign states emerged at the Caspian Sea: Kazakhstan, Azerbaijan, and Turkmenistan. The author aligns the Aktau Convention with the United Nations Convention on the Law of the Sea (UNCLOS) to discern both its distinctive features and areas where it is inspired by UNCLOS provisions. She also analyses the main provisions of the Aktau Convention through its own terms. The provisions of the Aktau Convention relating to internal waters and the territorial sea have been substantially inspired by UNCLOS. Moreover, Jahromi concludes that the provisions regarding the passage of ships through territorial waters, including those for warships, draw substantial influence from UNCLOS. She also looks at the national interests of the States which signed the convention and which interpretations (but also gaps) favour which interests. The

author concludes that the Aktau Convention represents an important step in defining the legal framework of the world's largest lake, but at the same time remains a work in progress, with certain critical issues remaining unresolved.

The fourth symposium article was written by Julia Miklasová and deals with Russian approaches to post-Soviet secession. The article starts with the question of whether Russia has sought to create its own rules of secession in the post-Soviet space. The paper's objective is to examine Russia's official understanding and application of international law regulating secession in the post-Soviet space and its relationship to universal practices and rules. Russia has changed its approach to secession in the post-Soviet space since its war with Georgia in August 2008, and apparently also related to Kosovo's declaration of independence from Serbia. It has used variations of remedial secession arguments to justify its military interventions and justifications for the recognition of separatist entities as states. Nevertheless, Miklasová demonstrates that the post-2008 Russian discourse favouring secession in the post-Soviet space has been inconsistent. Her paper claims that a persistent feature of Russian legal argumentation has been the raising of untenable arguments based on the law of secession – i.e., arguments that are flagrantly unsubstantiated by the legal or factual conditions required by the international law of secession. In particular, she refers to Moscow's arguments as if Georgia and Ukraine would have committed 'genocide' against groups of their own peoples. Miklasová maintains that Russia's arguments based on the law of secession in Georgia and in Ukraine have been made in bad faith. The *de facto* situations thus created have not been recognized by the international community.

The fifth symposium article is by Artur Simonyan and deals with the three patterns of desovietizing international law. Simonyan starts with the provocative statement that the 'critique on decolonization relevant in post-liberation Mumbai, Ouagadougou, or Maputo in the 1960–70s, at best, can be partially comparable with the same sentiments and ontological conundrums in post-independent, desovietized Tashkent, Baku, or Ashkhabad in the 1990s'. Yet Simonyan also demonstrates that at the same time, this is not an easy comparison because decolonization and desovietization were not exactly the same thing either. Consequently, he argues that desovietization should address *sui generis* complexities. The fate of the successful desovietization agenda also lies, claims Simonyan, in the hands of the legal scholars of the region. He further observes that the desovietization process clashes with Russia's post-imperial behaviour, where any demand for alienating the Soviet past may be interpreted as an alienation from Russia *per se*, with dire consequences. At the end of his article, Simonyan also offers an alternative reading of the *uti possidetis juris* principle in the post-Soviet Eurasian space. He argues that the policy

and legal aspect of the applicability of *uti possidetis* requires a more contextual reading in the post-Soviet Eurasian space, which has always been characterized as a particular case.

The sixth symposium article was written by Milosz Gapsa and focuses on the importance of provisional measures in Ukraine's cases against Russia at the ICJ, ITLOS and ECtHR. The author asserts that Ukraine's cases against Russia exemplify the strategic use of provisional measures. Gapsa first discusses the general legal and political intricacies of requesting provisional measures at international courts, its connection with procedural strategy and lawfare. Gapsa then offers a detailed analysis of Ukraine's strategies and outcomes at the stage of provisional measures in the above-mentioned international courts against Russia. Of course, provisional measures in the ICJ cases, to an extent, also appear in a new light after the ICJ made its final judgment in the ICSFT/CERD case on 31 January 2024 and the preliminary objections judgment in the Ukraine-Russia Allegations of Genocide case on 2 February 2024. Perhaps one of the enduring insights of this article is that provisional measures themselves can be an important part of litigation and deserve the attention of international lawyers.

The seventh article is by Saskia Millmann and Pia Hüsch who have contributed 'Civilian Non-Violent Defence against Russian Warfare – Eastern European Strategies and the Gap between Civilians and Combatants in Customary International Humanitarian Law'. The authors take a closer look at the concept of civilian defence and how it is used, both in a preparatory or perhaps deterrent way, as well as in an ongoing international armed conflict. What is of particular interest to the authors is how civilians are addressed in these strategies and how (if at all) customary IHL addresses civilian defence in an international armed conflict. The authors focus on the Baltic States and Ukraine to examine how States address civilians in their defence strategies, countries which, as they argue, have a long history of being targeted by Soviet or Russian attacks. Millmann and Hüsch conclude that neither non-violent nor violent civilian defence constitutes a violation of IHL *per se*. However, while both forms can be read in conjunction with existing IHL, the authors argue that violent civilian defence goes against the spirit and purpose of the Geneva Convention which emphasizes the distinction between combatants and civilians. They also turn their attention, in particular, to the Ukrainian IT army which the authors interpret as civilians in an international armed conflict. The authors emphasize that civilians who are supporting Ukraine's cyber efforts are not principally acting in violation of IHL but still need to be able to do so on an informed basis.

The eighth and final article in the symposium was authored by Frederik Rogiers and concerns Russia's evolving approach to the freedom of navigation. Rogiers illuminates the Russian journey in the law of the sea area with relevant history, reminding the reader that the Soviet-Union proved to be one of the US' closest allies in obtaining the current law of the sea navigation regime during the UNCLOS III negotiations. There was a Group of Five – with the US and USSR forming the backbone of a maritime alliance with the UK, France and Japan, which would, until the end of UNCLOS III, work together to defend the freedom of navigation from the developing world. However, Rogiers sees a recent change in Russia's naval policies: once again, the country is focused on the defence of its nearby seas and, therefore, its approach to the innocent passage of foreign warships in its territorial sea has followed suit. Rogiers illustrates this point by observing two regions: the Black Sea and the Arctic. The article further examines the 2018 incident involving three Ukrainian vessels near the Kerch Strait and the 2021 HMS Defender incident. Rogiers also discusses Russia's straight baselines in the Arctic as well as stipulations in the Russian legislation which allow for the suspension of innocent passage in the Arctic upon the mere transmission of a navigational warning and set out an authorization procedure for foreign warships' access to the internal waters of the Northern Sea Route. Rogiers calls these Russian actions 'highly questionable' under the law of the sea. In his conclusions, Rogiers also contemplates whether the concept of free navigation for warships now faces a major challenge in the future.

What can be cumulatively concluded based on these symposia articles? The articles deal with quite different issues, and of course they also differ in their conclusions and perhaps also the straightforwardness of their tone. However, one thing seems obvious: there is an ongoing struggle in recent years, especially since 2022, but in many ways also since 2008, about whether international relations in the region will be based on international law or the power of the stronger. The outcome of this struggle will have repercussions for the whole world because if naked power prevails over international treaties and law, it may be tempting to copy this elsewhere as well. First and foremost, we need respect for international law to end the war and tame the conflict, especially in Ukraine which has become the victim of Russia's aggression. Thus, a lot in the region, and for international law, will depend on what happens in the Russian Federation in the coming years. We can only wish that respect for international law will return in Russian foreign policy, especially with respect to its neighbouring states in the formerly imperial space.

Last but not least, we also have a substantive article in the general articles section in this volume. It was written by Edmunds Broks, Arnis Buks, Lolita

Buka and Artūrs Kučs and is a case study of Latvia's response to the migration crisis on the Latvia-Belarus border. The authors conclude that the initial suspension of asylum applications breaches the obligation of non-refoulement. They suggest that the regime currently in force in Latvia is not ensuring genuine and effective access to the asylum procedure and is, thereby, breaching Latvia's obligations under the principle of non-refoulement.

In the name of the editors of the Baltic Yearbook, I hope that this open access volume meets the expectations of its readers and demonstrates once again why such a publication as the Baltic Yearbook of International Law can contribute something unique to global and European debates about international law.

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