

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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RUSSIAN AGGRESSION AGAINST UKRAINE, THE ANNEXATION OF THE CRIMEAN PENINSULA AND THE 1994 BUDAPEST MEMORANDUM

This article analyzes the circumstances of the conclusion, the approaches to the interpretation and practice of application of the Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons of December 5, 1994 in the context of an aggressive war of Russia against our country and annexation of Crimea. The author makes conclusions about the legal effect of the Budapest Memorandum, specifics of the obligations violated by Russia, the necessity to implement its provisions by the guarantors under the universal nuclear disarmament process.

Key words: the 1994 Budapest Memorandum, the regime of nonproliferation of nuclear weapons, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the 1991 Treaty on the Reduction of Offensive Weapons, the guarantor states, an international treaty.

Appropriate international law qualification of the war of aggression against our country, which was launched by military operations in Crimea in February 2014 and continued in the Donetsk and Luhansk regions, is necessary due to the pressing problem of efficient use of facilities and instruments provided for by international law and designed to ensure bringing aggressors to justice in all its aspects. The author aims to resolve an important scientific and practical task – to perform an international law analysis of the Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Non-proliferation of nuclear weapons of 1994 (the Budapest memorandum) - one of the main international legal instruments, which Russia has violated. This in turn requires a thorough analysis of the general context, the process of concluding, regulatory content, validity and peculiarities of its application.

Among the recent *researches and publications on this subject*, in our view works of the following publicists deserve special attention: Ph.Bleek¹, V.Vasylenko², T.Grant³, I.Lossovsky⁴, W.Martel⁵, O.Svyatun⁶, R. Synovitz⁷ and other researchers. However, currently *there is a need to deepen international*

¹ Bleek, Ph. (2014). Why Ukraine wasn't a nuclear power in the early 1990s and the West has no legal obligation to come to its aid now. *Arms Control Wonk*. <<http://lewis.armscontrolwonk.com/archive/7316/ukraine-and-the-1994-budapest-memorandum>>.

² Vasylenko, V. (2009). On assurances without guarantees in a "shelved document". *День*. December 15. <<http://www.day.kiev.ua/en/article/close/assurances-without-guarantees-shelved-document>>.

³ Grant, T. (2015). *Aggression against Ukraine: Territory, Responsibility, and International Law*. Palgrave; Grant, T. (2015). The Budapest Memorandum and Beyond: Have the Western Parties Breached a Legal Obligation? *Blog of the European Journal of International Law*. <<http://www.ejiltalk.org/the-budapest-memorandum-and-beyond-have-the-western-parties-breached-a-legal-obligation/>>.

⁴ Лоссовський, І. (2015). Будапештський меморандум як міжнародний договір, обов'язковий для виконання його гарантантами. *Віче*, 14, 28–31; Лоссовський, І. С. (2014) До 20-ї річниці будапештських «гарантій»: агресія Росії проти України як фактор ерозії міжнародно-правових режимів нерозповсюдження. *Зовнішні справи*, 11, 6–11.

⁵ Martel, W. (1998). Why Ukraine gave up nuclear weapons: nonproliferation incentives and disincentives. *Pulling Back from the Nuclear Brink: Reducing and Countering Nuclear Threats*. *Psychology Press*. 88–104.

⁶ Святун, О. (2014). Будапештський меморандум та його співвідношення з Договором про нерозповсюдження ядерної зброї. *Віче*, 20, 15–20.

⁷ Synovitz, R. (2014). The Budapest Memorandum and Its Relevance To Crimea. *Radio Free Europe*. 28 February. <<http://www.rferl.org/content/ukraine-explainer-budapest-memorandum/25280502.html>>.

law analysis of relevant relationships determined, in particular, by the need to respond to arguments brought up by the Russian Federation in 2014 - 2015, trying to refute the violation of the provisions of the 1994 Budapest Memorandum and its binding effect from the international law perspective. Thus, the *objectives of this article* is to carefully examine processes, content regulations, the question of the legal nature and validity of provisions of the memorandum in the context of the nuclear disarmament process and providing, in terms of international law, relevant characteristics and ratings.

The period of 1991 – 1994 in relations between Ukraine and the Russian Federation was marked by a sharp confrontation over the “Crimean issue” and the closely related problems of division of the Black Sea Fleet. At the same time other processes were taking place, namely, Ukraine’s participating in the process of nuclear disarmament, inheriting the world third nuclear weapon stockpile after the Soviet Union breakup. Only the United States and the Russian Federation possessed more warheads than our country. On the territory of Ukraine Strategic Rocket Forces were situated, namely, 43rd Missile Army, that were two missile divisions deployed in Khmelnytsky and Pervomaisk with 176 strategic missiles (130 missiles SS-19, “Satan”), 46 missiles SS-24, mining and mobile installations with 1,240 nuclear warheads. Also, strategic aircraft was deployed in the territory of Ukraine - two heavy bomber aircraft divisions - 44 strategic bombers (19 Tu-160 and 25 Tu-95 MS) with 1,068 cruise missiles. The important point was the fact that ballistic intercontinental missiles were produced in Dnepropetrovsk¹.

In general, Ukraine received the ownership of nuclear weapons controlled by Moscow, which our country could use on your own, but still had the technical ability to control these weapons itself and become the successor of the USSR as a nuclear state.

In that period there was a tense debate in Ukrainian society regarding nuclear weapons. One part of the population and some politicians believed that the existence of nuclear weapons was one of the main guarantees of security. At the same time, in government and military circles there were quite many opponents of acquiring nuclear status, who concerned that in this case Ukraine could be put in international isolation, and leading Western states would be inclined toward anti-Ukrainian attitudes². This position had substance behind it, as the most influential nations in the world that promoted the process of nuclear disarmament were extremely keen to Ukraine’s giving up its nuclear weapons and constantly pressured it on this matter. An important factor was the fact that the Chernobyl disaster led to a strong anti-nuclear sentiment in Ukrainian society and political circles.

For the first time our state declared its intention to renounce nuclear weapons in 1990 in its Declaration on State Sovereignty³. J.Goodby in his work “Europe Undivided. The New Logic of Peace in U.S.-Russian Relations” pointed that nuclear policy of Ukraine was formed as a result of the influence of several political groups in the leadership of the state⁴.

On April 9, 1992 the Parliament adopted the resolution “On Additional Measures for Ensuring Ukraine’s Attainment of Non-Nuclear Status”, which simultaneously announced that Ukraine reaffirmed its commitment not to use, have, or make nuclear weapons and outlined measures that approached it to nuclear arms control. Thus, parliament demanded that tactical nuclear weapons remained on Ukrainian territory until the creation of effective international mechanism for monitoring the destruction of nuclear warheads with the participation of our country. The government was instructed to take immediate measures “to ensure operational and technical control of Ukraine over non-use of nuclear weapons located on its territory.” The Ministry of Defense was instructed to send only Ukrainian military personnel to divisions of Strategic Missile Forces⁵.

The understanding of actions of the Ukrainian leadership of that period should be analyzed against the general background. The decisions were taken during the exacerbation of the Russian-Ukrainian relations, in particular the problems of the Black Sea Fleet. Ukraine’s leaders played the “nuclear card” in response to the aggressive actions of the Russian side in respect of the fleet. However, Russia acted more

¹ Буткевич, Б., Жалко-Титаренко, А. (2014). Ракетна реінкарнація. Чи потрібно Україні повертати ядерний статус. *Тиждень*, 10–11. <<http://tyzhden.ua/Politics/107226>>.

² Соловйова, О. (2012). Український прецедент. *Атлантична панорама*, 1 (38).

³ Декларация про державний суверенітет України 1990 (Верховна Рада УРСР). *Відомості Верховної Ради УРСР*, 31, 429.

⁴ Соловйова, О. (2012). Український прецедент. *Атлантична панорама*, 1 (38).

⁵ Постанова Верховної Ради України про додаткові заходи щодо забезпечення набуття Україною без’ядерного статусу 1992 (Верховна Рада України) *Відомості Верховної Ради України*. 29, 405.

decisively and insistently. Chief of Strategic Forces of the CIS Y.Maksimov warned Ukraine that in comparison to a possible conflict over nuclear arms control a dispute over Black Sea Fleet was a “child’s play”¹. Russia consistently demonstrated that the normalization of bilateral relations could not be achieved without a final resolution of nuclear weapons issue and the status of the fleet.

In these circumstances, on May 23, 1992 at the international summit in Lisbon Ukraine ratified the 1991 Protocol to the Strategic Arms Reduction Treaty (START-1). A number of requirements of our state were taken into account. Ukraine insisted on guarantees of its national security, including the possible threat or use of force against Ukraine by any nuclear state, which announced that it voluntarily gave up its nuclear arsenal. Ukraine also pledged to promptly join the 1968 Treaty “On the Non-Proliferation of Nuclear Weapons” (NPT) as a non-nuclear state. Negotiations on these issues continued throughout 1992 - 1993².

On November 18, 1993 a resolution of the Verkhovna Rada of Ukraine on ratification of the START-1 and the Lisbon Protocol was adopted. The Parliament recommended that the President and the executive branch negotiate issues that were of fundamental importance for Ukraine’s implementation of the treaty and approve the program of elimination of strategic nuclear offensive weapons. In this regard Ukrainian diplomacy tried to avoid possible political and economic isolation of the state caused by the negative reaction of the international community to this regulation, in particular to reservations about the ratification of the START-1 and the Lisbon Protocol and non-joining of the NPT by Ukraine³.

At a time when bilateral contacts on the mentioned subject with the Russian Federation exhausted because of deteriorating relations in respect of the “Crimean issue”, the formula of tripartite talks involving the US was resorted to, which was not least of all associated with a significant intensification of Ukrainian-American relations with Clinton administration coming to power. Finally, the tripartite negotiations led to the concluding an agreement in Moscow on January 14, 1994 by Presidents B.Clinton, L.Kravchuk and B.Yeltsin under which Ukraine undertook to denounce all nuclear weapons located on its territory, within 7 years. Nuclear warheads were transported to Russia, where they were to be deactivated within 10 months. Ukraine was to join the NPT as a non-nuclear weapon state.

Besides “nuclear provisions”, these agreements forged a tripartite framework for resolving other issues, including on economy and security. In addition, there was legitimization of the US involvement in resolving the Russian-Ukrainian issues. This was an opportunity for our country to confidently defend its position in relations with a more powerful Russia, obtain security guarantees from the United States and Great Britain, as well as double the US economic assistance⁴.

Therefore, safety factor is a key one in the process of Ukraine’s giving up of nuclear weapons: in case of Russia’s generally provocative policy of destabilization of the situation in the Crimean peninsula, first, in particular through the accession and implementation of the Protocol to START-1, NPT was associated closely with its security guarantees of Ukraine that were to be provided by the most influential countries in the world. An instrument that reflected these approaches was the Budapest Memorandum on Security Assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons of December 5, 1994 - a unique international legal instrument that secured the obligations of nuclear powers concerning national security of Ukraine in accordance with generally recognized principles of international law⁵. The 1994 Memorandum securing a nuclear-free status of our state⁶, was an important step to guarantee the integrity and inviolability of the borders of Ukraine.

¹ Buntin, J. (1997). The Decision to Denuclearize: How Ukraine Became a Non-Nuclear-Weapons State, *Kennedy School of Government. Case Program*, 29.

² Соловйова, О. (2012). Український прецедент. *Атлантична панорама*, 1 (38).

³ *Постанова про ратифікацію Договору між Союзом Радянських Соціалістичних Республік і Сполученими Штатами Америки про скорочення і обмеження стратегічних наступальних озброєнь, підписаного у Москві 31 липня 1991 р. і Протоколу до нього, підписаного у Лісабоні від імені України 23 травня 1992 (1993) (Верховна Рада України). Відомості Верховної Ради України*, 49, 464.

⁴ Burns, N. (1996). Excerpt from the Daily Press Briefing concerning the visit of Ukrainian President Leonid Kuchma and the U.S. *Department of State*, 6.

⁵ Соловйова, О. (2012). Український прецедент. *Атлантична панорама*, 1 (38).

⁶ *Меморандум про гарантії безпеки у зв’язку з приєднанням України до Договору про нерозповсюдження ядерної зброї 1994 (Верховна Рада України). Офіційний сайт Верховної Ради України.* <http://zakon2.rada.gov.ua/laws/show/998_158>.

This act, which in addition to the states mentioned above, on December 5, 1995 was joined by France and China, contained the obligation of States parties to respect the independence and sovereignty and the existing borders of Ukraine (para. 1); refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations (para. 2); in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind (para. 3); seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used (para. 4); not to use nuclear weapons against any non-nuclear weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a State in association or alliance with a nuclear-weapon State (para. 5); consult in the event a situation arises that raises a question concerning these commitments (para. 6)¹.

In our opinion, one should agree with the assessment of O.Chaly, who believes that Ukraine managed to considerably strengthen the final document when compared with the version offered by Russia, the US and UK. Firstly, Ukraine managed to make participating States pledge to guarantee the independence, sovereignty and territorial integrity of Ukraine not only in the light of the principles of the CSCE Final Act, but provisions of the UN Charter, which strengthened the legal principle component of appropriate safeguards. Secondly, as a result of long discussions provisions on the guarantor's obligation to abstain from economic coercion on Ukraine, intended to take over their own interest from the implementation by Ukraine of the rights inherent in its sovereignty were included in the memorandum.

Thirdly, the most ardent "diplomatic battles" led to the amending the Budapest Memorandum with a provision that obliged States to conduct consultations at the request of Ukraine by guarantor states in the event of situations that threaten the independence, sovereignty and territorial integrity of our country and seek immediate action by the UN Security Council to assist Ukraine in case of a threat to use nuclear weapons. Fourthly, the discussions about the form of the instrument, its name, the final provisions and linguistic terms, which fixed the obligations of the parties, the level of individuals who would sign the Budapest Memorandum were long².

Ukraine's giving up of nuclear weapons became its permit to the civilized world and it played an important role in shaping the image of our state. The Budapest Memorandum contributed to resolving potential conflict issue of territorial belonging of Crimea. Despite regular statements and provocative actions of a number of Russian politicians, the memorandum confirmed a legal obligation to respect the territorial integrity of Ukraine, largely ensured the stabilization of relations between the two countries.

Russian aggression against our country in 2014 - 2015, illegal military occupation and annexation of the Crimean peninsula by Russia, illegal military occupation of parts of Donetsk and Luhansk regions, naturally raised concern over the actions of the guarantors in connection with the clear violation by the Russian side of almost all the provisions of the 1994 Budapest Memorandum. No wonder the UN General Assembly in Resolution 68/262 of March 27, 2014 "Territorial integrity of Ukraine" referred to *inter alia* the memorandum³.

In turn, Russia expressed a number of arguments designed to prove or lack of grounds for applying the Budapest Memorandum, or that it does not violate its provisions. The Russian side expressed the following statement, "the 1994 Memorandum is a political document of a declarative nature"; "contains legal obligations"; "only confirms the provisions of the Helsinki Final Act"; "contains only the commitment not to use nuclear weapons against Ukraine"; "secured only prohibiting the use of force and only in the

¹ Закон про Заяву Верховної Ради України про надання Україні реальних гарантій безпеки 2010 (Верховна Рада України). *Відомості Верховної Ради України*, 39, 519.

² Чалий, О. (2009). Будапештський меморандум може стати першою шаблinoю у побудові якісно нової зовнішньої політики України. *День*. <<http://www.day.kiev.ua/uk/article/den-ukrayini/oleksandr-chaliy-budapeshtskiy-memorandum-mozhe-stati-pershoyu-shchablinoyu>>.

³ UNGA Res 68/262 (27 March 2014) UN Doc A/68/L.39 and Add.1). <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262>.

sense of direct hostilities”; “contains only the collective liability of Guarantor”; “has no direct relationship to the overall process of nuclear disarmament”¹.

However, the circumstances of the conclusion of the Budapest Memorandum after years of tense negotiations, with generally provocative policy of destabilization of the situation in the Crimean peninsula² proved that the Ukraine’s giving up of nuclear weapons was associated with international legal guarantees of its security and territorial integrity, pledged by certain states, primarily Russia, which undertook a number of legal obligations and guarantees enshrined in the memorandum.

Russia’s denying of binding effect of the 1994 Memorandum does not meet international law requirements, as it is an international treaty. Memorandum satisfies the criteria of an international treaty fixed by 1969 Vienna Convention on the Law of Treaties (VCLT) and is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. The memorandum stipulates that it enters into force upon signature. It is clear that under Chapter III of the VCLT the content of the memorandum should be interpreted taking into account the context and circumstances of its conclusion³. Validity, overall value of the memorandum and essential character of relations governed by its rules are determined by its role for the entire international community - relations related to the process of nuclear disarmament.

One could also agree with an argument that referring to the Budapest Memorandum two official UN document, namely, document of the UN and the UN Security Council A/49/765-S/1994/1399 of December 19, 1994 in the form of a letter on behalf of the Permanent Representatives of Ukraine, the UK, Russia and the US (A.Zlenko, D. Hannay, S.Lavrov and M.Albright) to the 59th session of the UN GA with a request to circulate the text of the Budapest Memorandum as a document of the General Assembly and the Security Council; and a document of the UN Conference on Disarmament CD/1285 of December 21, 1994 in the form of a letter to the Permanent Representatives of the mentioned countries at the conference with a request to register of the Budapest Memorandum registration and a cover letter as “official documents of the Conference on Disarmament and their dissemination among all States ... participating in the conference” point to international law evidence of the validity and its binding effect on the parties (including Russia) as an official document of the United Nations⁴.

Given the abovementioned, claims of “political character”, “declarative nature of the Budapest Memorandum”, “non-binding effect”, “its confirmation of solely the provisions of the Helsinki Final Act”, “application of the memorandum only to nuclear weapons” and the like are clearly untenable; they directly contradict the content of the treaty and are not compatible with the general context in which it was concluded. The claim that the memorandum secures “only prohibition of the use of force and only in the sense of direct hostilities” is contrary to paragraphs 2 - 4 of this act, the “confirmation of solely the provisions of the Helsinki Final Act” – to paragraphs 2 - 5, the “application of the memorandum only to prohibition of use or threat of nuclear weapons” – to paragraphs 1 - 3, the “collective obligations of the guarantors”- to the content of the Budapest Memorandum in general.

The above is confirmed by the subsequent practice of States. The Russian Federation committing to respect the territorial integrity of Ukraine, deprived Russian politicians’ of insinuations about the “illegality” of Crimea and Sevastopol belonging to our country of any legal and practical meaning and contributed to the stabilization of the bilateral relationship in general, which had worsened especially because of the mentioned issues.

¹ *Правовые обоснования позиции России по Крыму и Украине 2014* (Министерство иностранных дел Российской Федерации) <<http://www.russianunesco.ru/rus/article/1636>>; В МИД РФ заявили, что аннексия Крыма и конфликт в Донбассе – это не нарушение Будапештского меморандума (2015). *Сегодня*. <<http://www.segodnya.ua/politics/pnews/v-mid-rf-zayavili-cto-anneksiya-kryma-i-konflikt-v-donbasse-eto-ne-narushenie-budapeshtskogo-memoranduma-599484.html>>; Зампостпреда РФ при ООН: Россия взяла на себя ответственность за ядерные объекты в Крыму (2014). *Сообщение ТАСС*. <<http://tass.ru/politika/1550082>>.

² Задорожній, О. (2014). *Міжнародне право в міждержавних відносинах України і Російської Федерації 1991–2014*: монографія. Київ: К.І.С., 959.

³ Vienna Convention on the Law of Treaties, 23 May 1969. United Nations Treaty Series, vol. 1155, 331.

⁴ Лоссовський, І. (2015). Будапештський меморандум як міжнародний договір, обов’язковий для виконання його гарантами. *Віче*, 28–31.

The Budapest Memorandum is taken into consideration when analyzing Art. 2 of the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (1997 “Big Treaty”), pursuant to which the parties in accordance with the UN Charter and obligations under the CSCE Final Act respect each other’s territorial integrity and the inviolability of existing boundaries between them¹.

The referred to above allows arriving at the following *general conclusions*. Under the conditions of general provocative policy of Russia of destabilizing the situation in Crimea, Ukraine’s giving up of its nuclear weapons arsenal, including through accession and implementation of the Protocol to the Strategic Arms Reduction Treaty signed by the United States and the Soviet Union, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons closely associated with the security guarantees provided by the most influential countries in the world, and who promoted the overall process of nuclear disarmament. The 1994 Budapest Memorandum incorporated the mentioned approaches. It is a unique international legal instrument in the field of nuclear disarmament, which stipulated legal obligations of nuclear states concerning national security of Ukraine in accordance with generally recognized principles of international law, commitments to respect its territorial integrity and inviolability of borders, abstain from economic coercion.

The Budapest Memorandum is an international treaty satisfying the criteria enshrined in the 1969 Vienna Convention on the Law of Treaties. The 1994 Memorandum was crucial for the overall process of nuclear disarmament and national security of Ukraine, as the nuclear states undertook international legal commitment in respect of Ukraine not only in the light of the principles of the CSCE Final Act, but also the provisions of the UN Charter, which strengthened the legal principle component by respective safeguards. By pledging to respect the territorial integrity of Ukraine Russia from international law perspective, put an end to any insinuations about the “illegality” of Ukraine’s title over Crimea and Sevastopol.

In view of the above mentioned, that the problems faced by the international community because of the actions of the Russian Federation in respect of Ukraine in 2014 and, accordingly, flagrant violations of the Budapest Memorandum seem naturally rather serious. The aggression of one of the guarantors and the inability of others to ensure compliance with its provisions directly induce states of the world to arm, implement nuclear programs, because this turns out the only option to protect oneself from external aggression, and not international legal obligations. World leaders understand it very well; e.g. A.Merkel in her speech at the 51st Munich Conference on Security 2015 in connection with the actions of Russia against Ukraine said, “What state will give up nuclear weapons, if we can not guarantee its territorial integrity?”².

Obviously, only the observance of the provisions of the Budapest Memorandum, active and effective actions of other guarantors, with the use of existing international legal instruments to terminate illegal acts, to return control of Ukraine over Crimea and occupied parts of Donetsk and Luhansk regions, compensation for damages, prosecution of perpetrators guilty of aggression and crimes that accompany it, could help address serious problems that appeared due to the Russian aggression and threatening the overall process of nuclear disarmament. There is necessity of further scientific research due to problems of practical implementation of the relevant provisions of the 1994 Budapest Memorandum.

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¹ Договір про дружбу, співробітництво і партнерство між Україною і Російською Федерацією від 31.05.1997 р. (1999) (Верховна Рада України). *Офіційний вісник України*, 20, 518.

² Speech by Federal Chancellor Angela Merkel on the occasion of the 51st Munich Security Conference 2015. Federal Government of Germany. 7 February <http://www.bundesregierung.de/Content/EN/Reden/2015/2015-02-07-merkel-sicherheitskonferenz_en.html>.

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