

BOOK REVIEW NOTES

RULE OF FORCE V. RULE OF LAW¹

DENIS PATRIN,
Lomonosov Moscow State University
(Moscow, Russia)

DOI:10.17589/2309-8678-2016-4-2-112-115

Recommended citation: Denis Patrin, *Rule of Force v. Rule of Law*, 4(2) Russian Law Journal 112-115 (2016).

Seventeen years ago, on March 24th, 1999, following a break after the World War II, a new 'hot' war broke out in Europe; a full scale war broke out, a war that was neither a non-international armed conflict, nor a limited military operation sanctioned by the UN Security Council resolution. The war was ended in the invasion of the foreign military troops into the territory of a sovereign State, and dismemberment of State territory.

On that day, NATO armed forces began bombing Yugoslavian territory in a military operation named 'Allied Force'. The targets included military, industrial facilities as well as state infrastructure; TV and radio broadcasting facilities, bridges, etc. Yugoslavia citizens who took the brunt of the attack and were indeed the real targets.

The NATO strikes on the Varvarin and Grdelica bridges; the bombing of the small city of Surdulica, the destruction of Radio-Television Serbia (RTS) can be compared to the Guernica, Coventry, Dresden bombings earlier in the century.

During the military campaign, NATO used ammunition with depleted uranium, which, together with destruction of chemical plants and oil refineries, led to a long-term harm to the environmental safety and public health of the Yugoslavian citizens in and beyond the bombed areas.

The government of Yugoslavia detailed and provided evidence of the attacks (which were in violation of the rules of international humanitarian law) and compiled them into '*The White Book of NATO Crimes in the Former Yugoslavia*'. Only after the war did the government of Yugoslavia and concerned citizens of Yugoslavia, Serbia attempt (unsuccessfully) to defend the rights of the victims of the military actions in

¹ Reviewed book: Alexander Jaksic, *NATO Intervention in the Former Yugoslavia: Individual Damage Compensation Claims: Jurisdiction and Applicable Law* (Belgrad, Sluzbeni glasnik 2008).

the International Court of Justice, the Tribunal for the Former Yugoslavia, the European Court of Human Rights, as well as in the national courts of NATO member States.

The position taken by the Alliance corresponds to the Rule of Force, where the winners are not judged; it is the winners who judge and the entire blame for the war is vested on the leaders of the targeted country of the attack. The term 'war' is avoided; the ugly issues of the inconsistency between the committed acts and international law are concealed.

The international community remained silent, while legal pundits continued their active discussions of '*the humanitarian intervention doctrine*', that later would be brushed up and called '*responsibility to protect*', in an attempt to somehow reconcile the action with international law principles.

Such attempts to reconcile the apologetics of war and denial of war are as ingenuous as the reconciling the Wolf from the Aesop fable and his sweet dinner. However, this wind sown at the turn of the century has become a whirlwind in the new and it has become more expedient to destroy the system of international law than to amend the existing.

The book by Serbian professor of Law Alexander Jaksic '*NATO Intervention in the Former Yugoslavia: Individual Damage Compensation Claims: Jurisdiction and Applicable Law*' (Belgrad, Sluzbeni glasnik, 2008, 184 pages) is a quasi-sequel to the above mentioned *White Book*.

Alexander Jaksic's book systematically outlines claims to receive compensation through the national and international courts for the victims of the military attacks showing evidence of violation of the international humanitarian law.

At its core, the book is based on a simple principle, a principle common to municipal legal systems and international law system; it is based on the legal principle of tort in which a wrongful act should be compensated in full by those responsible for the given wrongful act.

The book approach differs from treatises, and it is close to legal briefs in style or to a virtual reasoning issued by the relevant courts, while remaining a scientific and theoretical piece of work.

In the first chapters of his book, the author examines the rules for tort compensation in the various national legal systems. Deliberate attention is paid to the legal nature and application of the jurisdictional immunities of States, as well as the modern trends expressed by the courts in reference to State immunity from foreign jurisdiction.

In particular, the work focuses on the restrictive approach in the application of State immunity in the adjudication of claims regarding tort to human life and health - the so called tort exception rule.

In his assessment of legislation and jurisprudence of the United States and the United Kingdom, as well as the provisions of the European Convention on State Immunity of 1972, the UN Convention on Jurisdictional Immunities of States and Their Property, 2004, the author comes to a general conclusion regarding the use of references to State immunity; that is the rule of international law has evolved to

making an exceptions from the general rule of state immunity for cases involving harm to life and health, property damage.

In addition, the author elaborates further examining the application of State immunity and concludes that not only the above-mentioned exception from the State immunity rule became a norm of international law, but the extraterritorial jurisdiction in respect of grave breach of international law, including war crimes, crimes of genocide also has evolved from the state practice to the norm.

At the same time, the author's analysis of American legislative and judicial practice concludes that if a positive perception of extraterritorial jurisdiction of the own judicial authorities for alleged human rights violations and other similar actions exist in the US practice – the inverse opportunity to appeal in court for victims of attacks realized by persons the responsibility of which is held by the United States – to appeal in order to obtain judicial defense and compensation for harm in the United States judicial institutions – such opportunity is, in the strongest terms, limited and, in fact, suppressed.

The author concludes this section by stating that by far the most effective way to protect the interests of victims would be a creation of a mixed arbitration body, similar to the US-Iran Claims Tribunal. Unfortunately, the probability of the creation of such a tribunal is extremely slim.

Attempts to file claims in the national courts in the Alliance's Member States (Germany, Italy) have been unsuccessful, having been recognized extrajudicial by these courts. Initiations of legal actions in the United States or UK courts were also doomed due to the nature of legal mechanisms regarding such litigation.

The author also concludes that the application of the aggressor State immunity in Serbian courts, should be considered as a denial of justice. Furthermore, it is the Serbian courts which are the only possible judicial authority for at least some, albeit very theoretical protection of the interests of victims.

The second part is devoted to the analysis of applicable law in the legal proceedings related to damage to life, health, property of the NATO-bombing victims. These chapters address the legality of the use of force against Yugoslavia by NATO forces in the absence of a UN Security Council resolution.

The author reviews the issue of initiating legal action on a municipal level, if the tort was a result of breach of international law. He concludes that there is no fundamental difference between the concept of tort resulting from the breach of civil law or tort resulting from the breach of an international obligation. The applicable rules of international humanitarian law should, to his mind, serve as a basis for the municipal court to determine the legality of the behavior of the responsible actor. So the rules of international humanitarian law (the law of armed conflict) are considered by the author as self-executing in the application of legal action in municipal courts.

As to the issue of time limits for making claims, the author considers the claims' limitation period invalid in the case of serious breaches of international humanitarian law and international crimes. In the case of the above mentioned war, such crimes include bombing of the television and radio station of Serbia, the destruction of

the Varvarin bridge with civilians on it, the destruction of the bridge Grdelika with a passenger train crossing over it, the bombing of Surdulica, as well as environmental and ecological harm.

The last two chapters of the book are devoted to the review of the European Court of Human Rights and the activities of the Tribunal for the former Yugoslavia (ICTY) concerning investigation of the actions of NATO in 1999.

The first chapter examines *Bancovic and others v. Belgium and 16 Other Contracting States Case*, widely discussed and criticized by the international legal community. The court, in its reasoning of lack of jurisdiction, assumed a conservative position, which is uncharacteristic for this court indeed.

In the second chapter, the report given by Ms. Carla Del Ponte, Prosecutor of the Tribunal for the Former Yugoslavia (ICTY), regarding a need to conduct an investigation of war crimes committed by NATO member States against Yugoslavia is examined. It should be noted that the former ICTY prosecutor found no reason to conduct such investigations.

Thus, doors were ostentatiously slammed in front of Yugoslav, Serbian governments and victims, eliminating fair and efficient mechanisms to ensure the rule of law, that had been developed by the most civilized and democratic members of the world community.

The author has to admit that the international law has not developed effective mechanism to protect the civilian populations – the most numerous group of victims of armed conflicts. He considers it imperative to fill this gap.

In this regard, he welcomes the adoption by UN General Assembly (RES 60/147 of 16 Dec 2005) of a soft law document called '*The Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And Serious Violations Of International Humanitarian Law*', which, despite the criticism of certain provisions, can be viewed as a positive step in addressing the issue of compensation to victims of armed conflict. One should add that without an effective system to protect the victims by means of legal instruments, talking about the rule of law is hypocrisy.

The work, in spite of the reasons behind its creation, is objective and is distinguished by sensible, high quality legal analysis. It focused on the challenges relating international law with national legal systems. The work is written for lawyers by a lawyer in the western legal tradition and is designed to fill the gap of silence for victims of that given war, to ensure that it is not repeated in the future. The book will be of interest to all those concerned with topical issues in international law, the law of armed conflict, problems on international and national legal orders.

Information about the author

Denis Patrin (Moscow, Russia) – Associate Professor at Faculty of Law, Lomonosov Moscow State University (1 Leninskie Gory, bldg. 13–14, Moscow, 119991, GSP-1, Russia; email: d_patrin@law.msu.ru).