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Cuvânt înainte / Foreword

The current issue is an *anniversary one – the 25th*. It was a long way since issue number 1 back in 2003, that is 18 years ago. But it was a rewarding jurney, with hardships, and also with a lot of achievements.

This issue includes first the presentation of a special event – the *International Round Table on Promoting the Jurisdiction of the International Court of Justice* of 24 June 2021, which I have hosted as Foreign Minister of Romania in order to promote a very important initiative which I had launched – a campaign for extending the use of the jurisdiction of the ICJ, to the benefit of international peace and security, in other words of the rules-based international order. During the *Round Table*, beyond myself and the Registrar of the ICJ, Mr Philippe GAUTIER, the following professors and high-level experts in international law contributed: Alain PELLET, Sir Michael WOOD, Rolf Einar FIFE – all former, current or future members of the UN International Law Commission. We also publish the Declaration on this topic which was launched in November which marks the start of the mentioned campaign.

In the *Articles* section, the journal introduces the analysis by Prof. Ion GÂLEA and Lecturer Carmen ACHIMESCU of the *Metamorphoses of the Danube Commission*, the second ever international organization.

Additionally, the journal is hosting Filip-Andrei LARIU's study on the *Legal Implications Regarding the Use of Autonomous Weapons in Armed Conflicts and Law Enforcement Operations.*

The section *PhD and Master Candidate's Contribution* presents Adrian-Nicușor POPESCU's paper on the legal issues engendered by sea-level rise: *Seeking Judicial Venues for the Persons Affected by Sea-Level Rise*.

The present book review section includes a review by Lecturer Elena Lazăr of Victor STOICA's volume: *Remedies before the International Court of Justice. A Systemic Analysis*, published at Cambridge University Press in June 2021.

I hope this new on-line issue of the Romanian Journal of International Law will be found attractive by our constant readers, and all those interested in

international law will enjoy these new contributions[1] of the Romanian and foreign scholars and experts in this field.

Professor Dr. Bogdan Aurescu
Member of the UN International Law Commission

[1] The opinions expressed in the papers and comments published in this issue belong to the authors only and do not engage the institutions where they act, the RJIL or the Romanian Branch of the International Law Association.

Abrevieri / Abbreviations

ADIRI – Asociaţia de Drept Internaţional şi Relaţii Internaţionale / Association for International Law and International Relations

AIEA / IAEA – Agenţia Internaţională pentru Energie Atomică / International Atomic Energy Agency

CAHDI – Comitetul ad-hoc al experţilor în drept internaţional public / Committee of Legal Advisers on Public International Law

CDI / ILC – Comisia de Drept Internaţional / International Law Commission

CEDO / ECHR – Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights

CIJ / ICJ – Curtea Internaţională de Justiţie / International Court of Justice

CJUE / CJEU – Curtea de Justiţie a Uniunii Europene / Court of Justice of the European Union

COJUR – Grupul de lucru Drept Internaţional Public al Consiului UE / EU Council Working Group on Public International Law

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

CPJI / PCIJ – Curtea Permanentă de Justiţie Internaţională / Permanent Court of International Justice

NATO – Organizaţia Tratatului Nord-Atlantic / North Atlantic Treaty Organization

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

TUE / TEU – Tratatul privind Uniunea Europeană / Treaty on European Union

UE / EU – Uniunea Europeană / European Union

UNSC – Consiliul de Securitate al Organizaţiei Naţiunilor Unite / United Nations Security Council

The Works of the International Round Table

on

Promoting the Jurisdiction of the International Court of Justice (Bucharest, VTC, 24 June 2021)

Introductory Foreword

by *Professor Dr. Bogdan Aurescu*[1]

On 24 June 2021, I have hosted, as Foreign Minister of Romania, the works of the International Round Table on *Promoting the Jurisdiction of the International Court of Justice*, thus starting the implementation of an initiative I had following a meeting of mine, in November 2020, in The Hague, with the then President of the International Court of Justice (ICJ), and with the Registrar of the Court.

Our discussions during that important meeting focused on ways of encouraging States towards a wider use of the Court's jurisdiction and its judicial function, as a peaceful mechanism to solve international disputes.[2]

I suggested, during that visit, the idea of launching a global campaign aimed at encouraging States to accept the ICJ's jurisdiction, through promoting a political declaration to be endorsed by as many as possible UN member States. This is how the idea behind Romania's initiative was born. The ICJ high officials welcomed the proposal I have advanced at that point.

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[1] *Dr. Bogdan Aurescu is Professor of Public International Law of the Faculty of Law, University of Bucharest and Member of the UN International Law Commission (since 2017). President of the Romanian Branch of the International Law Association – London and editor-in-chief of the Romanian Journal of International Law. Also member of the Permanent Court of Arbitration, substitute member of the Venice Commission of the Council of Europe. Former Government Agent for the European Court of Human Rights (2003-2004), former Secretary of State for European Affairs (2004-2005), for Strategic Affairs (2009-2010, 2012-2014), for Global Affairs (2012) within the Ministry of Foreign Affairs, former Agent of Romania before the International Court of Justice in the Maritime Delimitation in the Black Sea case (2004-2009). Former Presidential Advisor for Foreign Policy to the President of Romania (2016-2019). Minister of Foreign Affairs of Romania (2014-2015 and 2019-present).* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

[2] On the occasion of that visit of mine to The Hague, I also donated to the International Criminal Court, on behalf of Romania, the portrait of Vespasian Pella, the illustrious Romanian diplomat and lawyer, one of the "founding fathers" of the concept of the International Criminal Court and of international criminal law as a sub-branch of international law.

This initiative is integral part of the strong support of Romania for the ICJ.

As this year we mark the 75th anniversary of the inaugural sitting of the ICJ and contemplate the outstanding contribution of the Court to the development of international law and its judicial application in support of maintaining peace and security worldwide, it is even more appropriate to look into ways of encouraging a wider use of the Court's jurisdiction.

Beyond my position of current Minister of Foreign Affairs of Romania, I am also a Professor of international law and member of the UN International Law Commission, as well as a former pleading Agent before the International Court of Justice. This is why, for me, it is more than natural to attach great importance to the peaceful settlement of disputes, not only from theoretical, but also from practical perspectives. The respect for this fundamental principle also lies at the heart of Romania's foreign policy, together with the respect for the whole body of international law and the promotion of the international rule of law. This should be integral part of the foreign policy of each and every State in the world. I firmly believe that one concrete way through which we can accomplish this goal is strengthening ICJ.

The objective of the *international round table* of 24 June 2021 was multi-purposed: to promote the idea of a *political declaration* as a means to stimulate to the acceptance of the ICJ jurisdiction; to build a *cross-regional Core Group of States* to decide upon a text for the declaration – States that would then assume the leading role in their respective regions for gathering as many State adhesions as possible to the initiative and the declaration, underlying, thus, States' determination to make recourse to the ICJ for the purposes of solving their disputes; to engage in a technical exchange of views with professionals in the field – the Registrar of the ICJ, former legal advisers at the ministries of foreign affairs, professors of international law, all well familiarised with the ICJ and its procedures – with the aim of identifying the appropriate avenues to take in order to make the initiative as successful as possible and to understand, in a pragmatic way, what lies at the roots of States' reticence to engage with the ICJ.

All interventions that you will find in this special number of the Romanian Journal of International Law, as well as the discussions these generated, provided substance for the political declaration which was discussed and further agreed within the Core Group of States, which includes Japan, Liechtenstein, Mexico, The Netherlands, New Zealand, Norway, Poland, Spain and Switzerland.

The Declaration was launched on 3 November 2021 during a second event dedicated to this initiative, an online event that I and hosted at the Romanian Ministry of Foreign Affairs. The Declaration is at the heart of the global campaign, which we launched on that occasion, aimed at encouraging States to accept the jurisdiction of the ICJ.

The text of the Declaration was subsequently circulated to all UN Member States and opened for endorsement by any interested State, through a Note Verbale submitted to the Permanent Mission of Romania to the United Nations in New York, acting as "depositary" for this initiative on behalf of the Core Group of States.

The ultimate purpose of the initiative is to turn ICJ into a *de facto* universal international court through the combination of the various means for accessing its jurisdiction provided in its Statute.

This aim plays as a concrete application of the international legal obligation States have to settle their disputes peacefully. In this way, States are encouraged to make the International Court of Justice competent to solve their disputes when other mechanisms to settle the dispute fail.

No State can be forced to submit its disputes to the Court: the jurisdiction of the Court is firmly rooted in the States' consent. This justifies the initiative to figure out ways to bring the matter to the active interest of States and determine them to take action at national level with the final aim of recognizing as compulsory the jurisdiction of the ICJ (through depositing a declaration with the Court in this respect – the so-called *optional clause*).

If this is too ambitious of an aim for some States, there are other ways envisaged by the Statute of the International Court of Justice, leading to inter-State disputes be entertained by the Court:

- *by special agreement*: the parties jointly conferring jurisdiction to the Court to settle a dispute;
- *by compromissory clause*: a treaty provision granting the ICJ jurisdiction to entertain possible future cases concerning disputes related to the application and interpretation of that treaty or any other type of disputes decided by the parties;
- *forum prorogatum*: if a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting such jurisdiction to enable the Court to entertain the case: the Court thus has jurisdiction as of the date of acceptance under the *forum prorogatum rule*;

Hence, the only real limit for States to submit a dispute to the Court is their willingness to do so. *If there is a will, there is a way*, to quote a known saying, and certainly many ways to reach the Court are already in place, if the will to do so is there.

Apart from positive steps that States can take in order to enable the jurisdiction of the ICJ in relation to international disputes involving them, States can also take action to remove circumstances that impede or block the jurisdiction of the ICJ. For instance, States can withdraw reservations to provisions in various international treaties conferring jurisdiction to the Court in relation to disputes concerning the interpretation and application of the respective treaty.

Why Romania of all States took the lead and articulated this initiative? For a number of reasons:

First, as I stated at the beginning, Romania's foreign policy is deeply rooted in the respect for the international rule of law; it is my firm belief that all disputes must be resolved through peaceful means as an underlying requirement for ensuring peace and good neighbourliness.

Second, it is a belief that we practice. Romania brought before the International Court of Justice its dispute with Ukraine over the maritime delimitations in the Black Sea, after almost 40 years of bilateral negotiations that were unable to lead to a satisfactory result; the decision to refer the dispute to the ICJ improved the political bilateral dialogue and was conducive to contributing to the building of trust between the two States, which implemented the 2009 judgment of the Court without questioning it or any of the legal arguments included therein. I was honored to be the pleading Agent of Romania before the ICJ for this case which brought to Romania 9700 km² of continental shelf and exclusive economic zone out of the disputed area of about 12200 km² of maritime zones, i.e., almost 80% of this disputed area – the single extension of sovereign rights and jurisdiction of Romania since the Great Union of 1918.

Also, Romania withdrew almost all its reservations to ICJ jurisdiction in multilateral treaties, reservations that were formulated as part of the communist strict policy towards sovereignty.

At the same time, Romania became a party to the Optional Protocols to the Vienna Convention on Diplomatic Relations and to the Vienna Convention on Consular Relations for the peaceful settlement of disputes.

Last but not least, Romania deposited, in 2015, during my first mandate as Foreign Minister, its declaration on the acceptance as compulsory of the ICJ

jurisdiction, following a similar approach already undertaken back in 1930, when Romania deposited a declaration for the acceptance as compulsory of the jurisdiction of the Permanent Court of International Justice. Thus, in 2015, Romania became the 72nd State to accept the compulsory jurisdiction of ICJ (now there are 73 such States in total).[1]

These are really good arguments for Romania taking the lead in reenergizing initiatives aimed at promoting the ICJ jurisdiction and making the court truly a *World* Court.

Romania's actions can serve as a model for other States hesitant towards the International Court of Justice as it promoted a step-by-step approach that ultimately led to the deposit of the declaration of the acceptance as compulsory of the Court's jurisdiction.

At present, out of the 73 States that have deposited an article 36 paragraph (2) declaration, among them being almost all EU Member States (23). Six out of the States having accepted as compulsory the jurisdiction of the Permanent Court of International Justice – the predecessor of the International Court of Justice – have not withdrawn their declaration until now, those declarations acting, pursuant to Art. 36 paragraph (5) of the Statute of the ICJ, as recognition of the ICJ's jurisdiction as well. Those States are: Uruguay (before 28 January 1921), Haiti (4 October 1921), Panama (25 October 1921), Dominican Republic (30 September 1924), Nicaragua (24 September 1924), Luxembourg (15 September 1930).

At the same time, on overview of the information on the ICJ's website shows that all bases for the ICJ's jurisdiction were used by States lodging cases before the Court, a statistic in this respect being provided in the intervention of the Registrar of the Court during the June round table. This should be the case in future as well, and more energetic demarches must be undertaken in order to provide for the recourse to the ICJ as a mechanism for the dispute settlement in multilateral and bilateral treaties, as a negative trend in this respect can be noticed already for some decades now.

Therefore, although a powerful political message of support for the jurisdiction of the Court would be recognizing its jurisdiction as compulsory *ipso facto* via a declaration to that end, States should have in mind that they could always access the Court for solving their disputes and that there are good arguments that justify this avenue. The most powerful of all such reasons is that the values of a State lie in the strength of its legal arguments,

[1] See https://www.icj-cij.org/en/declarations.

as the most precious asset a State has is the lasting peace, to quote the Romanian diplomat Nicolae Titulescu.

To extrapolate, I would add that the most precious asset humanity has is lasting international peace and security and States should continuously work to its achievement through dialogue, negotiations, good offices, mediation, conciliation, and ultimately through recourse to international jurisdictions.

Concept Note
of the
International Round Table
on
Promoting the jurisdiction of the International Court of Justice

(24 June 2021)

9.30 - 11.30 am (GMT- 4); 3.30 - 5.30 pm (GMT + 2); 4.30 – 6.30 pm (GMT + 3) via Webex

Background

The International Court of Justice (ICJ) is the most important forum for the settling of disputes in accordance with international law. Nevertheless, in respect of its contentious competence, the jurisdiction of the Court is non-compulsory. The consent of the States is necessary in order for this international court to settle a certain dispute.

Thus, States have the possibility to submit cases to the ICJ by *compromise* (a special agreement concluded by the parties especially for this purpose) or *compromissory clauses* (provisions in treaties and conventions conferring jurisdiction upon the Court for matters provided for therein), on the basis of Article 36 (1) of the Statute of the Court, by *forum prorogatum* (the possibility of subsequently accepting the ICJ's jurisdiction to enable it to entertain the case), or by means of the "*optional clause*" (a declaration made at any time by a State Party by which it recognizes the jurisdiction of the Court as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation), as provided by Article 36 (2) of the Statute.

In recent years, the Court's activity has intensified, covering disputes in the most various fields and concerning issues of major importance such as those related to territorial settlements or the delimitation of maritime spaces. This indicates increased trust in the professionalism and impartiality of the Court.

Nevertheless, the acceptance of the compulsory jurisdiction is far from being universal. Up to now about a third of the States of the world (73) have availed themselves of the relevant provisions of the ICJ Statute and have filed a declaration by which the compulsory jurisdiction of the Court was accepted.

In order to understand the reasons for this reluctance, one must take into account that the acceptance of jurisdiction implies acquiring certain rights,

but also incurring certain obligations. On the one hand, the State that makes such a demarche has the right to institute proceedings unilaterally against another State that has made a similar declaration. On the other hand, it undertakes to accept the jurisdiction of the Court if such a declaration is invoked by other State to serve as basis for seizing the Court.

As regards the limitations on the jurisdiction of the Court, States have the option, when filing a declaration by which they accept the compulsory jurisdiction, to exclude certain disputes. When making this decision, each State takes into account its own interests, but also various issues with a litigious potential on its foreign affairs agenda. Moreover, States have the liberty to include other exemptions than those traditionally found in the declarations filed, under the condition to be consistent with international law. The system of declarations is thus flexible and leaves room to States to protect their vital interests.

On 23 June 2015, Romania deposited with the Secretary General of the United Nations the declaration of acceptance of the jurisdiction of the Court and, therefore, became a party to this complex system of interconnected declarations.

The significance of submitting such declarations is manifold:

Firstly, it signals the desirability to have inter-State disputes settled by an impartial legal actor in the framework of international law. It is, consequently, a reaffirmation of trust in the potential of international law to serve the cause of peace and in particular in the role of the ICJ as promoter and guarantor of the supremacy of law in international relations.

Secondly, it expresses the willingness of a State to ground its foreign policy on strict compliance with international law, given that a State which makes such a declaration must be prepared to defend its interests by advancing legal arguments before the most important international court.

Thirdly, from a pragmatic perspective, the acceptance of the Court's jurisdiction would facilitate the settlement of disputes that could not be solved through negotiations. Practical experience shows that, inevitably, in relations between States certain situations may arise when the accommodation of different interests cannot be achieved bilaterally, and it is useful to benefit from the possibility to seize a court having universally recognized expertise, as the ICJ.

At the same time, it is worth mentioning that Romania, as other ex-communist States, used to refuse the compulsory jurisdiction of the International Court of Justice, by formulating reservations excluding the

jurisdiction of the ICJ with respect to all international treaties that provided for such a dispute settlement mechanism. After the fall of the communist regime and the changes in the political culture, Romania joining the group of states which strongly favours the rule of law in international relations. Consequently, it withdrew the above-mentioned reservations and even became a party to the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (1961) and to the Optional Protocol to the Vienna Convention on Consular Relation concerning the Compulsory Settlement of Disputes (1963).

This discussion is expected to focus on the added value of declarations recognizing the jurisdiction of the International Court of Justice as compulsory, as well as of making use of the compromissory clauses in conventions and treaties, on the rationale that accepting the ICJ's jurisdiction acts in support of maintaining peace and consolidating the rule of law globally.

Objectives

- Examining the ICJ's contribution to the peaceful settlement of disputes and the importance of access to the Court's jurisdiction;
- Identifying adequate modalities of promoting the compulsory jurisdiction of the ICJ, by means of its recognition ipso facto in relation to any other state accepting the same obligation, by withdrawing certain reservations to existent treaties and by including compromissory clauses in future treaties establishing the ICJ as the dispute settlement mechanism;
- Encouraging States to further resort to this instrument for international adjudication, including by exploring the benefits of a declaration on this topic, open for endorsement by all interested States, which should set the framework for an outreach campaign to the above-mentioned end.

The Programme of the International Round Table on

Promoting the Jurisdiction of the International Court of Justice (Bucharest, VTC, 24 June 2021)

9.30 - 11.30 am (GMT- 4); 3.30 – 5.30 pm (GMT+2), 4.30 – 6.30 pm (GMT+3)

4.30 – 5.00 pm ***Introduction***

Introductory remarks by H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania, Member of the International Law Commission

Remarks by H.E. Ms. Ine Marie Eriksen Søreide, Minister of Foreign Affairs of the Kingdom of Norway (recorded message)

Opening speech by Mr. Miguel de Serpa Soares, United Nations Under-Secretary-General for Legal Affairs and UN Legal Counsel (recorded message)

5.00 – 5.50 pm ***Discussion***

Moderator: *H.E. Mr. Bogdan Aurescu*, Minister of Foreign Affairs of Romania, Member of the International Law Commission

Speakers: *Mr. Philippe Gautier*, Registrar of the International Court of Justice

H.E. Mr. Rolf Einar Fife, Ambassador of Norway to the European Union, former Legal Adviser of the Ministry of Foreign Affairs of Norway

Sir Michael Charles Wood, Member of the International Law Commission, former Legal Adviser to the Foreign and Commonwealth Office

Mr. Alain Pellet, Professor of Public International Law at the Paris Quest Nanterre La Défense University, former Member and Chairperson of the International Law Commission

5.50 – 6.25 pm ***Interventions from representatives of Core Group and Supportive States and other participants***

Dr. René Lefeber, Legal Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands

Ms. Corinne Cicéron Bühler, Ambassador, Director, Directorate of Public International Law, Federal Department of Foreign Affairs of the Swiss Confederation

Mr. Alejandro Celorio, Legal Adviser, Ministry of Foreign Affairs of Mexico

H.E. Mr. Hidehisa Horinouchi, Ambassador Extraordinary and Plenipotentiary of Japan to the Kingdom of the Netherlands

H.E. Mr. Agustín Santos Maraver, Ambassador, Permanent Representative of Spain to the United Nations – New York

H.E. Mr. Marcin Czepelak, Ambassador Extraordinary and Plenipotentiary of the Republic of Poland to the Kingdom of the Netherlands

H.E. Mr. Arnoldo Brenes Castro, Ambassador Extraordinary and Plenipotentiary of Costa Rica to the Kingdom of the Netherlands

Dr. Penelope Ridings, Honorary Professor, University of Auckland, Former Chief International Legal Adviser to the Ministry of Foreign Affairs and Trade, New Zealand

H.E. Mr. Collen Vixen Kelapile, Ambassador, Permanent Representative of the Republic of Botswana to the United Nations – New York

Questions & Answers

6.25 – 6.30 pm ***Final remarks***

H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania, Member of the International Law Commission

Concept Note

of the

Launch event of the

Declaration on promoting the jurisdiction of the International Court of Justice

VTC format

3 November 2021, 8.45 – 9.45 am (New York time)

Core Group States

Japan, Liechtenstein, Mexico, the Netherlands, New Zealand, Norway, Poland, Romania, Spain, Switzerland.

Background

On 24 June 2021, the Minister of Foreign Affairs of Romania, H.E. Mr. Bogdan Aurescu, hosted a virtual *High-Level Round Table on Promoting the Jurisdiction of the International Court of Justice* (ICJ), with the participation of the Registrar of the ICJ, the UN Under-Secretary–General for Legal Affairs and prominent personalities in the field of international law, as well as representatives of interested UN Member States.

The objective of the Round Table was to highlight the important contribution of the International Court of Justice to maintaining international peace and make better use of its potential, by building on previous efforts in this area and re-energizing them into a more systemic campaign for broader recognition of the ICJ's jurisdiction.

More specifically, the event was intended to put forth an initiative to promote expanding access to the ICJ's jurisdiction on a stable and predictable basis, in accordance with the Statute, including by means of encouraging States to submit declarations recognizing *ipso facto* the Court's jurisdiction as compulsory in relation to any other States accepting the same obligation, to withdraw relevant reservations blocking access to the ICJ jurisdiction in existent treaties and to include compromissory clauses in treaties establishing the ICJ as the dispute settlement mechanism, whenever possible.

Taking into consideration that the contentious competence of the Court is rooted in the consent of the States, the Core Group States drafted a *Declaration* that encourages States to accept the jurisdiction of the Court as

a means of contributing to fostering stability through the judicial application of law. The document will be circulated for endorsement to all States with the open invitation to join in this demarche. Such an endorsement could be seen as an expression of States' willingness to ground their foreign policies on strict compliance with international law and to turn the leading international court into a judicial body having *de facto* universal jurisdiction.

Objective of the event

This virtual event is meant to present the purpose and the content of the above-mentioned initiative and its outcome – the *Declaration* encouraging States to accept the jurisdiction of the Court – to all interested States, including details regarding the possibility of endorsement and the follow-up process.

Programme

8.45 – 8.50 am Presentation by H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania

8.50 – 9.20 am Statements by representatives of the Core Group States (3 minutes)

Ms. Victoria Hallum, Chief International Legal Adviser and Divisional Manager, New Zealand Ministry of Foreign Affairs and Trade

Mr. Kristian Jervell, Director General, Legal Department of the Ministry of Foreign Affairs of Norway

H.E. Ms. Corinne Cicéron Bühler, Ambassador, Director of the Directorate of International Law and Legal Adviser of the Federal Department of Foreign Affairs of Switzerland

H.E. Mr. Kimihiro Ishikane, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Japan to the United Nations

H.E. Mr. Christian Wenaweser, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Principality of Liechtenstein to the United Nations

H.E. Ms. Yoka Brandt, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Kingdom of the Netherlands to the United Nations

H.E. Mr. Krzysztof Szczerski, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Republic of Poland to the United Nations

H.E. Mr. Agustín Santos Maraver, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Spain to the United Nations

H.E. Mr. Juan Gómez Robledo Verduzco, Ambassador, Deputy Permanent Representative of Mexico to the United Nations

9.20 – 9.45 am Interventions from the floor

Concluding remarks by H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania

Declaration

on promoting the jurisdiction of the International Court of Justice

We firmly believe that the principle of peaceful settlement of disputes must guide the conduct of all States, as enshrined in the United Nations Charter and reiterated by the United Nations, in particular in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[1] the 1982 Manila Declaration on the Peaceful Settlement of International Disputes,[2] the 2005 World Summit Outcome[3] and other relevant resolutions of the United Nations General Assembly, such as the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.[4]

We express our appreciation for the International Court of Justice ("the Court") as the principal judicial organ of the United Nations and the overarching forum for the judicial settlement of disputes between States in accordance with international law.

We highlight the fact that the authoritative value of the Court's decisions, its unique mandate, its universal character and consent-based jurisdiction have placed the Court as the crucial mechanism for the adjudication of legal disputes for many States, with due regard to States' free will in choosing the most appropriate means of peaceful settlement of disputes in a given context.

We emphasize the important role of the Court in promoting the rule of law globally, thus fostering harmonious relations among States, and *believe* that the contribution of the Court in maintaining international peace can be reinforced by widening the access to its contentious jurisdiction.

We notice at least the following reasons for accepting the Court's jurisdiction as a mechanism for dispute settlement:

- The Court can hear any legal dispute concerning international law; thus by making recourse to this mechanism and through the judgments rendered based on law, both States and the Court contribute significantly to the consolidation of the rule of law at the international level;

[1] Adopted by United Nations General Assembly resolution 26/25 (XXV) of 24 October 1970
[2] Adopted by United Nations General Assembly resolution 37/10 of 15 November 1982
[3] Adopted by United Nations General Assembly resolution 60/1 of 16 September 2005
[4] Adopted by United Nations General Assembly resolution 67/1 of 24 September 2012

- ❖ The Court has a vast expertise in dispute settlements, developed during a century of activity, including that of its predecessor, the Permanent Court of International Justice (the "PCIJ"), and comprehensive jurisprudence concerning various areas of international law;
- ❖ The jurisdiction of the Court (in contencious cases) is based on the consent of the States, thus enabling the Court to settle disputes between States peacefully, through authoritative judgments, and contributes to building inter-State harmonious relations;
- ❖ The Court offers an efficient and affordable dispute settlement mechanism;
- ❖ The Court actively contributes to the realization of the principles and purposes of the United Nations, in particular the maintenance of peace.

We take into consideration and build upon previous initiatives at the international and regional levels aimed at promoting the jurisdiction of the Court and especially upon the *Handbook on accepting the jurisdiction of the International Court of Justice*,[1] developed by Switzerland, the Netherlands, Uruguay, the United Kingdom, Lithuania, Japan and Botswana.

We believe in the added value of declarations recognizing the jurisdiction of the Court as compulsory, as well as in the benefits of compromissory clauses in bilateral and multilateral treaties on the rationale that accepting the Court's jurisdiction serves the cause of international peace and builds expectations of stability and consistency in international relations thus contributing to the consolidation of the rule of law at the international level.

We encourage States to have recourse to the jurisdiction of the Court for settling their inter-State disputes; to that end they could confer jurisdiction on the Court by:

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[1] https://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf

- unilaterally accepting the jurisdiction of the Court, in accordance with Article 36 (2) of the Statute of the Court, through a declaration deposited with the UN Secretary General;[1]
- including specific clauses in bilateral and multilateral treaties,[2] taking into account the provisions of Article 36 (1)of the Statute of the Court; two categories of treaties can be identified:
    - bilateral or multilateral treaties dealing with a specific subject matter containing a clause conferring jurisdiction on the Court with regard to legal disputes relating to the interpretation or application of that specific treaty;
    - bilateral or multilateral treaties concluded specifically for the purpose of peaceful settlement of disputes (including *inter alia* the category of Friendship Treaties), and providing for the jurisdiction of the Court over any legal dispute between the Parties, irrespective of its subject matter.
- concluding a special agreement,[3] in order to submit a specific dispute to the Court, in view of Article 36 (1) of the Statute of the Court;
- *forum prorogatum*,[4] thus accepting the jurisdiction of the Court.

We further encourage States to exercise great care when drafting titles of jurisdiction with due regard to the importance of avoiding disputes over the jurisdiction of the Court.

We further encourage States to consider withdrawing, where appropriate, the reservations made to the specific dispute settlement provisions in international treaties conferring jurisdiction on the Court to deal with disputes related to the application and interpretation of the specific treaty, in order to allow the Court to exercise jurisdiction on all treaty-related disputes concerning all States parties to that treaty.

[1] Models of such declarations are to be found in the *Handbook on accepting the jurisdiction of the International Court of Justice* at Chapter II
[2] See Chapter III of the *Handbook on accepting the jurisdiction of the International Court of Justice*
[3] See Chapter IV of the Handbook
[4] See Chapter V of the Handbook

We further encourage the inclusion of compromissory clauses in new bilateral and multilateral treaties, where appropriate, conferring jurisdiction on the Court to deal with disputes between States parties.

We further encourage States to accept the jurisdiction of the Court seized with a case against them, on the basis of the *forum prorogatum*, where appropriate, in view of the mandate of the Court to find a solution based on law and of the effect of the Court's judgment in the specific dispute, namely building harmonious inter-State relations and thus potentially contributing to the consolidation of bilateral cooperation.

We invite all interested States to engage in a systemic manner in efforts to further promote the ideal of universal acceptance of the jurisdiction of the Court.

Speech of the Minister of Foreign Affairs of Romania, Bogdan Aurescu,[1] on the occasion of the International Round Table of 24 June 2021

Excellencies,

Ladies and gentlemen,

Distinguished participants,

Dear friends,

Thank you all for being with us for a dialogue on a topic of great importance for my country and not only, namely the promotion of the use of the jurisdiction of the International Court of Justice.

It is a great honor for me to be the host of today's event.

As a professor of international law and member of the International Law Commission, a career diplomat, a former pleading Agent before the International Court of Justice, and as current Minister of Foreign Affairs of Romania, it's natural for me to attach great importance to the peaceful settlement of disputes, both from a theoretical and from the practical perspectives. The respect for this fundamental principle lies at the very heart of Romania's foreign policy, together with the respect for international law and the promotion of the international rule of law. This should be integral part of the foreign policy of each and every State in the world. And one concrete way through which we can accomplish this is strengthening the ICJ and this is the main objective of the event I am hosting today.

Looking into the lessons drawn from the post-Second World War history, Romania believes that *the role of the international courts and tribunals should be further acknowledged and strengthened*, in order to consolidate the rules-based international order and international rule of law.

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Moreover, in our globalized and technologically advanced society, the settlement of disputes through peaceful means, including by using international justice, is required more than ever, the costs of doing otherwise being too dangerously high.

During my last visit at The Hague on November 9, 2020, I have exchanged views with the President of the ICJ and the Registrar of the International Court of Justice, Mr. Gautier, regarding the potential means through which us, as States, could contribute to increasing the essential role that the Court has for the international community.

And it was in this context that I have advanced the idea of launching a campaign of intensifying the *outreach demarches* by States supportive of the ICJ in favour of an enhanced use of the World Court. The ICJ high officials welcomed this proposal, which is part of the strong support of Romania to the ICJ.

Against this background, we have organized today's event.

Although the ICJ is both a contentious and an advisory jurisdiction, the *objective of our* today's *discussion* is to examine how the role and contribution of the ICJ in maintaining international peace can be reinforced - in other words, how the access to the Court's contentious jurisdiction could be widened.

The increasing number of cases on the docket, including ones of utmost complexity, as well as the reference to the jurisdiction of the ICJ in numerous conventions are indicative of the States' confidence in its high-quality judicial work.

Many cases involve issues of interest not only for the parties directly concerned, but also for the international community as a whole. Thus, the influence of the Court in international relations is felt more and more broadly, whilst its judgments are perceived as unbiased, fully built upon international law, and contributing to its development.

However, the ICJ's jurisdiction is rooted in State consent. Consequently, States must agree to bring their disputes before the Court, either in advance of a particular dispute or when a dispute has arisen. And as we all know, consent can be given in four ways: *by special agreement, by compromissory clause, by depositing unilateral declarations recognising as compulsory the jurisdiction of the ICJ, and* by *forum prorogatum*.

In a nutshell, *the only real limit for States to submit cases to the Court is their willingness to do so*.

The jurisdiction of the Court based on the *optional clause*, as envisaged in art. 36 of the Statute, implies that each State which has recognized, *ipso facto* and without special agreement, the compulsory jurisdiction of the Court has the right to bring any other State which has accepted the same obligation before the Court, by filing an application instituting proceedings with the Court. Conversely, it undertakes to appear before the Court, should proceedings be instituted against it by any other such State.

Therefore, in this instance, the jurisdiction of the Court is based on the convergence of the *wills* of States expressed independently of each other, through *unilateral acts*, namely the declarations recognizing as compulsory the jurisdiction of the Court. So the necessary condition is, of course, that the respective dispute should not have been excluded by one or the other of the parties from the jurisdiction of the Court.

The possible reservations that States may formulate when depositing such declarations establish exceptions or qualifications to the commitments made in the declarations to recognize the jurisdiction thus protecting the declaring State against undesired judicial involvement to the extent specified. Needless to say, this goes both ways, as the reservation, made on conditions of reciprocity, will weaken to the same extent the opportunity of the declaring State to bring a case to the Court against another State.

It was believed that, *if states were progressively to adhere to the optional clause, the Court would also gradually achieve universal compulsory jurisdiction*. Up to now, 74 States have deposited unilateral declarations, recognizing the Court's compulsory jurisdiction and cases have been submitted based on such declarations. But we cannot afford to stop at the threshold of two thirds of United Nations member states.

Distinguished participants,

As I have mentioned before, *while acceptance of the Court's contentious jurisdiction can be achieved in various modalities, I would like to underscore the importance of building a stronger commitment of States to widely access the ICJ's jurisdiction for finding solutions based on law for any disputes arising between them.*

And this can only be attained not only by promoting the compulsory jurisdiction of the Court, by means of its recognition *ipso facto* in relation to any other state accepting the same obligation, but also by inclusion of compromissory clauses in treaties establishing the ICJ as the dispute settlement forum.

Securing in this manner the resort to the ICJ as a permanent option on the table would reinforce the Court's leverage to help maintain or even restore peace and reassure States that a settlement to any legal dispute is within reach, in accordance with international law.

Ladies and gentlemen,

As a State which has seized the Court in the past with a Maritime Delimitation case, for which I had the honor to serve as Agent, and which has subsequently accepted the compulsory jurisdiction of the Court, *Romania* is highly appreciative of the effectiveness and fairness of the Court and thus well placed to plea for the widest recognition of its jurisdiction.

Romania's engagement with the World Court has started with the acceptance of the compulsory jurisdiction of the Permanent Court of International Justice on whose bench also served a Romanian judge, Professor Demetru Negulescu.

The communist period registered a downturn, given that Romania followed the same approach as other socialist countries, which did not trust the ICJ sufficiently to accept its jurisdiction as compulsory. In addition, all ex-communist States formulated reservations excluding the jurisdiction of the ICJ with respect to all international treaties that provided for such a dispute settlement mechanism.

Further to the fall of communism, Romania rejoined the group of States that upholds and promotes the rule of law in international relations, which is what the Court actually stands for. Consequently, after its return to democracy, Romania withdrew the reservations excluding the jurisdiction of the ICJ to the conventions concerned and favored the insertion of compromissory clauses in the bilateral and multilateral treaties it concluded.

In 2004, Romania decided to seize the Court with an important matter, namely the *Maritime Delimitation in the Back Sea* between Romania and Ukraine based on a compromissory clause included in a bilateral treaty.

Romania's experience in relations to these proceedings before the Court has been fully positive and constituted a significant impetus for the decision to initiate the process leading, in 2015, to the acceptance of the mandatory jurisdiction of the ICJ. It was with great honor for me to have signed the Declaration recognizing as compulsory the jurisdiction of the International Court of Justice on behalf of Romania during my first mandate as Minister of Foreign Affairs of Romania. The actors involved in the internal

consultations have been very supportive to this step, which was seen as being in harmony with the core guiding lines of Romania's foreign policy. This was a proof that international law was one of the most important pillars of the Romanian foreign policy, and that it needed efficient instruments to be enforced, the International Court of Justice being the paramount tool.

Distinguished participants,

It is in this spirit that we have decided to organize today's event as a springboard to launch an outreach campaign aimed at promoting both the acceptance by more States of the compulsory jurisdiction of the Court and the inclusion of compromissory clauses in treaties. We wish to build on previous efforts in this area and re-energize them in a more systemic manner.

For this to happen, we considered useful to take the initiative of the *establishing a Core Group of supportive States* willing to work together in building the follow-up process and decide on the most appropriate means of promoting the ICJ's jurisdiction.

I am extremely thankful to the Mrs. Ine Soreide, the Foreign Minister of the Kingdom of Norway for taking the time to send us her recorded intervention, to Japan, Switzerland, Liechtenstein, Norway, Spain, New Zealand and Mexico for their decision to already join the *Core group,* as well as to other States, such as Netherlands, Poland, Costa Rica, and Botswana for their expressions of support and willingness to cooperate in this exercise. We will hear from several government representatives and other participants in the discussion the views of their countries known for their activism in support of the Court's work. After today, we will continue our demarches to rally like-minded States around this project.

The contribution of the academic community is also tremendously important both in today's event and in our future endeavors. We are privileged and grateful to have with us distinguished speakers to address this topic and help us better frame the future steps in promoting the jurisdiction of the ICJ.

I anticipate at this point our intention to elaborate a declaration promoting the jurisdiction of the World's Court, which after being negotiated and convened upon by the *Core Group States*, will be open for endorsement to all States willing to turn the International Court of Justice into a judicial body having *de facto* universal jurisdiction.

Not last, we will also hear a recorded message of the UN Under-Secretary-General for Legal Affairs, Miguel de Serpa Soares, who will provide useful input from the perspective of the Secretary General's depositary function under multilateral treaties, as well as depositary of declarations recognizing the jurisdiction of the Court as compulsory.

So, I look forward to the discussions today.

Introductory intervention by H. E. Mr. Bogdan Aurescu, minister of foreign affairs of Romania, [1]

at the launching event of the

Declaration on promoting the jurisdiction of the International Court of Justice (3 November 2021)

Distinguished participants,

Ladies and gentlemen,

Thank you all for taking the time to join this discussion on a very important topic, namely broadening the recognition of the jurisdiction of the International Court of Justice.

As we mark this year the 75th anniversary of the inaugural sitting of the ICJ and contemplate the outstanding contribution of the Court to the developments of international law and its judicial application in support of maintaining peace and security worldwide, it is even more appropriate to look into ways of encouraging a wider use of the Court's jurisdiction.

Therefore, it is a great honor for me to host today's event, which follows the virtual *High-Level Round Table* on the same topic, organized by Romania on June 24 this year, and which I also had the pleasure to host. As we announced on that occasion, we intended to launch a campaign aimed at encouraging States to accept the ICJ's jurisdiction, building upon previous initiatives in this area. *Today we are starting this campaign!*

Beyond my position of current Minister of Foreign Affairs of Romania, I am also a Professor of international law and member of the International Law Commission, as well as a former pleading Agent before the

[1] *Dr. Bogdan Aurescu is Professor of Public International Law of the Faculty of Law, University of Bucharest and Member of the UN International Law Commission. President of the Romanian Branch of the International Law Association – London and editor-in-chief of the Romanian Journal of International Law. Also member of the Permanent Court of Arbitration, substitute member of the Venice Commission of the Council of Europe. Former Government Agent for the European Court of Human Rights (2003-2004), former Secretary of State for European Affairs (2004-2005), for Strategic Affairs (2009-2010, 2012-2014), for Global Affairs (2012) within the Ministry of Foreign Affairs, former Agent of Romania before the International Court of Justice in the Maritime Delimitation in the Black Sea case (2004-2009). Former Presidential Advisor for Foreign Policy to the President of Romania (2016-2019). Minister of Foreign Affairs of Romania (2014-2015 and 2019-present).* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

International Court of Justice. This is why, for me, it is more than natural to attach great importance to the peaceful settlement of disputes, not only from theoretical, but also from practical perspectives. The respect for this fundamental principle also lies at the heart of Romania's foreign policy, together with the respect for the whole body of international law and the promotion of the international rule of law. This should be integral part of the foreign policy of each and every State in the world. I firmly believe that one concrete way through which we can accomplish this is strengthening ICJ.

Expanding the Court's compulsory jurisdiction, through various options, may consolidate the "normalcy" of submitting a legal dispute to the Court even if, or especially when, it is a matter of importance to the security or the international profile of the respective country.

I have advanced the idea of launching a campaign for intensifying the outreach demarches by States supportive of the ICJ in favour of an enhanced use of the World Court during a visit I made one year ago at The Hague, on November 9, 2020. Then, I have exchanged views with the President and the Registrar of the Court regarding the potential means through which us, the States, could contribute to increasing the essential role that the Court has for the international community. The ICJ high officials welcomed the proposal I have advanced at that point, which is part of the strong support of Romania for the ICJ.

We initiated this demarche with a group of supporting States composed of Japan, Liechtenstein, Mexico, the Netherlands, New Zealand, Norway, Poland, Spain and Switzerland, whose contribution and involvement in this exercise are highly appreciated. Together, we have elaborated the Declaration on promoting the jurisdiction of the ICJ, which will lie at the heart of the global campaign dedicated to this goal.

Immediately after today's event, the text of the Declaration will be circulated to all UN Member States and opened for endorsement by any interested State through a Note Verbale submitted to the Permanent Mission of Romania to the United Nations in New York, acting as "depositary" for this initiative on behalf of the Core Group. Updated information on the endorsing States will be posted on the websites of our Permanent Mission in New York and the Romanian Ministry of Foreign Affairs.

Insofar as the structure and the content of the Declaration are concerned, this document refers to the ICJ's important role in promoting the rule of law globally and inventories the main reasons for accepting the Court's jurisdiction, specifically: its competence over any legal dispute among States, its vast expertise in dispute settlement; its efficiency and

affordability as a dispute settlement mechanism; its anchoring in State consent as the basis for its contentious jurisdiction and its contribution to the realization of the principles and purposes of the United Nations, such as the maintenance of international peace and security. Not least, it encourages States to have recourse to the ICJ and confer jurisdiction on the Court by any of the means envisaged in its Statute.

In addition, the Declaration states the added value of declarations recognizing the jurisdiction of the Court as compulsory and the benefits of the compromissory clauses in treaties on the rationale that accepting, on a predictable basis, the ICJ's jurisdiction builds expectations of stability and consistency in international relations and, thus, serves the cause of international peace.

At the same time, the Declaration encourages States, where appropriate, to consider withdrawing the reservations made to the specific dispute settlement provisions in international treaties conferring jurisdiction on the Court and to include compromissory clauses in new bilateral and multilateral treaties. On a general note, the Declaration invites States to exercise great care when drafting titles of jurisdiction, in order to avoid disputes over the jurisdiction of the Court.

Moreover, the Declaration recognizes the merit of, and draws on previous initiatives at the international and regional levels, such as the Handbook on accepting the jurisdiction of the International Court of Justice, developed by Switzerland, the Netherlands, the United Kingdom, Lithuania, Japan and Botswana. These demarches should be seen as mutually reinforcing, given that the purpose of this initiative is to reenergize efforts dedicated to expanding the access to the ICJ's jurisdiction by putting forth a platform of political commitment to work systemically towards this goal.

By endorsing this Declaration, States will reaffirm their support for international law in conducting their foreign affairs and their readiness to advance legal arguments in defence of their positions before the leading international court, as a means of translating into practice the principle of peaceful settlement of disputes, enshrined in the UN Charter.

We see the growing docket of the Court, covering a wide array of topics and involving States from various geographical areas of the world, together with the references to the jurisdiction of the Court in numerous conventions of universal application, as indicative of the States' rising confidence in its high-quality judicial work and in its ability to prompt solutions that bring the disputes to a peaceful resolution. Therefore, we hope to gather substantial support for this Declaration. The more we rally around this

initiative, the more we can convince States to bring their disputes to the Court. A high number of endorsements could serve for other States as a springboard for action at the domestic level towards accepting the ICJ's jurisdiction.

In terms of follow-up measures, Romania envisages undertaking outreach activities by the Core Group States within their respective regional groups and in their bilateral contacts. We also intend organizing dedicated events or using related conferences or opportunities, like the presentation of the annual report of the ICJ to the UN General Assembly, to disseminate information about this declaration and continue to persuade all States to join in.

While countries exert their free will in choosing the most appropriate means of peaceful settlement of disputes in each context, I cannot underscore enough the importance of judicial adjudication mechanisms and, in particular, the authoritative value of ICJ's judgments, as reliable instruments bringing durable solutions, based on law, for any disputes between States.

The Court is the essential element of the international justice system, while its jurisprudence provides guidance to States in the interpretation of international norms and, hence, fosters dialogue and cooperation among governments.

To conclude, let me reiterate the invitation included in the Declaration, to all interested States, to join us in the efforts to further promote the ideal of universal acceptance of the jurisdiction of the Court.

I thank you and I am looking forward to the enriching discussions on this topical initiative.

Contribution by Mr. Philippe Gautier[1]

1. Introduction

At the outset, I should recall that the golden rule of international adjudication is "State consent".[2] In other words, States are free to accept or not the jurisdiction of the Court, and their consent determines the possibility for the Court to entertain their disputes.

My presentation will focus on two procedural tools through which States may express their consent to the jurisdiction of the Court: compromissory clauses, and Optional Clause declarations under Article 36, paragraph 2, of the Court's Statute.

States can consent to the jurisdiction of the Court by virtue of a compromissory clause,[3] a treaty clause that provides for the jurisdiction of the Court over a defined category of disputes, as provided under Article 36, paragraph 1 of the Statute of the Court. They also have the possibility to make a declaration under Article 36 paragraph 2 that allows a State to "recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation" the jurisdiction of the Court, which are known as "Optional Clause" declarations.[4]

There are two other ways through which States can consent to the jurisdiction of the Court – either through a Special Agreement[5], or through *forum prorogatum*,[6] but I will focus on the acceptance of the jurisdiction of the Court prior to the emergence of a dispute. Indeed, both compromissory clause and Optional Clause declarations are a way for States to express consent to the jurisdiction of the Court before any dispute is materialised.

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[1] *Mr. Gautier was elected Registrar of the ICJ on 22 May 2019, after having served as Registrar (2001-2019) and Deputy Registrar (1997-2001) of the International Tribunal for the Law of the Sea. He also has relevant expertise within the national administration system, as former Deputy Director, Head of the Law of the Sea/Antarctica Office and Director, Head of the Treaties Division in the Belgian Ministry of Foreign Affairs. Mr. Gautier is a member of various scientific and learned bodies, extraordinary professor at the Université catholique de Louvain and a visiting professor at various other universities, where he lectures on several aspects of international law, in particular the law of the sea.* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

[2] *See Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 41 (Oxford University Press, 2006).

[3] Article 36, paragraph 1 of the Statute of the Court.

[4] Article 36, paragraph 2 of the Statute of the Court.

[5] Article 40 of the Statute of the Court.

[6] Article 38, paragraph 5, Rules of Court.

This is important to underline since it it is easier for States to consent to the Court's jurisdiction when they are not facing a dispute. Such an observation is supported by evidence as illustrated by the following figures. Out of 151 contentious cases submitted to the Court, a large majority, i.e., 111 cases were instituted on the basis of compromissory clauses or optional declarations while only 19 were instituted on the basis of special agreements or compromise. In brief, more than 70% of cases were instituted on these two bases.[1]

In this paper, I will deal in turn with compromissory clauses and Optional Clause declarations, before offering some concluding remarks.

2. Compromissory Clauses

The term 'compromissory clauses' can refer to two different categories of instruments.

The first category concerns treaties (general or regional) which exclusively address disputes settlement mechanisms. Through these treaties, States express their consent to submit to the Court disputes which might arise between the contracting parties. It may be noted that these treaties, such as the European Convention for the Peaceful Settlement of Disputes of 1957 and the General Act for the Pacific Settlement of International Disputes of 1928, have been invoked in a limited number of cases.[2] Nevertheless, they may play an important role as a basis for the jurisdiction of the Court, as can be observed from the *Jurisdictional Immunities of the State* case between Germany and Italy.[3]

One particular treaty, however, stands out. The Pact of Bogotá of 1948 has proved to be a very successful regional agreement which, so far, has been used as a legal basis to establish the competence of the Court in 16 cases.[4] Despite the important role played by such treaties, they have not

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[1] The other 21 cases were either based on *forum prorogatum* (2 cases) or other means (such as Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case and *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)*) or were applications for revision or request for interpretation (9 cases).

[2] For instance, *see Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*; s*ee also Certain Property (Liechtenstein* v. *Germany)*.

[3] *See Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*.

[4] *See Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* (discontinued on 19 August, 1987); *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (discontinued on 27 May, 1992); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras); Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua); Maritime Dispute (Peru* v.

been adopted with respect to all regions of the world; only for Latin-American and European countries. In bringing stability to neighboroud relations, they play a major role in bolstering relations amongst regional States and their adoption in all parts of the world should be promoted.

The second category of instruments containing compromissory clauses are provisions contained in treaties (bilateral and multilateral) regulating various substantive matters ranging from investments, human rights, environment to the law of the sea. Often, these clauses provide that the Court will be competent to settle disputes arising out of the implementation or application thereof.

As an illustration, one may refer to the *Treaty of amity, economic relations and consular rights* between the United States of America (USA) and Iran of 1955,[1] the Convention on the Elimination of All Forms of Racial Discrimination of 1965,[2] or the Optional Protocol Concerning the Compulsory Settlementof Disputes attached to the Vienna Convention on Consular Relations.[3]

Currently, there are more than 250 treaties, that have been notified to the Registry of the Court, after being registered, classified, or recorded by the Secretariat of the United Nations, which contain clauses providing for the jurisdiction of the Court in contentious proceedings.[4] In the last 20 years,

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Chile); *Aerial Herbicide Spraying (Ecuador* v. *Colombia)* (discontinued on 13 September, 2013); *Certain Questions concerning Diplomatic Relations (Honduras* v. *Brazil)* (discontinued on 12 May, 2010); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia); Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)*; *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia).*

[1] *See Oil Platforms (Islamic Republic of Iran* v. *United States of America)*; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America).*

[2] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates).*

[3] *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*; *Jadhav (India* v. *Pakistan).*

[4] International Court of Justice, Treaties (https://www.icj-cij.org/en/treaties).

59 contentious cases have been instituted before the Court. Out of these 59 contentious cases, in 26 cases, States exclusively relied on compromissory clauses to found the basis of the Court's jurisdiction.

At the same time, it should be highlighted that there is a large variety of dispute settlement mechanisms stipulated in the compromissory clauses of such treaties. Some provisions simply indicate that the Court may be competent if the parties so agree, other clauses enable any party to the treaty to institute proceedings unilaterally, some clauses provide for prior requirements - such as negotiations - before a case could be brought to the Court. This shows that compromissory clauses are a flexible tool that can be modelled to adjust to the needs of the States concerned.

Another characteristic of compromissory clauses is the crucial role they play in ensuring compliance with treaty commitments. In the absence of such clauses, there is no access to international justice – either the International Court of Justice or another international jurisdiction – in the event of a dispute. Given the importance of these clauses, it would be advisable for treaty negotiators to consider this matter at a earlier stage of the negotiations.

I should also stress the fact that, whenever a robust mechanism for the settlement of disputes is included in a treaty, it is extensively used by States to settle their disputes peacefully. This is illustrated by Part XV of UNCLOS. Pursuant to Article 287, paragraph 1, of the UNCLOS a State may choose the ICJ as its preferred forum. Although, so far no case has been submitted to the Court on the basis of declarations made under Article 287, 28 States have (out of the 168 States Parties), until now, opted for the ICJ. States should keep this option in mind, particularly in light of the fact that, under Article 287 of UNCLOS, if the parties to a dispute have not made declarations selecting the same forum, arbitration is the default mechanism.[1]

3. Declarations accepting the Compulsory Jurisdiction of the Court

As of today, out of 193 member States of the UN, 74 States have submitted Optional Clause declarations recognizing the compulsory jurisdiction of the Court.[2] Since 1947 and until now, 27 contentious cases have been based on applications solely based on the Optional Clause declarations.

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[1] Article 287, paragraph 5, of UNCLOS.

[2] International Court of Justice, *Declarations recognizing the jurisdiction of the Court as compulsory* (https://www.icj-cij.org/en/declarations).

As stated by the Court (in its Judgement in the *Military and Paramilitary Activities),* States are "absolutely free" to make or not to make such unilateral declaration.[1] At the same time, States should be aware of this option to be able to take an informed decision as to whether they wish to make such a declaration. The organisation of the Round Table event by the Ministry of Foreign Affairs of Romania is a wonderful opportunity to promote the use of this tool. In this connection, it should be noted that 10 States have chosen to make such a declaration in the past 20 years,[2] bringing the number of States in the world entrusting the Court to settle their dispute to almost 40%.

An Optional Clause declaration is a flexible tool. It provides States with the ability to exclude certain matters from the jurisdiction of the Court, thereby increasing the willingness of States to accept the compulsory jurisdiction of the Court for non-excluded matters. This flexibility is crucial to the Optional Clause declarations system. Out of 74 declarations, 55 contain a reservation. To quote the Court, State "may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it",[3] to which we could add reservation *ratione materiae*, excluding disputes concerning with a specific subject-matter, or *ratione personae*, excluding disputes with certain State or group of States, such as the Commonwealth. Of course, to remain meaningful, a declaration should keep the door open to a number of disputes.

4. Concluding Remarks

To conclude, I would say that, in the recent experience of the Court, there are both positive and less positive developments.

On one hand, we may note that there is an apparent "decline" in compromissory clauses, in the sense that fewer compromissory clauses are

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[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para.59.

[2] Côte d'Ivoire (2007); Djibouti (2005); Dominic Commonwealth (2006); Equatorial Guinea (2017); Marshall Islands (2013); Slovakia (2004); Timor-Leste (2012); Romania (2015); Lithuania (2012); Latvia (2019).

[3] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para.59.

being negotiated and inserted in treaties.[1] In addition, several States have withdrawn from certain multilateral treaties in recent times.[2]

But, on the other hand, the recent activity of the Court is evidence of the vitality of both compromissory clauses and the Optional Clause declarations system: more cases than ever have been brought before the Court in the last decades. Since 2010, 31 contentious cases were brought before the Court, of which 15 cases (48%) were based the jurisdiction of the Court on compromissory clauses, 6 cases (19%) on Optional Clause declarations, and 4 cases (13%) invoked both bases.[3]

I could therefore conclude on a positive tone. Nevertheless, it is important to keep in mind that nothing is to be taken for granted in international relations. That means that it is extremely important to promote and explain the advantages of these tools as a way of providing States with a forum for the settlement of disputes, whenever they need it. In this respect, I am grateful to the Ministry of Foreign Affairs of Romania for taking the initiative of organizing this event to promote the jurisdiction of the Court.

[1] The recent multilateral treaties to include such clause, for instance, are the International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in 2010, or the 2013 Minamata Convention on Mercury which provides for an "opt-in" compromissory clause that stipulates that a State party "may declare" that it recognizes either arbitration or compulsory jurisdiction of the Court. *See* Filippo Fontanelli, *Once burned, twice shy. The use of compromissory clauses before the International Court of Justice and their declining popularity in new treaties*, 104 RIVISTA DI DIRITTO INTERNATIONALE 1, 7-20 (April 2021).

[2] Such as Colombia from the Pact of Bogotá in 2012, or the United States from the 1955 Treaty of Amity with Iran.

[3] The remaining contentious cases were either applications for revision or requests for interpretation (4 cases) or were based on special agreements (3 cases).

Contribution by Professor Alain Pellet[1]

As I thought I have been a bit isolated in this eminent panel since contrary to the other panelists who, with, it is true, important nuances, showed much sympathy in favour of optional declarations under Artcle32, paragraph 2, of the Statute of the ICJ while I am quite reluctant to encouraging States to accept, not the jurisdiction of the Court on a case-by-case basis but the optional clause system which I find too rigid. And I note that all the States represented by these most distinguished diplomats have made declarations under Article 36.

That said, when I received the invitation to participate in this exchange of views, from my old friend, Minister Bogdan Aurescu, I warned him that, given the theme of this encounter, it might not be very advisable to have me on the panel. But the organisers have maintained their invitation, which I think is to their credit.

And I wish to make another *caveat*: my country, France does not accept the compulsory jurisdiction of the Court. However, even if in this matter I am supportive of its position, I am not a spokesman for the French Government. As a professor, I tended, in the now distant past, to consider the compulsory jurisdiction of the Court as a kind of panacea, a Holy Grail that would make international law look like "real" law. It was practice (above all, a great deal of ICJ practice) that convinced me that such a purely doctrinal belief was not self-evident and that there were more dangers and counter-indications to accepting the Court's compulsory jurisdiction than one might think *a priori* and indeed than most of my excellent colleagues seemed to think - even though they are all particularly eminent practitioners.

I don't want to take the floor too long. I only wish to stimulate discussion by giving some arguments that go against the quasi-consensual view that has characterised the other presentations – with the noticeable

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exceptions of the Legal Adviser of the United Nations and the Registrar of the ICJ who showed more balanced views – maybe because their functions induce them to some caution in view of the reluctance of a majority of States to make the 36, paragraph 2, declaration, maybe by realism dictated by the observation of the real world.

I have three main objections (in large part overlapping):

- *First*, accepting the compulsory jurisdiction is, more often than not, a tactical step which does not correspond to a real adhesion to the idea of compulsory jurisdiction;

- *Second*, this tactical purpose is often reflected in the number and scope of reservations which quite often empty the acceptance of the allegedly compulsory jurisdiction of any real significance;

- *Third*, optional declarations do not guarantee a better compliance with the Courts' judgments.

First then: a tactical step.

When and why does a State subscribe to the optional clause?

- Sometimes because it genuinely trusts in the virtue of compulsory jurisdiction. This is probably the case of several Latin American countries many of which have been the strongest supporters of the compulsory jurisdiction of the Court.

But it also happens that:

- You will make a "surprise declaration" because you have a case and want to take the opponent to the Court on a particular case (there are several well-known precedents: *India v. Portugal*; *Cameroon v. Nigeria*; or *mutatis mutandis* recently *Ghana v. Côte d'Ivoire*); of course there is a way out for the potential Defendant State: specify that jurisdiction is not accepted for a single case and, above all, impose a time limit (usually one year) between the declaration and the referral to the Court (as is done in the Norwegian declaration). Or

- You will make a "propaganda declaration": you accept the Court's jurisdiction but with so many reservations that you, in fact, empty it from any substance.

And this is my *second* point: if you take just the three declarations made by way of examples, by Norway, Romania and the United Kingdom

- Norway has only one, rather sophisticated reservation, but it concerns the subject-matter on which that country probably has the biggest risk of being attracted before the ICJ: the law of the sea;

- Romania's 2015 declaration includes no less than six reservations, two are technical (preservation of other agreed modes of settlements and twelve months prior notice) but the four others concern very important matters: the protection of the environment, "any dispute relating to, or connected with, hostilities, war, armed conflict…" or "connected with, the use for military purposes of the territory of Romania" and, more classically, the indeterminate and rather obscure reservation concerning "any dispute relating to matters which by international law fall exclusively within the domestic jurisdiction of Romania".

- And, last but not least, the United Kingdom, which prides itself on being the only permanent member of the Security Council to accept the Court's compulsory jurisdiction and has repeatedly amended its declaration, usually to limit its scope, and whose current declaration (from 2017), which also includes six reservations that largely render it meaningless; these reservations concern notably: "any dispute with the government of any other country which is or has been a Member of the Commonwealth" (indeed one of the most likely situation lending itself to settlement by the ICJ); "any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question." an obviously unrealistic – not to say absurd condition); moreover, "[t]he Government of the United Kingdom also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, *and with effect as from the moment of such notification*, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added", which aims at permitting the UK to escape any possible judgment if it deems it appropriate.

Clear cut acceptances of the Court's jurisdiction are indeed most respectable but I sometimes wonder whether case-by-case sincere acceptance of judicial settlement are not, together, more dignifying and more efficient than "optional acceptations" with numerous and important reservations inspired by questionable ulterior motives.

This takes me to my *third remark*: States subscribing the optional clause are not less inclined to challenge the Court's jurisdiction when a case

is brought against them. There are many examples of this in the practice before the Court, some of which being downright caricatural.

This is the case of the frankly outrageous behaviour of Kenya in the case introduced against it by Somalia. In that case, brought before the Court by Somalia on the basis of the respective optional declarations of both Parties, Kenya, as was its right raised preliminary objections, which were dismissed by a quasi-unanimous Court's Judgment of 2017. It is from this point onwards that Kenya's conduct became quite outrageous and it multiplied unacceptable procedural demands to obstruct the Court's exercise of jurisdiction, even going so far as to dismiss its first team of counsel to give itself time to conduct a diplomatic campaign to pressure Somalia to withdraw its application, ending up refusing to participate in the oral proceedings on futile pretexts. One can also think of the procedural incidents multiplied by Nigeria to delay the settlement of the case brought by Cameroon on the basis of the optional declarations of the two States (it is true that the Cameroonian declaration was filed less than a month after the filing of its application...).

And, if you go back to more remote times, you may also have in ind the (bad) examples of France I the *NuclearTests* cases or the USA in the "big case" against Nicaragua, who challenged the jurisdiction of the Court then having lost on the preliminary objections withdrew their optional declaration.

Now, far from me to dispute the importance of peacefully settling disputes in general and more specifically by the ICJ, even if it is not the panacea. My only point is that Article 36, paragraph 2, declarations might not be the best way to reinforce the role of the Court.

First, what is important is not the *means* of settlement of disputes, but the settlement itself, provided it is effective and fair; there is no inherent superiority in legal settlement. It can happen that the very mention of a seizin of the World Court acts as a red rag, while a conciliation solution might achieve satisfactory results.

Second, it is completely unrealistic to expect that a universal acceptation of the Court's jurisdiction could be obtained in a foreseeable future all the more so that when I speak of acceptation, I mean real acceptance, without reservation limiting or excluding *de facto* the Court's jurisdiction.

Third, I maintain that *considered* consent to jurisdiction is more important than tactical or propaganda optional declarations. Referring

disputes to the Court is not an end in itself: what matters is that they are effectively and definitely settled.

To that end, the other bases for the Court's jurisdiction are at least as– and probably more – efficient than Article36, paragraph 2, declarations. This is partially true of compromissory clauses included in a more general treaty. However, very unfortunately, they are more and more rarely included in contemporary conventions. Moreover, these clauses have the same disadvantages as optional declarations: inserted into the treaty at the time of its conclusion, they are rejected by the respondent State when they are invoked in relation to a specific dispute; or, but this is only the other side of the coin, they are used in a totally artificial manner to bring secondary disputes to the attention of the Court, as a pretext for pleading the "real" issue: The multiplication of cases allegedly directed against violations of the Convention on the Prevention and Elimination of Racial Discrimination is one of the manifestations of this drift, which can be compared, for example, to the cases directed by Ukraine against Russia on various pretexts when in reality it is the re-annexation of Crimea that is at issue.

Ultimately, it is probably when the Court's jurisdiction is accepted on a case-by-case basis, in full knowledge of the facts, that it can be exercised most effectively, either when this acceptance is given jointly in a special agreement concluded for the purpose, or when it is given by the respondent State following a referral made on the basis of Article 38, paragraph 5, of the Rules of Court "when the applicant State proposes to find the jurisdiction of the Court upon a consent thereto yet to be given or manifested...". In these two hypotheses, the acceptance of jurisdiction, more real, better informed, will be the guarantee of a more effective implementation of the judgment to be made. And it is to be regretted, that this possibility is not much used and even more rarely accepted by the requested State.

This all to say that, while a strong supporter of the Court's jurisdiction, I deem it more important to encourage effective and efficient recourse to all means of peaceful settlement of disputes than to focus exclusively on the ICJ, and, when it comes to the Court, to insist on the necessity of the real will of the States concerned to submit themselves to the Court's jurisdiction.

Contribution by Sir Michael Wood[1]

This is an important initiative by Romania.

I recall a most interesting and enjoyable seminar, held in Bucharest, about Romania and the International Court of Justice (and the PCIJ).[2] That was just before Romania submitted its declaration accepting the Court's compulsory jurisdiction under the optional clause in 2015.

The UN Legal Counsel has just reminded us of various efforts by the UN Secretary-General and the UN General Assembly to encourage States to accept the compulsory jurisdiction of the Court.

Other initiatives have also been mentioned, including in the Council of Europe[3] and the Swiss-led initiative a few years ago to prepare a *Handbook on accepting the jurisdiction of the International Court of Justice*.[4]

I note in passing that the UNGA's Sixth (Legal) Committee has still not taken forward the proposal to update the excellent UN *Handbook on the peaceful settlement of disputes between States*, the first edition of which was published as long ago as 1992. I find the reasons why one or two States have blocked this incomprehensible. I hope that an update can be prepared in time for the 30th anniversary of this publication.

So, this initiative is not the first of its kind, and—as is always the case with international law—we need to be realistic. It has to be recognised that the results of these various prior initiatives have been quite meagre. Some States are perhaps more willing than they were to accept compromissory

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[2] For the proceedings, see B. Aurescu (ed.), *Romania and the International Court of Justice* (2014).

[3] Recommendation CM/Rec (2008)8 of the Committee of Ministers of the Council of Europe on the acceptance of the jurisdiction of the International Court of Justice.

[4] UN Office of Legal Affairs – Codification Division, *Handbook on accepting the jurisdiction of the International Court of Justice: Model clauses and templates* (July 2014), available at https://www.eda.admin.ch/publikationen/en/eda/voelkerrecht/handbook-jurisdiction-international-court.html The group of countries involved in this project comprised Switzerland, the Netherlands, Uruguay, the United Kingdom, Lithuania, Japan and Botswana.

clauses in international conventions,[1] and to refer disputes to the Court by special agreement.[2] But little progress has been made towards acceptance of the Court's compulsory jurisdiction under the optional clause. Seventy-four optional clause declarations are not a lot, especially when one recalls that not many are as 'clean' as that of The Netherlands (which only excludes disputes arising out of situations or facts that took place no earlier than one hundred years before the dispute is submitted to the Court).[3] Indeed, there have been steps backward if one looks at recent revisions of optional clause declarations. In any event, we should not regard acceptance of the optional clause as the unique touchstone of a State's commitment to the Court (or to international law more broadly), notwithstanding its symbolic importance.[4] Even where States have accepted jurisdiction, failure to appear before the international courts and tribunals seems to be on the increase.

There is an understandable reluctance on the part of Governments to place foreign policy decisions in the hands of international judges. There are also, no doubt, more specific considerations that are particular to the case or matter at hand. Rolf Einar Fife has already mentioned the importance of confidence, though I do not necessarily fully share his assessment. There is indeed a need for States to have confidence in international courts and tribunals if they are to accept to submit to their jurisdiction.

Confidence may be affected both by a court or tribunal's decisions on the substance of the law, and its decisions on jurisdiction.

As to substance, decisions that are viewed as poorly reasoned or politically motivated – and here I am referring to international courts and tribunals generally – are hardly likely to inspire confidence in judicial settlement, among Governments at least.

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[1] In recent decades, particularly following the end of the Cold War, a number of States have accepted compromissory clauses in multilateral treaties, sometimes by withdrawing reservations to such clauses. This trend should be encouraged.

[2] For an impressive example, where the special agreement was approved by referendum in both countries, see the ICJ case *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize*). To date, 19 cases have been submitted to the Court by means of special agreements.

[3] Declaration of The Netherlands dated 21 February 2017.

[4] In the words of the late John Merrills, a perceptive observer of the optional clause: "Those who devised the Optional Cluse hoped for a culture shift in international affairs which obviously has not yet occurred. But as States continue to make declarations under Article 36 (2) and to use them, that worthy ideal retains its value.": J.G. Merrills, 'Does the Optional Clause Still matter?', in K.H. Kaikabad and M. Bohlinder (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* (Martinus Nijhoff Publishers, 2009) 431 at 454. For a much earlier, moderately sceptical overview of the optional clause, see C.H.M. Waldock, 'Decline of the Optional Clause', 32 *British Year Book of International Law* (1955-1956) 244.

Confidence is also likely to vary depending on the subject-matter, which explains at least some of the exceptions included in optional clause declarations: for example, the exclusion of 'any dispute regarding to the protection of the environment',[1] or, perhaps more understandably, of law of the sea disputes from time to time excluded under the United Nations Convention on the Law of the Sea.[2] It was often argued in the past that international law was not clear enough, either generally or as regards specific points, for States to subject themselves to judicial settlement. This is less true today, though may still be a concern in fields such as the use of force.

Other exceptions may be explained by a State's concerns about the legality of its actions, which may, for example, be carried out with a view to changing the existing law.

In the present context, confidence depends perhaps above all upon the soundness of an international court's decisions on jurisdiction. There have been some rather questionable decisions on jurisdiction in the last few years, by the ICJ and by other international courts and tribunals. When a court is seriously divided in finding that it has jurisdiction, one may wonder whether it has approached the question with the necessary caution. As the UN Legal Counsel has just reminded us, for Governments it remains fundamental that consent is the basis of jurisdiction.

Hersch Lauterpacht put it very well, in words that are as true today as when they were written:

> *Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it.*[3]

There are two final points that anyone seeking to encourage States to accept compulsory jurisdiction of international courts and tribunals should bear in mind.

First, there is the need for States to draft titles of jurisdiction with great care, whether they are *compromis* (special agreements) submitting disputes to an international courts or tribunals, general dispute settlement treaties, compromissory clauses in bilateral and multilateral treaties, declarations accepting compulsory jurisdiction under the Optional Clause, or even acceptances of jurisdiction by way of *forum prorogatum.* At the very least,

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[1] For example, Romania's declaration of 23 June 2015; Slovakia's declaration of 28 May 2004; Poland's declaration of 25 March 1996.

[2] For example, Norway's declaration of 24 June 1996.

[3] *The Development of International Law by the International Court* (Stevens & Sons, 1958) 91.

careful drafting may limit disputes over jurisdiction. A particular point to bear in mind when drafting compromissory clauses for multilateral treaties is that an opt-out clause is likely to be much more effective than an opt-in clause.[1]

Second, as Judge Xue wrote over a decade ago,

> *When States opt for diplomatic process to settle their disputes, it should not be deemed solely as political expediency, or negation of the rule of law. Legal regulations may bring about stability and predictability, but they may also unduly cause rigidity and unfairness in State relations, particularly when conditions are not ripe for normative arrangements.*[2]

In other words, submission to the jurisdiction of international courts and tribunals is by no means the only way to settle international disputes, and not always the most effective way.[3]

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[1] For an example of an opt-out clause, see article 27 of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property.

[2] H. Xue, 'The Role of the ILC's Work in Promoting Peace and Security – Definition and Evaluation', in G. Nolte (ed.), *Peace through International Law: The Role of the International Law Commission* (Springer, 2009) 183 at 185.

[3] One may recall, in this regard, the successful UNCLOS conciliation at the Permanent Court of Arbitration [2016-10] *Timor Sea Conciliation (Timor-Leste* v. *Australia).*

Contribution by Rolf Einar Fife[1]

The freedom of choice of mechanisms for peaceful settlement of international disputes and the promotion of the compulsory jurisdiction of the International Court of Justice

1. Origins

Ten widely recognized jurists convened on 16 June 1920 in the newly constructed Peace Palace in The Hague to discuss the establishment of a Permanent Court of International Justice (PCIJ). Entrusted by the Council of the League of Nations pursuant to Article 14 of the Covenant of the League of Nations to make proposals to this effect, the Advisory Committee of Jurists contributed decisively to the framing of issues and to the elaboration of the draft Statute for such a court. By the time it had concluded its debates on 24 July 1920, the committee's proposals also included the compulsory jurisdiction of such a court, i.e. a generalized obligatory system of jurisdiction. That suggestion was, however, rejected in the ensuing examination of the draft Statute by the League of Nations. Instead, it was provided for an optional clause permitting States to voluntarily accept in advance the compulsory jurisdiction of the Court in a sphere delimited by Article 36 of the Statute.[2]

After the Second World War, in the context of the elaboration in 1945 of the Statute of the International Court of Justice (ICJ), a "predominant sentiment" seemed to have emerged among States in favour of a less limited compulsory jurisdiction. This was recognized in the explanatory material

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[2] Report on Draft of Statute for an International Court of Justice Referred to in Chapter VII of the Dumbarton Oaks Proposals (Jules Basdevant, Rapporteur), submitted by the United Nations Committee of Jurists to the United Nations Conference on International Organization at San Francisco, U.N. Committee of Jurists, XIV Documents of the United Nations Conference on International Organization San Francisco, 1945 (1945), 840-841.

prepared by the Committee of Jurists meeting at Washington in April 1945 prior to the San Francisco Conference.[1] Nevertheless, "the counsel of prudence was not to go beyond the procedure of the optional clause inserted in Article 36, which has opened the way to the progressive adoption, in less than 10 years, of compulsory jurisdiction by many States which in 1920 refused to subscribe to it".[2] Ultimately, "the chain of continuity" between the PCIJ and the ICJ was not broken.[3] Manley O. Hudson wrote in 1946 that "from a practical point of view it is more accurate to say that the same Court will go on under a new name and with but slight modifications of its basic Statute".[4]

General acceptance of the compulsory jurisdiction of the court thus continues to require a voluntary declaration under the optional clause of the Statute. The question of compulsory jurisdiction had been considered a "stumbling block" for adherence to the Statute, notably for the United States Senate in 1945, in the words of Senator Vandenberg. However, he added that the optional clause would "leave its development to evolution".[5] This left scope for considerations of policy - and continues to do so. To reach out to policymakers and a broader public in this context, it may be useful to speak of "acceptance of the compulsory jurisdiction" of the Court, as mere references to the notion of the "optional clause" do not necessarily convey the essence of this topic – at least not to the many who are not familiar with the system of the Statute. More importantly, the scope that is left to considerations of policy fully justifies a continuous discussion on how to promote broader acceptance of compulsory jurisdiction by States. This was usefully done in the Bucharest Virtual Round Table of 24 June 2021 dedicated to promoting the jurisdiction of the International Court of Justice.

2. The prospective analysis of preconditions for broad acceptance of the Court's jurisdiction

In 1920, Francis Hagerup was among the members of the Advisory Committee of Jurists. He had twice been prime minister of Norway, was a

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[1] Loc.cit.

[2] Id.

[3] "*The creation of the new Court will not break the chain of continuity with the past*." Report of the Rapporteur (Nasrat Al-Farsy, Iraq) of Committee IV/1 to Commission IV of the San Francisco Conference, Doc. 913, IV/1/74 (1), 12 June 1945, XIII Documents of the United Nations Conference on International Organization San Francisco 1945 (1945), 384.

[4] Manley O. Hudson, "*The Twenty-Fourth Year of the World Court*", 40 American Journal of International Law, 1946, 1.

[5] Congressional Record, 27 July 1945, 8247, quoted by Preuss, "*The International Court of Justice and the Problem of Compulsory Jurisdiction*", XIII Bulletin, Department of State, No. 327, 30 September 1945, 471 at 477; see Whiteman, Digest of International Law, Department of State Publication, 1971vol. 12, at 1286.

former president of the *Institut de droit international* and had been head of the Norwegian delegation to the 1907 Second Peace Conference in The Hague. To him a standing world court would contribute to the realization of the objectives of the latter conference, highlighting interaction between peace and justice. He advocated that "(t)he principle of the equality of States is the Magna Charta of the smaller States" and vigorously spoke in favour of responding to ambitious expectations of international justice.[1] At the same time, his "experience with the difficulties which arose at the 1907 Peace Conference when it attempted to define cases in which arbitration should be compulsory had a great weight with him".[2] The French member, Albert de La Pradelle, spoke in favour of giving the Court the widest possible competence as concerns both the obligation of States to make use of it and the actual rules to be applied by it. However, there was a definite proviso: "(t)he only limit should be imposed by practical possibilities; they should go as far as they felt sure the States would follow them".[3] Certain other interventions, including by the former US Secretary of State Elihu Root, expressed in various contexts doubts that States would sign on if the court were to be given too broad a competence.[4] The proposal to include compulsory jurisdiction, as strongly advocated by the Swiss member, Loder,[5] was as mentioned ultimately not adopted by the League of Nations. The questions raised in the committee remain relevant. However, in 1920 they were characterized by *prospective* reflection on a future institution, without the benefit of experience of the court's actual activity and of its reception by States.

3. **"Eppur si muove" (*And yet it moves*)**[6]

A hundred years later, we do have the benefit of experience gained. On the occasion of the one hundredth anniversary in 2020 of the first standing World Court, the president of the International Court of Justice, Abdulqawi Ahmed Yusuf, summarized the continued relevance and viability of the Statute, as originally debated by the Advisory Committee of Jurists in 1920:

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[1] Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920 with Annexes (Van Langenhuyen Brothers, 1920) 103.

[2] Advisory Committee of Jurists, op.cit. 227. The Swiss member of the Committee, Loder, was in favour of compulsory jurisdiction for all disputes, op.cit. 224, while the British member, Lord Phillimore, was against, id. 225.

[3] Advisory Committee of Jurists, op.cit. 312.

[4] Advisory Committee, op.cit., see for instance Annex 2, Statement of Fernandes referring to Root, 345.

[5] See note 9 supra.

[6] Words attributed to Galileo Galilei (1564-1642) as to the fact that the Earth actually moves (around the Sun).

"If time is the ultimate test of quality, the work of the drafters of the Statute was certainly a masterpiece. Even if we were to draft a new Statute today, I do not think that we would find much to change in its provisions."[1]

The best argument today for accepting the compulsory jurisdiction of the ICJ and the inclusion of compromissory clauses in bilateral and multilateral treaties might be summarized as the demonstrated *quality* of that Court's work. In 2021, the International Court of Justice has been celebrating its 75th anniversary.[2] A lot of ground has been covered since, among others, Herbert W. Briggs in 1960 described issues of *confidence* in the predictability of the International Court of Justice.[3] While questions related to actual State practice in support of the Court are admittedly still raised,[4] Alain Pellet has recently underlined that the Court's legitimacy is related to the *trust* upheld in her by States, and that the Court's actual role and importance goes in reality beyond the mere wording of the relevant provisions in the Statute.[5] Confidence and trust in the Court have been highlighted in its annual reports to the General Assembly of the United Nations.[6] In 2012, the Security Council of the United Nations issued a statement that "called upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute".[7]

The perceived enhanced predictability giving rise to confidence may have several reasons, as also highlighted by quantitative empirical studies related to the evolution in citation practice and related working methods of the Court.[8]

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[1] Speech to the General Assembly of the United Nations on 10 December 2020, https://www.icj-cij.org/public/files/press-releases/0/000-20201210-STA-01-00-EN.pdf, accessed on 25 August 2021).
[2] Speech of Judge Joan E. Donoghue, President of the International Court of Justice (Video Message), https://www.icj-cij.org/public/files/press-releases/0/000-20210419-STA-01-00-EN.pdf, (accessed 25 August 2021).
[3] Herbert W. Briggs, "*Confidence, Apprehension and the International Court of Justice*", in Proceedings of the American Society of International Law at its annual meeting, Vol. 54 (April 28-30, 1960), Cambridge University Press, 25-38.
[4] E.g., Bimal N. Patel, "*Recommendations on the enhancement of the Role and Effectiveness of the International Court of Justice and State Practice: The Gap between Recommendations and Practice (1971-2006)",* in 11 Singapore Yearbook of International Law and Contributors, 2007, 99-122.
[5] Alain Pellet, *Le droit international à la lumière de la pratique – L'introuvable théorie de la réalité, Cours général de droit international public*, Académie de droit international de La Haye, 2021, at 487 p. 292.
[6] See e.g. A/75/4, para. 15.
[7] S/PRST/2012/1.
[8] Wolfgang Alschner and Damien Charlotin, "*The Growing Complexity of the International Court of Justice's Self-Citation Network*", in European Journal of International Law, vol. 2, issue 1, February 2018, 83-112 (https://doi.org/10.1093/ejil/chy002, accessed 16.8.2021).

4. Consideration of concrete recommendations to promote broader acceptance

After the collapse of the Berlin Wall, Elihu Lauterpacht reminded us in 1991 that "(t)he question of whether it is desirable for States to accept the compulsory jurisdiction of judicial organs is not a new one".[1] Several initiatives have been taken over the years to promote a broader use of the International Court of Justice and other means for the peaceful settlement of such disputes.[2]

While the question of how to promote broader use of the Court is not new, and it is safe to assume that it will remain on the agenda for future discussions, there are continuously lessons to be drawn from efforts devoted to this end. This author should like to recall a particular experience from the Council of Europe, in 2007 and 2008, when Michael Wood was chairing the Council of Europe Committee of Legal Advisers on Public International Law, the CAHDI, and this author was its vice-chair. Based on an idea by Sir Michael a proposal was circulated by the Chair and Vice-Chair to the Committee in March 2007.[3] It concerned Model Clauses for accepting the compulsory jurisdiction of the Court to promote the very aims under discussion. A revised draft was considered in September 2007 by the CAHDI. [4] In July 2008, the Committee of Ministers of the Council of Europe eventually adopted a recommendation to this effect.[5] The initiative in the Council of Europe was taken some years after that incredibly productive decade of the 1990s in terms of advances made, including institution building, in international law. With hindsight, we might say that those years were particularly aptly named the United Nations Decade of international law, and truly deserved that characterization.

The recommendations made did not depart from the principle that States maintain a broad freedom of choice when resorting to mechanisms for the

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[1] Elihu Lauterpacht, *Aspects of the Administration of International Justice*, Hersch Lauterpacht Memorial Lectures, Cambridge, Grotius Publications Ltd., 1991, 25.

[2] See, for example, the relevant resolutions of the General Assembly of the United Nations, including, among others, resolutions 171 (II) in 1947, 3232 (XXIX) in 1974, 44/23 of 1989, 61/37 of 2006..

[3] Council of Europe, CAHDI (2007) 4 rev, Strasbourg, 22 March 2007, "*International Court of Justice: Model Clauses for Accepting the Compulsory Jurisdiction*", Document submitted by the Chair and Vice-Chair of the CAHDI.

[4] Council of Europe, CAHDI (2007) 8 rev, Strasbourg, 22 June 2007. Preliminary Draft Recommendation, Document prepared by the Secretariat of CAHDI, with Appendix to the draft Recommendation containing "*Model Clauses for Possible Inclusion in Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute*".

[5] Council of Europe, Recommendation CM/Rec (2008) 8 of the Committee of Ministers to member States on the acceptance of the jurisdiction of the International Court of Justice, adopted by the Committee of Ministers on 2 July 2008 at the 1031s meeting of the Ministers' Deputies.

peaceful settlement of disputes, which remains the overarching and essential objective. The recommendations noted that there is no requirement to make any reservations when accepting the jurisdiction of the International Court of Justice. It put forward suggestions as to using basic and clear language when accepting the Court's jurisdiction. This did not exclude, however, the consideration of certain issues or situations that may give rise to particular reluctance or caution on the part of States, in order to reduce the risk that such considerations prevent the acceptance of the jurisdiction of the Court for other cases.

In addition to the need for clauses concerning the possibility of termination (or amendment) of a declaration of acceptance, a long-standing dispute may give rise to caution in policy considerations (sometimes this situation may be referred to as a "stale conflict"). Concerns might in this regard be alleviated by including a clause excluding prior disputes. It is not contrary to international law to phrase an acceptance of the compulsory jurisdiction of the ICJ in such a way that it would avoid giving it a retro-active effect ("clause excluding prior disputes"). Moreover, there may ways to provide additional clauses ensuring that recourse may instead be given to other methods of settlement for particular issues ("settlement by other method"). Furthermore, concerns may arise as to so-called "surprise applications". There may be ways to formulate an acceptance in such a way as to prevent giving effect to the acceptance by any other party deposited just before filing an application bringing the dispute before the Court.

Among later initiatives, the one taken by several States in 2014 to publish a Handbook on Model Clauses and Templates is particularly noteworthy.[1] It is freely available on the web – and builds further on the idea of how to help, how to assist states in a very practical manner when considering how to approach the issue.

No attempt was made to exclude the possibility of other clauses. However, it is fair to state that the way one approaches this issue has a bearing on legal clarity, but also as to overarching, essential goal of strengthening predictability and usefulness both to States and the international community at large. What would be detrimental, is of course if caution, which in some cases may be perceived to be politically necessary, were to translate into obscurity of declarations. Lack of clarity in such cases

[1] *Handbook on Accepting the Jurisdiction of the International Court of Justice – Model Clauses and Templates*, 2014, Switzerland, the Netherlands, Uruguay, the United Kingdom, Lithuania, Japan and Botswana. It was published by the Swiss Confederation and made available on the internet by the Office of the Legal Adviser of the United Nations Secretariat at https://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf, (accessed 25 August 2021).

has rarely prevented recourse to dispute settlement, and in some cases spending an unforeseen amount of resources in dealing with such lack of clarity. Fifty shades of grey may here, so to speak, neither be conducive to responding to the needs of States or of the international community.

Moreover, reservations which in reality "carve out" the contents of the declaration by vaguely referring to domestic jurisdiction and leaving it to domestic authorities to decide on its contents, are controversial and may undermine the purposes of legal certainty and predictability. The lively debate in the wake of the so-called "Connally Amendment" reservation of the United States in 1946, which provided a model for several other States, was instructive.[1] That amendment excluded from the acceptance of the compulsory jurisdiction of the Court disputes regarding matters which are essentially within the domestic jurisdiction of the State concerned, as determined by that State.[2]

When attempting to encapsulate key messages from discussions that have regularly taken place as regards declarations of acceptance of the compulsory jurisdiction of the Court, in one simple formula, it might be to use plain language and promote as much clarity as possible.

[1]See for instance the classic article of Herbert W. Briggs, "*The United States and the International Court of Justice: A Re-Examination*", 53 American Journal of International Law, 1959, 301-318.
[2] Op.cit. 301.

Articole
Articles

Les Métamorphoses de la Commission du Danube

Ion GÂLEA, Carmen ACHIMESCU [1]

Résumé **:** *Une des premières organisations internationales, la Commission Européenne du Danube a été créée pour règlementer la navigation sur le Danube Maritime à une époque où le transport fluvial des marchandises revêtait une importance stratégique pour ses membres fondateurs. Actuellement, il est difficile de qualifier de stratégique l'activité de navigation fluviale. Pourtant, le transport de certaines marchandises sur le Danube présente encore un certain intérêt, notamment dans la proximité des ports maritimes de certains Etats riverains.*

Mots-clés **:** *Commission du Danube, transport fluvial, reforme*

1. Introduction

Les premières organisations internationales au sens contemporain du terme sont apparues au début du XIXème siècle, ayant pour but de garantir la liberté de navigation sur certains fleuves internationaux d'importance stratégique. La toute premiere organisation internationale – la Commission Centrale du Rhin - est apparue en 1815, suite à l'Acte Finale du Congrès de Vienne, qui avait établi le principe de la liberté de navigation sur les fleuves internationaux. D'autres « commissions fluviales » ont été créés par la suite,

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afin de gérer la navigation sur les fleuves Elbe (1821), Douro (1835) et Pad (Po) (1849)[1].

Les Commissions du Danube furent créées en 1856, suite au Traité de Paix de Paris, conclu à la fin de la guerre de Crimée, après la défaite de l'Empire Russe[2]. Conformément à ce Traité, le Danube a été divisée en deux secteurs : le Danube maritime - initialement entre Isaccea et les embouchures du fleuve et le Danube fluviale – le secteur adjacent. La navigation sur chaque secteur était régie par une commission internationale :

- La Commission Européenne du Danube, compétente pour régir la navigation sur le Danube maritime, était composée de l'Angleterre, l'Autriche, la France, la Prusse, la Russie, la Sardaigne et l'Empire Ottoman.
- La Commission compétente pour régir la navigation sur le Danube fluviale était composée des représentants de l'Autriche, de Bavaria, de la Sublime Porte, de Württemberg, ainsi que des commissaires des trois Principautés danubiennes (nommés aves l'accord de la Sublime Porte).

Il convient pourtant de rappeler que l'évolution du droit fluvial jusqu'à présent n'a pas abouti à la reconnaissance d'un droit général de navigation des non-riverains ; des exceptions existent dans le cas de certains fleuves internationaux, tels le Rhin, le Danube ou le Niger. Une telle liberté générale de naviguer ne peut être accordée que par concession unilatérale ou par convention expresse[3].

Actuellement, le régime juridique de la navigation sur le Danube est régi par la Convention de Belgrade de 1948. Le lien entre l'actuelle Commission du Danube, crée en 1948, et les commissions fluviales créées au XIXème siècle est tellement faible qu'à peine pourrait-on parler d'une véritable continuité. Pourtant, sur la page web de l'organisation, l'attachement à la

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*Ce thème a fait l'objet d'une intervention dans le cadre de la Journée d'étude « La réforme des/dans les organisations internationales », organisée par le Groupe de Recherche sur l'Action Multilatérale à Paris, le 15 novembre 2021. Certains passages ont été préalablement publiés par les auteurs dans une étude intitulée *L'apparence de modernité de la Convention de Belgrade de 1948 relative à la navigation sur le Danube*, in *In honorem Flavius Antoniu Baias, Hamangiu, Bucarest, 2021*.

[1] Malcolm N. Shaw, "*International Law*", Cambdridge University Press, 2017, p. 28; Jan Klabbers, "*An Introduction to International Institutional Law*", Cambdridge University Press, 2015, p. 17.

[2] Articles XV-XIX du Traite de Paris du 30 mai 1856 ; voir également Jan Klabbers, "*An Introduction to International Institutional Law* ", *supra.*

[3] Les règles d'Helsinki de 1966 ainsi que celles de Berlin de 2004 (International Law Association) ne reconnaissent le droit de navigation sur les fleuves internationaux qu'aux Etats riverains ; Jean-Marc Thouvenin, "*Droit international général des utilisations des fleuves internationaux*, in *Actualité du droit des fleuves internationaux*", *supra*, pp.107-139.

tradition est fortement affirmé : « *Dans son activité la Commission du Danube se fonde sur une riche expérience historique en matière de réglementation de la navigation sur les fleuves internationaux d'Europe et les meilleures traditions des commissions fluviales internationales, notamment la Commission européenne du Danube instituée par le Traité de Paris de 1856.* » [1]

La fragmentation du régime juridique de la navigation sur le Danube après la seconde guerre mondiale, cumulée avec la diminution substantielle du volume de la navigation fluviale fait de la commission du Danube une organisation internationale inadéquate au présent (II). Pourtant, avant le déclin, la Commission du Danube a connu une longue période de gloire et sa pratique institutionnelle a été une source d'inspiration pour les organisations internationales modernes (I).

2. La période de gloire de la Commission du Danube (1856-1948)

Les pouvoirs exorbitants que la Commission Européenne du Danube a exercés entre la fin du XIXème siècle et le début du XXème siècle ont été comparés à ceux des Communautés Européennes[2] et l'organisation a été surnommée par la doctrine « un Etat fluvial »[3]. Afin d'assurer la liberté de navigation fluviale, celle-ci percevait des taxes et effectuait des travaux sur les voies navigables. Elle avait sa propre flotte, sa propre police et ses propres tribunaux ; ses règlements étaient directement applicables dans les Etats riverains et à toute personne qui utilisait le fleuve.

Au fil du temps, plusieurs traités successifs ont apporté des modifications au statut du fleuve, ainsi qu'au fonctionnement des Commissions. Ayant au cœur le principe de la liberté de navigation, le régime juridique du fleuve est progressivement devenu très complexe, à cause des multiples références croisées incluses dans les traités en question (1). En 1927, la CPIJ a rendu un avis consultatif afin de clarifier le fondement et l'étendue des compétences exercées par la Commission Européenne du Danube (2).

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[1] https://www.danubecommission.org/dc/fr/commission-du-danube/, vu le 4 novembre 2021.

[2] Anton F. Zeilinger, *apud* Alina Miron, "*The Modernity of the 1927 Advisory Opinion on the Jurisdiction of the European Commission of the Danube between Galatz and Braila*", in Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Hamangiu, Bucarest, 2014, p. 78.

[3] Jean Spiropoulos, *apud* Alina Miron, supra, p.78.

3. L'extension progressive de la compétence *ratione loci* de la Commission Européenne du Danube

Le Traité de paix de Berlin de 13 juillet 1878 a modifié les dispositions du Traité de Paris relatives à la Commission Européenne du Danube, au sens où un jeune Etat riverain, la Roumanie, allait y être "représenté"[1]. En même temps, le Traité de Berlin élargissait la compétence territoriale initiale de la Commission Européenne du Danube en amont d'Isaccea, jusqu'à Galatzi[2]. Le Traité prévoyait aussi un délai pour que les Etats parties se mettent d'accord sur l'extension du mandat de la Commission, ainsi qu'à l'égard d'un éventuel élargissement des pouvoirs de la Commission ou des éventuelles modifications de statuts considérées nécessaires[3].

Ultérieurement, le 10 mars 1883, les Etats parties au Traité de Berlin ont signé à Londres, un accord pour prolonger le mandat *ratione temporis* de la Commission Européenne du Danube pour encore 21 ans, avec une clause de tacite reconduction pour une période supplémentaire de 3 ans. La compétence *ratione loci* de la Commission était également élargie jusqu'à Braila, en amont de Galatzi. Il convient de rappeler que le secteur maritime sur lequel la Commission Européenne Danube exerçait ses pouvoirs exorbitants était entièrement situé sur le territoire roumain.

La Roumanie, Etat riverain au Danube maritime et désormais membre de la Commission Européenne du Danube, n'avait pas été appelée à participer à l'adoption du Traité de Londres. Par ailleurs, elle refusait l'élargissement de la juridiction de la Commission Européenne sur le secteur Braila – Galatzi, en étant pourtant être disposée à permettre que la Commission y exerce certaines prérogatives techniques. Cela fût le moment de déclanchement d'un différend entre la Roumanie, d'un côté, et les autres Etats membres de la Commission Européenne du Danube, d'un autre.

Le différend lié à la compétence territoriale de la Commission Européenne du Danube a persisté après la première guerre mondiale. Le Statuts Définitif du Danube de 1921 a maintenu la division entre le Danube maritime et le Danube fluviale, chaque secteur étant géré par une Commission distincte :

- La Commission Européenne, composée par la Grande Bretagne, la France, l'Italie et la Roumanie, compétente pour le Danube maritime,

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[1] Article LIII du Traité de Berlin du 13 juillet 1878.
[2] *Ibidem.*
[3] *Ibidem,* article LIV.

- La Commission Internationale, composée par la Grande Bretagne, la France, l'Italie et tous les Etats riverains, compétente pour le Danube fluviale.

Concernant la competence territoriale de chaque Commission, les négociations entre la Roumanie et les autres Etats membres n'ont abouti qu' à une solution de compromis. Le Traité de Versailles prévoyait, de manière très ambigüe, que la Commission regagnait les pouvoirs qu'elle exerçait avant la guerre[1]. Le Statuts Définitif est également resté ambigu à l'égard de la compétence *ratione loci*. Son article 5 prévoyaient que les pouvoirs de la Commission Européenne du Danube seraient exercés « comme avant la guerre ». L'article 6 rappelait que *« la compétence de la Commission européenne s'étend, dans les mêmes conditions que par le passé et sans aucune modification à ses limites actuelles, sur le Danube maritime, c'est-à-dire depuis les embouchures du fleuve jusqu'au point où commence la compétence de la Commission internationale ».*

Chaque partie pouvait donc continuer à soutenir ses propres arguments. La Roumanie, d'un côté, essayait consolider sa souveraineté territoriale. D'un autre côté, les autres Etats parties au Statuts Définitif du Danube présentaient des arguments en faveur de la légalité de l'extension des compétences *ratione loci* de la Commission Européenne du Danube sans l'accord formel de l'Etat riverain.

4. La validation jurisprudentielle des compétences élargies de la Commission Européenne du Danube

En 1927, ce différend a finalement fait l'objet d'un Avis consultatif de la Cour Permanente de Justice Internationale[2]. La Cour a conclu que, dans le secteur Galatzi-Braila, la Commission Européenne du Danube avait les mêmes compétences que dans le secteur (incontesté) entre Galatzi et embouchures du fleuve. L'argument retenu par la Cour avait été celui de l'exercice *de facto* des compétences de la Commission, acceptées de manière tacite par les autorités roumaines [3]. Par conséquent, la limite de la compétence territoriale de la Commission Européenne du Danube était établie pour le secteur navigable entre les embouchures du fleuve et Braila. Le secteur navigable adjacent (de Braila à Ulm) relevait de la compétence de la Commission Internationale du Danube.

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[1] Article 346 du Traite de Paix de Versailles du 28 juin 1919.
[2] Avis consultatif *Juridiction de la Commission Européenne du Danube entre Galatzi et Braila*, CPIJ, 8 décembre 1927.
[3] *Ibidem*, p. 17.

Quant à l'inefficacité de l'opposition de la Roumanie à l'extension des compétences de la Commission, il est nécessaire d'analyser le fondement de ces compétences, à savoir un faisceau de traités adoptés en XIXème siècle, époque à laquelle le principe de l'égalité souveraine des Etats n'avait que peu de place dans le droit international[1]. Au moment où la décision d'établir un régime juridique international de la navigation sur le Danube a été prise (1856), la Roumanie n'existait pas comme État indépendant. Les Principautés danubiennes étaient des Etats dépendantes de l'Empire Ottoman. Pour décider si le régime du Danube établi au XIXème siècle par les grands pouvoirs était opposable à la Roumanie, la CPIJ a donc dû analyser le processus normatif de l'époque respective.

Ainsi, la Cour a souligné le fait qu'au XIXème siècle il ne suffisait pas qu'un Etat ait un intérêt légitime de participer à un certain traité ; il fallait encore que celui-ci soit coopté par les autres pouvoirs. Cela explique que la Roumanie n'ait pas participé aux conférences de Berlin et de Londres non plus, même si en 1878 cet Etat était déjà indépendant.

D'un autre côté, la Roumanie a été partie aux Traites de Versailles de 1919 et au Statuts Définitif de 1921. Les références aux traités antérieurs que l'on retrouve dans l'article 41 du Statuts Définitif rendaient ceux-là opposables à la Roumanie, car le Statut du Danube aurait été « incomplet » en tant que tel. De cette manière, le consentement de la Roumanie quant à l'internationalisation du régime juridique du Danube a pu être formellement identifié.[2]

Par la suite, la CPIJ avait analysé, en première, une série d'éléments relatives au fonctionnement des organisations internationales, notamment ***le principe de l'attribution et de la spécialité des compétences***. : *« Lorsque, dans un seul et même espace, il y a deux autorités indépendantes, la seule méthode qui permette d'établir une démarcation entre leurs compétences respectives consiste à définir les fonctions qui leur sont dévolues. Comme la Commission européenne n'est pas un État, mais une institution internationale pourvue d'un objet spécial, elle n'a ' que les attributions que lui confère le Statut définitif, pour lui permettre de remplir cet objet ; mais elle a compétence pour exercer ces fonctions dans leur plénitude, pour autant que le Statut ne lui impose pas de restrictions »* [3].

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[1] Alina Miron, *supra*, p.73.

[2] Nous pouvons observer que le raisonnement de la Cour n'a pas eu pour fondement l'opposabilité *erga omnes* ou la théorie de la succession des Etats, qui ne se sont développées que dans la seconde moitié du XXème siècle ; voir Alina Miron, *supra*, p. 76.

[3] Avis consultatif *Juridiction de la Commission Européenne du Danube entre Galatzi et Braila*, supra, para. 64.

Nous pouvons observer que l'Avis consultatif de 1927 a été « très innovateur pour son époque », en affirmant avec force le principe de l'attribution des compétences (ou de la spécialité), de la personnalité juridique internationale et de l'autonomie fonctionnelle des organisations internationales, le principe des compétences implicites et, finalement, le rôle de la pratique institutionnelle dans l'interprétation des traités. Ainsi, une fois établie l'opposabilité d'un réseau de traités à la Roumanie, la validité du droit institutionnel qui en résulte a pu être justifiée par l'acquiescement tacite à une pratique institutionnelle, qui représente à la fois une source des pouvoirs de l'organisation et des obligations de Etats membres[1].

5. Le déclin de la Commission

A partir du Traite de paix de Paris de 1856, le régime juridique du Danube a fait l'objet des traités conclus à la fin de chaque guerre européenne importante. A l'issue de la deuxième guerre mondiale, le transport fluvial représentait encore un instrument important du commerce international. Par conséquent, il était important de réaffirmer des garanties internationales de la liberté de navigation sur le fleuve. Une Conférence sur le régime juridique du Danube fût organisée à Belgrade en 1948, après le refus initial de l'URSS d'inscrire la question du Danube dans les négociations de paix. Sept Etats riverains y ont participé – l'Union Soviétique, l'Ukraine, la Roumanie, la Bulgarie, l'Yougoslavie, la Hongrie et la Tchécoslovaquie. Les Etats Unis et les Etats non riverains parties au Statut du Danube de 1921 – la Grande Bretagne et la France - ont également participé à la Conférence[2].

Le projet de Convention proposé par l'URSS n'a été voté que par les Etats riverains. Les Etats Unis ont voté contre et ont proposé que le fleuve soit administré sous l'égide de l'ONU. La Grande Bretagne et la France ont refusé de participer au vote, ayant soutenu que le Statut du Danube de 1921 restait toujours en vigueur jusqu'à ce qu'un nouveau texte reçoive l'accord unanime.

Etant en supériorité numérique, les délégations des Etats communistes ont facilement réussi à imposer la nouvelle Convention, qui a remplacé le Statut de 1921. Le patrimoine de l'ancienne Commission Européenne du Danube a été transféré à « l'Administration fluviale spéciale du Bas-Danube », créée conformément à l'article 2 du Protocol additionnel à la

[1] Alina Miron, *supra*, p. 83.
[2] Marc Cogen, "*An Introduction to European Intergovernmental Organizations*", Routledge, 2016, p. 239.

Convention signé à Belgrade, le 18 août 1948[1], malgré les protestations de la France, de la Grande-Bretagne et des Etats-Unis. Les reproches n'ont pas tardé, la Conférence de Belgrade étant qualifié de « *caricature de conférence internationale sous domination totalitaire* » et de « *chapitre très malheureux dans la longue histoire de la navigation sur le Danube* »[2].

Si l'adoption de la Convention de Belgrade de 1948 peut être considérée un recul du multilatéralisme dans la gestion de la navigation sur le Danube (1), la question qui se pose est si l'effort de reformer le système de Belgrade serait justifié, vu l'importance de plus en plus réduite du transport fluvial (2).

6. Les Commissions du Danube sont mortes – vive la Commission du Danube

Conformément à la Convention de Belgrade, les deux Commissions du Danube – la Commission Internationale et la Commission Européenne, ont été remplacées par une organisation internationale unique, dénommée tout simplement la Commission du Danube. Composée exclusivement des Etats riverains, celle-ci ne garde que des compétences à caractère techniques et ne dispose que d'un pouvoir de formuler des recommandations afin de maintenir la navigabilité du fleuve et d'assurer ainsi l'application de la Convention de 1948.

Après 1948, la navigation sur le Danube est restée libre entre Ulm et la Mer Noire, suivant le bras de Sulina et le Canal Sulina aux embouchures du fleuve[3], les Etats parties à la Convention de Belgrade ayant l'obligation d'assurer la navigabilité des voies qui se retrouvent dans leur secteur. Même si la Convention de 1946 précisait expressément que son champ d'application s'étendait jusqu'à Ulm, l'Allemagne n'en devint partie que 50 ans plus tard, en 1998. Toujours en 1998, l'application *ratione loci* de la Convention fut révisée – entre Kelheim et les embouchures.

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[1] « *Il est constaté que le régime appliqué antérieurement à la navigation sur le Danube, ainsi que les actes qui prévoyaient l'établissement de ce régime et, en particulier, la Convention signée à Paris le 23 juillet 1921, ne sont plus en vigueur. Tous les biens ayant appartenu à l'ancienne Commission Européenne du Danube sont transférés à l'Administration fluviale spéciale sur le Bas Danube créée conformément à l'article 20 de la Convention à laquelle se rapporte le présent Protocole.* »

[2] La Grande Bretagne, la France et les Etats Unis ont protesté vis-à-vis l'idée que le Statuts Définitif cesse d'exister et les biens de la Commission Européenne du Danube soit transférés sans l'accord de tous les Etats parties au Statut de 1921, voir Joseph L. Kunz, "*The Danube Regime and the Belgrade Convention*", American Journal of International Law, 1/1949, pp. 110-111.

[3] La Convention indiquait expressément un champ d'application *ratione loci* entre Ulm et les embouchures ; pourtant, l'Allemagne n'est devenue partie qu'en 1998, quand le champ territorial d'application a été ajouté - entre Kelheim et les embouchures.

En même temps, chaque Etat a le droit de régir l'entrée et la navigation dans ses ports. Les bras de Kilia et de Saint Georges ont été laissés en dehors du champ d'application de la Convention de Belgrade et, par conséquent, ils ne font pas l'objet de la liberté de navigation. Le régime juridique du bras de Kilia, qui représente la frontière commune entre la Roumanie et l'Ukraine, est actuellement régi par le Traité de Cernauti, conclu par les deux Etats le 17 juin 2003. Ce traité prévoit un droit de navigation réservé uniquement aux pavillons des deux Etats parties, qui ont accès au chenal navigable principal, peu importe le trajet de la frontière. Les autres pavillons doivent respecter la ligne de la frontière d'Etat.

La Convention de Belgrade de 1948 a donc été favorable à la fragmentation du régime juridique du Danube. Cela s'est également concrétisé dans la mise en œuvre de deux administrations spéciales mixtes, ainsi que par la possibilité de mettre en place des accords bilatéraux concernant l'activité de celles-ci[1]. Le régime international des deux administrations spéciales crées en 1948 - Administration fluviale du Bas-Danube et L'Administration fluviale des Portes de Fer fût néanmoins abolie très vite[2]. A présent, la Roumanie gère seule le secteur inferieur du Danube, car l'Administration fluviale du Bas-Danube est un organe directement subordonné au ministère des transports roumain[3]. Le complexe hydro-énergétique construit dans le secteur des Portes de Fer est régi par des accords bilatéraux entre la Roumanie et la Serbie[4].

Adoptée au début de la guerre froide, lorsque l'URSS dominait la zone de l'Europe centrale et de sud-est, la Convention de Belgrade porte « la marque de son époque »[5], à savoir la rivalité entre l'URSS et les démocraties occidentales. Il est vrai que le principe de la liberté générale de navigation n'a pas été remis en cause, mais la diminution des pouvoirs de la Commission du Danube ainsi que « l'élimination » de la France et la Grande-Bretagne - fondateurs du régime international du Danube, pourraient soulever des doutes quant à la légalité de la Convention de 1948[6].

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[1] Articles 21-23.
[2] Ion Diaconu, "*Pour une nouvelle Convention concernant la navigation sur le Danube*", in Alain Pellet, Bogdan Aurescu (ed.), *Actualité du droit des fleuves internationales*, Pedone, Paris, 2010, pp153-161 ; Cosmin Dinescu, " *La révision de la Convention de Belgrade relative au régime de la navigation sur le Danube*", Revue roumaine de droit international 3/2006, pp. 170-174.
[3] *Ibidem.*
[4] Deux accords ont été signés le 30 septembre 1963, respectivement le 19 septembre 1976.
[5] Ion Diaconu, *supra.*
[6] *Ibidem.*

Il est vrai que, du point de vue numérique, les Etats parties à la Convention de Belgrade en 1948 étaient suffisantes pour imprimer un caractère international ou au moins régional aux règles de navigations sur le Danube. Pourtant, le déséquilibre des forces des Etats parties était évident. Ainsi, l'absence d'un véritable contre-pouvoir par rapport à l'URSS nous conduit à la conclusion que, malgré le nombre important des parties, le système de la Convention de Belgrade a marqué, à l'époque de son adoption, un recul du multilatéralisme en ce qui concerne la gestion de la navigation sur le Danube. Concernant l'argument que l'évolution du droit international fluvial imposait la participation des riverains à la prise des décisions concernant le Danube, il ne faut pas oublier qu'en 1948 l'Autriche et l'Allemagne n'étaient pas parties à la Convention de Belgrade - elles ne sont devenues parties qu'en 1955, respectivement en 1998[1].

Pour conclure sur ce point, il faut pourtant admettre que la Convention de Belgrade correspond aux tendances du droit international fluvial contemporain - gestion de la navigation sur les fleuves internationaux par les Etats riverains. Pourtant, le principe de la liberté de navigation pour tous était opposable *erga omnes* et a dû être maintenu au cœur du nouveau régime juridique du Danube. L'adoption de la convention de Belgrade a permis à l'URSS de se débarrasser du Statut Définitif du Danube de 1921, faute de toute obstacle technique - lors de l'adoption du Statut Définitif, l'évolution historique du droit des traités n'avait pas encore saisi l'importance de prévoir en avance des techniques d'amendement[2]. Il est difficile de dire si le droit coutumier antérieur à la deuxième guerre mondiale permettait la conclusion des actes d'amendement *inter partes*[3] et si l'actuel article 41 (1) b) de la Convention de Vienne de 1969 sur le droit des traités reflète le droit coutumier de l'époque entre-deux-guerres. Si l'on revient à l'esprit de l'article 41, nous devons tout simplement admettre qu'il exprime un principe général de droit, à savoir la liberté contractuelle… sans porter préjudice aux droits des tiers.

7. La Commission du Danube – maître honoraire d'un secteur économique en déclin

[1] Hanna Bokor-Szego, "*La Convention de Belgrade et le régime de navigation sur le Danube*", AFDI, vol. 8, 1962, pp. 192-205, https://www.persee.fr/doc/afdi_0066-3085_1962_num_8_1_964 .

[2] Athina Chanaki, **"***L'adaptation des traités dans le temps*", Bruylant, Bruxelles, 2013, https://www.persee.fr/doc/afdi_0066-3085_2012_num_58_1_4726_t42_0949_0000_4.

[3] Le projet « Harvard » de 1935, ainsi que la Convention de la Havane de 1928 sont silencieux sur ce point ; https://legal.un.org/ilc/documentation/english/a_cn4_23.pdf , p. 244 et s.

La dynamique politique et territoriale de l'Europe centrale et de sud-est a fait qu'après 1990 de nouveaux Etats riverains revendiquent leur participation à la Commission du Danube[1]. Cela a eu pour résultat l'adoption d'un protocole additionnel en 1998 qui, sans modifier la substance des dispositions antérieures, prévoyait que la Moldavie, la Croatie, la Slovaquie, ainsi que (finalement) l'Allemagne devenait parties à la Convention de Belgrade. N'étant plus riveraine, la Fédération Russe est quand même restée partie à la Convention et membre de la Commission du Danube en qualité de continuateur de l'URSS. A partir de 2017, plusieurs Etats, directement intéressés à la navigation danubienne ou aux autres domaines de la navigation interne européenne, ont acquis le statut d'observateur, conformément au Règlement de procédure de la Commission du Danube[2]: la Belgique, la Grèce, la Géorgie, le Chypre, la Macédoine de Nord, les Pays-Bas, la Turquie, la France, le Monténégro et la République Tchèque[3].

En 2001, à l'initiative de la Roumanie, un processus de révision sur le fond de la Convention de Belgrade a été démarré[4]. Les principaux éléments qui ont été invoqués en faveur de la révision concernaient l'adhésion de la plupart des Etats riverains à l'Union Européenne et leurs compétences partagés en matière de transports[5], ainsi que la nécessité d'harmoniser les conditions de navigation sur le Rhin et sur le Danube afin de mieux valoriser le canal Rhin-Main-Danube inauguré en 1993[6]. En même temps, les Etats parties à la Convention de Belgrade ont été d'accord que l'indépendance des fonctionnaires de la Commission du Danube devrait être garantie afin d'assurer la cohérence et l'unité d'action de l'organisation. Cela montre qu'il y a néanmoins un consensus sur la nécessite d'une réforme substantielle et institutionnelle, malgré les divergences liées à l'opportunité d'ouvrir un nouveau secteur du Danube Maritime à la navigation internationale.

Peu après le début des négociations, en 2006, l'Ukraine avait annoncé qu'elles souhaiteraient élargir l'application de la Convention au Bras de

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[1]Ion Diaconu, *supra*.

[2] Règles de Procédure de la Commission du Danube, Budapest, 2017 - Décision de la 29e session de la Commission du Danube en date du 26 mars 1971 (doc. CD/SES 29/28), avec les modifications ultérieures, dont la plus récente Décision de la 88e session en date du 9 juin 2017 (doc. CD/SES 88/23), para. 38.

[3]https://www.danubecommission.org/dc/fr/commission-du-danube/pays-observateurs-a-la-commission-du-danube/ (3 novembre 2021).

[4] Ion Gâlea, "*Manuel de Droit international public*", Hamangiu, Bucarest, 2021, pp.306-311

[5] Myriam Benlolo-Carabot, "*Vers un droit fluvial communautaire ?* " in Alain Pellet, Bogdan Aurescu (ed.), *Actualité du droit des fleuves internationales*, Pedone, Paris, 2010, pp.161-175.

[6] Ion Diaconu, *supra.*

Kilia, suivant un trajet de sortie en mer par le canal Canal Bystroe. Cet aspect semble un prolongement du différend ukrainien-roumain lié à la construction du Canal Bystroe en Ukraine, qui aurait provoqué des préjudices à l'écosystème du Delta du Danube[1], ainsi que la perturbation du débit du fleuve qui ont rendu nécessaires des efforts supplémentaires de la Roumanie pour assurer sa profondeur à la sortie du canal Sulina[2].

Mis à part les risques environnementaux, ainsi que la possibilité de créer une brèche dans la sécurité des frontières de l'UE, il est toujours difficile de justifier l'extension du champ d'application de la Convention sur le bras de Kilia. Cette sortie vers la mer est presque 200 km plus longue que la sortie sur le bras de Sulina. En plus, sa navigabilité ne pourrait être assurée que suite à des travaux assez couteuses [3].

Des divergences d'opinion se sont également révélées concernant les pouvoirs que la Commission du Danube devrait exercer. La proposition de rendre obligatoires certaines décisions de la Commission a d'abord généré des soucis pour les Etats membres de l'Union Européenne, qui craignait les éventuels conflits de normes.

En premier lieu, des incompatibilités entre le droit de l'Union et la Convention du Danube peuvent subsister en ce qui concernent les compétences[4]. Ainsi, l'article 3 (2) TFUE prévoit que la compétence de l'Union pour conclure un accord international est exclusive lorsque la conclusion d'un accord soit nécessaire pour réaliser, dans le cadre des politiques de l'Union, l'un des objectifs visés par les traités. Comme la Cour l'a affirmé dans son Avis 1/76 :

> « *Chaque fois que le droit communautaire a établi dans le chef des institutions de la communauté des compétences sur le plan interne en vue de réaliser un objectif déterminé, la communauté est investie de la compétence pour prendre les engagements internationaux nécessaires à la réalisation de cet objectif, même en l'absence d'une disposition expresse à cet égard. Cette conclusion s'impose notamment dans tous les cas où la compétence interne a déjà été utilisée en vue d'adopter des mesures*

[1] Les relations internationales entre la Roumanie et l'Ukraine étaient tendues à l'époque, voir le Rapport de la Commission internationale d'enquête sur le canal Bystroe, 2004 ou le différend relatif au plateau continental dans la Mer Noire qui a donné suite à un arrêt CIJ en 2009 ; Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana-Roxana Olteanu, "*Scurtă culegere de jurisprudență/Memento de jurisprudence*", Hamangiu, 2018.
[2] Ion Diaconu, *supra.*
[3] *Ibidem.*
[4] Augustina Dumitrașcu, Oana Salomia, "Droit de l'Union Europeenne II", Universul Juridic, Bucarest, 2020, p. 56

s'inscrivant dans la réalisation des politiques communes. Elle n'est cependant pas limitée à cette éventualité. Si les mesures communautaires internes ne sont adoptées qu'a l'occasion de la conclusion et de la mise en vigueur de l'accord international, ainsi qu'il est envisagé en l'espèce par la proposition de règlement soumise au conseil par la commission, la compétence pour engager la communauté vis-à-vis des Etats tiers découle néanmoins de manière implicite des dispositions du Traité établissant la compétence interne, pour autant que la participation de la communauté à l'accord international, comme en l'occurrence, est nécessaire à la réalisation d'un des objectifs de la Communauté ». [1]

En deuxième lieu, les incompatibilités pourraient apparaître sur des questions de « fond ». Une question potentielle – sans proposer une analyse ou une réponse – pourrait être si la liberté de navigation au sens de l'article 1 de la Convention de Belgrade donne la possibilité à un prestataire de services de transport d'un pays tiers d'offrir des services de transport fluvial entre les ports de deux Etats membres[2].

Par ailleurs, il faut rappeler que l'Union a déjà exercé sa compétence dans le domaine de la navigation sur les eaux intérieures, en adoptant les Directives 2009/100 et 2016/1629. Théoriquement, cela signifie que les Etats membres devraient se retirer de la Convention de Belgrade. Ce problème pourrait pourtant être surmonté, car les Etats intéressés se sont mis d'accord sur la participation de l'Union Européenne en tant que partie à une Convention relative au Danube substantiellement révisée [3].

Pour l'instant, la reforme a été mise en attente.

8. Conclusion

L'histoire de la Commission Danube est tellement ancienne qu'elle pourrait très bien commencer par « il était une fois ». Il était une fois une personne morale jeune, belle, riche et puissante. Tous les grands pouvoirs de l'Europe mettaient à sa disposition des ressources incroyables, afin qu'elle les aide à régner sur les eaux du Danube. Plus le temps passait, plus elle grandissait et prospérait. Elle était le reflet de l'équilibre des empires de l'époque. Comme tout équilibre est provisoire, cette belle histoire finit après la deuxième guerre mondiale. La rupture avec le passé, brutalement opérée, a causé un vieillissement prématuré de notre belle, riche et puissante

[1] Voir également l'affaire AETR, 31 mars 1971 et les affaires Open Skies, 5 novembre 2002
[2] Myriam Benlolo-Carabot, *supra.*
[3] Ion Diaconu, *supra.*

héroïne. Spoliée des outils juridiques qui lui assuraient jadis le contrôle de la navigation sur le fleuve, elle assista à l'emprise des riverains sur les eaux du Danube. Malgré les apparences, ce fut un moment de déséquilibre et de déclin du multilatéralisme, car un des riverains était en mesure d'imposer sa volonté et de se débarrasser de tous ceux qui pouvaient représenter un contrepoids.

Quelques décennies plus tard, les eaux du Danube devinrent de moins en moins intéressantes, car d'autres voies de communication étaient désormais plus efficaces. A présent, la Commission de Danube est une vénérable personne presque bicentenaire, qui a une histoire de vie fascinante.

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Legal Implications Regarding the Use of Autonomous Weapons in Armed Conflicts and Law Enforcement Operations

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Abstract: *The objective of this study is to emphasise the distinction between instances where autonomous weapons systems (AWS) are used. The article is structured on the dichotomy of law enforcement operations and armed conflict respectively, pointing out the differences in legal norms applied in each instance when autonomous weapons are used. While the technology is relatively new, there have been several authors, especially within the framework of international organisations, who have written on the subject. However, few, if any, have emphasised the parallels between International Humanitarian Law and International Human Rights Law with regards to the use of autonomous weapons systems. This study aims at stressing the importance of correctly classifying the circumstances where AWS are used and how these circumstances impact the legality of such use.*

Key-words: *Autonomous Weapons Systems; International Humanitarian Law; International Human Rights Law; Armed Conflict; Law Enforcement Operation.*

1. Introduction

The use of artificial intelligence in war and law enforcement is not a scenario exclusive to science fiction anymore. Serious advancements in this field have created a global tendency to eliminate the human factor from war and rely predominantly on machinery. This has a practical explanation to it, since it is less costly, both in terms of resources and time, and governments are less likely to experience the negative pressure of war-weariness due to high casualties. Even in domestic law enforcement, the use of artificial intelligence is being increasingly favoured, particularly in surveillance. This

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global trend, although beneficial in practical terms, poses some serious legal questions that ought to be clarified before the use of dangerous weaponry may cause grave law violations and permanent harm to individuals.

2. Definition

While there is no international consensus on what Autonomous Weapons Systems ('AWS') are, for the purpose of this article AWS will be defined as "weapons systems that are characterised by varying degrees of autonomy in the critical functions of acquiring, tracking, selecting, and attacking targets; and, to some extent or even fully, removal of human involvement from the decision-making process to use lethal force".[1]

3. Law Enforcement vs Armed Conflict

An essential distinction that must be made before delving further into the subject regards the circumstances in which AWS are to be employed. The importance of this distinction lies in establishing what rules of law are applicable. While International Humanitarian Law ('IHL') governs instances of armed conflict, in cases of law enforcement, the governing law is human rights law. The latter is a stricter set of provisions, limiting the use of force against persons as much as possible. Humanitarian law has a more permissive approach to the use of lethal force. Thus, finding out the particularities of the instances when AWS are used is inextricably bound to the analysis of the legality of AWS. In other words, in order to find out the criteria one should use to assess the legality of AWS, one must first verify if that particular case is an armed conflict or a law enforcement operation.

The Geneva Conventions offer a definition of armed conflict in Article 2: cases of declared war or of any other armed conflict which may arise between two or more states, and partial or total occupation of the territory of a state. These provisions, together with Article 1 of Additional Protocol I to the Geneva Conventions[2], define the concept of international armed conflict. This type of conflict is what most people associate with the conventional war: war between states or wars of liberation.

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[1] ICRC Expert Meeting, "Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons" (2016); Ozlem Ulgen, "Definition and Regulation of LAWS", *UN GGE LAWS* (2018).

[2] "Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

There is, however, also another, more 'subtle' kind of armed conflict, which is the non-international armed conflict. The concept has been defined as a "situation in which there is protracted resort to armed force between governmental authorities and organised armed groups".[1] In assessing the level of organisation, one needs to take into consideration whether the combatants are organised as a proper military force. Among the factors considered are the possession of a "command structure and disciplinary rules and mechanisms within the group," the "ability to plan, coordinate and carry out military operations, including troop movements and logistics," "define a unified military strategy and use military tactics," and "to speak with one voice and negotiate and conclude agreements".[2] Moreover, next to the condition that the opposing belligerent must be an organised armed group, a non-international armed conflict depends on whether the intensity of violence is such that has surpassed a certain threshold of "protraction".[3]

Non-international armed conflicts are the ones that pose the most problems in practice, since they are harder to distinguish from cases of law enforcement. An example where the lines were somewhat blurred was the La Tablada Case, where the Inter-American Commission of Human Rights ruled that an attack on an Argentinian military base that lasted 30 hours was an armed conflict, and not just an internal disturbance[4]. A Commission of Experts convened by the International Committee of the Red Cross reinforced the decision with the following observation: “The existence of an armed conflict is undeniable, in the sense of Article 3, if hostile action against a lawful government assumes a collective character and a minimum of organisation.”[5]

4. Autonomous Weapons Systems in Armed Conflicts

AWS are not specifically regulated by any IHL Treaty. However, a first set of criteria under the scrutiny of which they fall is that governing any new weapon. Article 36 of the Additional Protocol I to the Geneva convention sets the obligation for states to determine if the employment of a new weapon is prohibited any rule of international law. Below are several

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[1] International Law Commission, "*Draft Articles on the Effects of Armed Conflicts on Treaties*", *Yearbook of the International Law Commission*, Vol. II, Part Two (2011) ('ILC Draft Articles'), Art 2(b); See also Prosecutor v Tadic ICTY-94-1-A (Judgment) (2 October 1995) [70].

[2] Prosecutor v. Haradinaj, ICTY IT-04-84-T (Judgment) (3 April 2008) [60].

[3] ILC Draft Articles [8].

[4] Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137: Argentina, OEA/ Ser/L/V/II.98, Doc. 38, (6 December 1997) [55].

[5] ICRC, "Reaffirmat*ion and Development of the Laws and Customs Applicable in Armed Conflict*" (May 1969), p. 99.

principles derived from IHL that must be discussed in relation to a new weapons system, such as AWS.

When employing lethal force, combatants need to act respecting the principles of proportionality and necessity.[1] The former requires that the harm to civilians must not be excessive relative to the expected military gain,[2] while necessity refers to the decision to resort to force as a last resort.[3] With regard to these two principles, an argument in favour of AWS is human error. Although trained, human beings need to decide on the extent of used force under conditions of extreme stress. Often, feelings such as hunger, fear, or hate being added to the general stress of finding oneself in the midst of battle. For these reasons, human judgement may be seriously impaired, and the combatants may act more according to their instincts, rather than rational decisions.[4] During the war between Iran and Iraq in 1987, 37 sailors died as a result of such human error. The USS STARK, part of U.S. forces acting in support of Iraq failed to identify a missile threat from an Iraqi fighter jet that mistook the STARK for an Iranian ship.[5] Moreover, as an overreaction of human error following the tragic event, the USS VINCENNES shot down an Iranian civilian Airbus A300 killing everyone onboard.[6] For obvious reasons, none of this applies to AI. Instead, it would be able to simply select and engage targets irrespective of any physiological limitations. Therefore, actions of AWS prove to be more effective, less biased, and generally more efficient in producing the intended outcome regardless of external factors. This applies if we simply accept the prerequisite that feelings such as compassion or empathy ought not to play any part in assessing proportionality, which would thus exclusively rely on a clear and objective set of criteria to evaluate the level of impending danger and to act accordingly.

Other authors are against this theory, stating that when assessing proportionality, apart from a set of rational criteria, human beings employ

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[1] Ion Galea, "La riposte a une cyberattaque terroriste releve-t-elle du paradygme du conflit arme ?", Ed. Pedone, 2017, pp. 263-283.

[2] Additional Protocol I to the Geneva Conventions ('Additional Protocol 1'), Art. 51(5)(b).

[3] Mary Ellen O'Connell, "*Unlawful Killing with Combat Drones A Case Study of Pakistan, 2004-2009*", *Notre Dame Legal Studies Paper* No. 09-43, (2009) available https://ssrn.com/abstract=1501144 accessed 18 January 2021, p. 19.

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[5] "*Officer Errors Reportedly Left USS Stark Vulnerable*", *Chicago Trib*une (1 June 1987), available http://articles.chicagotribune.com/1987-06-01/news/8702100123_1_sea-skimming-radar-warning-receiver-exocet accessed 18 January 2021.

[6] George C. Wilson, "*Navy Missile Downs Iranian Jetliner*", *Washington Post* (4 July 1988), http://www.washingtonpost.com/wp-srv/inatl/longterm/flight801/stories/july88crash.htm accessed 18 January 2021.

an array of emotional and subjective standards, such as intuition, empathy and mercy.[1] Humans are "capable of morally praiseworthy and supererogatory behaviour, exemplified by (for example) heroism in battle, something that machines may not be capable of".[2] A further argument in favour of the necessity of subjective criteria in assessing proportionality is the very existence of the Martens Clause,[3] which states that the person remains under the protection of the principles of humanity and the dictates of the public conscience. For this reason, it can also be concluded that it is impossible for AWS to be programmed to respect the principle of humanity and the public conscience, these matters being intrinsic exclusively to the human being and its judgement.

Another legitimate concern regarding AWS is the lack of human supervision and control. Autonomous weapons manage to function entirely on their own, meaning that any human intervention would, theoretically, be superfluous, causing an unnecessary delay and affecting the efficacy of the weapon. Yet the absence of human intervention and control comes with its own issues in the field of accountability.[4] Authors have called for a certain degree of human interference not only in the operation phase of the weapons but also during the development and activation stage of AWS.[5] Furthermore, some countries that have the capability to develop AWS require that the possibility of human intervention in the acts of such weapons be an imperative.[6]

On the other hand, an argument in favour of AWS is that States have both a legal and a moral obligation to employ the least destructive method when engaged in armed conflicts. Because AWS may prove to be more reliable than human military personnel and may be programmed to be far less prone to use lethal force, not deploying and using this technology would mean creating an additional risk for more persons. As such, a theory suggests that using humans for such a dangerous mission when an alternative, far more effective, technology is readily available must be considered a disregard for human life. This approach derives or is an

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[1] Christof Heyns, "*UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*", A/HRC/23/47, (2013) ('Heyns 2013'), par. 5.

[2] Ryan Tonkens, "*The Case Against Robotic Warfare: A Response to Arkin*", Journal of Military Ethics, Vol. 11, (2012) pp. 149, 151.

[3] Additional Protocol I, Art 1 (2).

[4] Elena Lazar, "*Juridiction et cybercriminalité"*, revue TIC, Innovation et droit international, Ed. Pedone, 2017, pp. 157-175.

[5] Neil Davison, "*A legal perspective: Autonomous weapon systems under international humanitarian law*" (2018) available https://www.icrc.org/en/document/autonomous-weapon-systems-under-international-humanitarian-law accessed 18 January 2021.

[6] U.S. Department of Defense, DoD Directive 3000.09, "*Autonomy in Weapon Systems*" (2012), Art 3(a). See also Heyns 2013 par. 45.

extension of the principle of limiting unnecessary suffering (or superfluous injury).[1] IHL aims to limit the amount of destruction and suffering to only what is necessary, and the use of the AWS instead of human soldiers may well comply with the spirit of this principle.

5. Autonomous Weapons Systems in Law Enforcement Operations

In cases of law enforcement, the use of force is subject to stricter rules than those applicable in the context of an armed conflict. Governed by the rules of human rights law, the provisions of which are covered by both international treaties and national legislation, the discussion is too broad to be covered in this work. However, there are some issues and risks that need to be highlighted. One is about the use of *lethal* force by AWS, and the second is the danger posed by machine learning.

Law enforcement officials are deemed to "have a vital role in the protection of the right to life, liberty and security of the person".[2] As such, any limits to this obligation must abide by the principles of legality, strict necessity, proportionality and precaution.[3] There are very few instances where AWS employment of lethal force can be deemed a matter of strict necessity. For it to be so, the targeted person must pose a direct threat to law enforcement officials or other persons[4]. In fact, in the event AWS employ lethal force outside of these circumstances, the act could be considered an extrajudicial execution because it was not done in self-defence, nor was it another form of strict necessity. The decision to kill is based on a set of predetermined objective criteria, artificial intelligence by itself having no instinct of self-preservation.

Another risk associated with AI is machine learning, which is the ability of computer systems to learn and adapt without following explicit instructions, by using algorithms and statistical models to analyse and draw inferences from patterns in data. This technology has the potential and the freedom to actively transform and adapt its source code based on the data it is being fed. For this reason, there is a risk that the data being uploaded to

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[1] International Court of Justice, "*Legality of the Threat or Use of Nuclear Weapons*" (Advisory Opinion) (8 July 1996) par. 78; Additional Protocol I Art 35.

[2] United Nations, "*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*" (adopted September 1990) UN Doc A/CONF.144/28/Rev.1, 112 ('UN Basic Principles Law Enforcement'), preamble.

[3] UN Basic Principles Law Enforcement, principle 5.

[4] Human Rights Committee, "*Suarez de Guerrero v Colombia, Views*", Comm no R.11/45, Supp No. 40 (A/37/40) (9 April 1981) par. 137.

AWS in the development phase, is biased. As a result, the program itself would reach biased and incorrect conclusions,[1] that would cause it to make wrong decisions with terrible consequences.

6. Conclusions

Autonomous weapons are becoming a reality both in armed conflicts and law enforcement operations. The applicable rules of law differ according to specific circumstances. Cases of armed conflict are governed by international humanitarian law, while law enforcement must abide by the rules of human rights law. In humanitarian law, the main issue regards proportionality and lies in reconciling objective criteria with humane perspectives in decision-making. Regarding law enforcement operations, the problems that arise are related to the legality of the use of lethal force and the risks associated with machine learning. All things considered, there is no definitive answer for the legality of Autonomous Weapons Systems. Their prospective implementation will have to respect a series of rules and take some problematic elements into consideration.

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Contribuţia doctorandului şi masterandului / PhD and Master Candidate's Contribution

Seeking Judicial Venues for the Persons Affected by the Sea-Level Rise

Adrian-Nicușor POPESCU[1]

Abstract: *Climate change and especially sea-level rise are threatening the livelihoods of the persons living on the low-lying coastlines and are engendering the undesirable conditions for a future exodus. As recent reports have shown, sea-level rise is a very actual and problematic topic and important decisions must be made in the next years. If the recognition of the refugee status is not guaranteed, the persons affected by sea-level rise must find appropriate judicial venues to file complaints against those States that fail to reduce their contributions to climate change and affect their human rights. How complicated would it be to choose contentious procedures that require the proof of a strong causal link between the unlawful act and the damage, crystallized as rising sea levels? Is the request of an advisory opinion of the International Court of Justice a better option or filing complaints with the national judicial bodies? We considered that future climate change litigation and especially sea-level rise litigation should not be bypassed, as the international community made some strong commitments regarding the reduction of the anthropogenic influence on climate and, therefore, action must be taken to ensure that these commitments are respected and human rights are protected.*

Key-words: *climate change; sea-level rise; human rights; judicial venues.*

1. Introduction

Climate change is already creating major problems to our planet and, from scientists to legislators and legal specialists, everyone is concerned

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about the unfavourable predictions. One of the most unchangeable impacts of climate change is considered to be the unyielding sea-level rise that could lead from massive migration to the disappearance of sovereign States. A recent study of the IPCC (Intergovernmental Panel on Climate Change) found out serious increases in sea-level rise in the last century explaining that human influence is almost certainly the main cause. Thus, the process is likely to continue as the „global mean sea level rise above the likely range - approaching 2 m by 2100 and 5 m by 2150 under a very high GHG emissions scenario - cannot be ruled out due to deep uncertainty in ice sheet processes".[1] It was also concluded at a high level of confidence that „in coastal cities, the combination of more frequent extreme sea level events (due to sea level rise and storm surge) and extreme rainfall/river flow events will make flooding more probable".[2]

Generally, the actual standing and agenda of the international law does not permit the persons affected by sea-level rise to apply for refugee status, when the situation in their origin State does not allow survival anymore due to major floods. Being complicated to gain „climate refugee" status, they must resort to other options in order to save their communities and make their voices heard. Can they put pressure on governments to accelerate their efforts on preventing the disastrous events predicted to happen because of climate change? It is useful to search for the legal instruments that protect their human rights and the judicial venues where they can file complaints in order to receive compensations for the damage caused by sea-level rise.

2. Judicial Mechanisms That Can Be Used to Protect Human Rights in Case of Sea-Level Rise

If we want to find better mechanisms to protect the human rights of the persons affected by sea-level rise, we should look at the foundations of the legal recourse under the human rights, the tools that human rights law provides when violations are claimed and, overall, at the complementary protection mechanisms. Certainly, there is a sufficient and considerable jurisprudence on violation of human rights based on the failure of the States to protect the environment (especially at the regional level in the case of the European Court of Human Rights) but, in most cases, climate change or sea-level rise must not be the only reason for raising claims and petitioners should look for a combination of factors to efficiently demonstrate their

[1] IPCC, Climate Change 2021, The Physical Science Basis, Summary for Policymakers, https://www.ipcc.ch/assessment-report/ar6/.
[2] Ibid.

vulnerabilities. Although we could admit that in some cases the small island developing States must find solutions on their own in order to effectively protect the rights of their citizens put at risk by sea-level rise, the human rights analysis was not conducted to point out the culpability and the weaknesses of those States, as we already know that they are not still prepared to take action and mitigate the negative foreseeable impacts of climate change. The human rights dimension is a component of the complementary protection which has to be guaranteed to people who do not fulfil the strict conditions to be declared a refugee and, moreover, in the event of the disappearance of a State, there would be no territory, thus, no individuals subject to their jurisdiction. Significantly, they are not entirely liable for all those violations, as their contribution to climate change is almost inexistent. Thus, in our opinion, the protection of the aforementioned rights has to be guaranteed by all the States signatories and parties to the Covenants and other major treaties in the field of human rights. This could prove to be quite problematic, because human rights obligations are foremost fulfilled at the national level, by constitutions and national laws, and these obligations usually do not extend to third party States. However, legal recourse against the governments of the threatened island nations could be a useless undertaking, but it is also difficult to request the protection of human rights in third party countries.

At all events, human rights in the context of the bigger issues generated by climate change must not be just a theoretical and illusory concept. Although they seem to lack enforceability and pessimists think that "the existing weaknesses of the human rights regime appear exacerbated in conditions of climate change, with little obvious sign of renewal or reinforcement in the future",[1] human rights are enshrined in many legally binding treaties and they can also apply as customary law. Quite recently, two judicial bodies expressed their opinion on climate change and sea-level rise affecting human rights. The UN Human Rights Committee did not rule out the possibility of a future legal refuge in another State due to the endangerment of the right to life, caused by sea level rise leading to the destruction of the living conditions (the case of *Ioane Teitiota*).[2] Also, the Dutch Supreme Court confirmed a decision of the Hague Court of Appeal which found out that the Government of the Netherlands should reduce greenhouse gas emissions in order to respect the European Convention of Human Rights (right to life and right to private and family life, in

[1] Stephen Humphreys, *Competing Claims: Human Rights and Climate Harms*, in Humphrey Stephen, ed., *Human Rights and Climate Change*, Cambridge University Press, 2010, p. 65.
[2] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482.

particular).[1] The decision was applauded by the UN High Commissioner for Human Rights: "The decision confirms that the Government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases. […] Low-lying countries like the Netherlands are in the front line of climate change, and the potentially devastating effects of an unchecked rise in sea levels in particular should spur us on to demand courageous and decisive actions by Governments everywhere in responding to these threats".[2]

3. Filing Claims with International Judicial Bodies

Hence, several mechanisms can be set in motion in order to protect human rights affected by climate change and sea-level rise at an international level. It was already established in the ICJ's jurisprudence that States may be held for human rights violations: "Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law";[3] also, in its *Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[4], the Court found that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".[5] The ICJ already found that the protection of human rights represents an *erga omnes* obligation in the *Barcelona Traction Case*. Also, the ICJ has acknowledged in the *Corfu Channel Case* the *due diligence* principle: "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[6] (seen as a duty to prevent and control a foreseeable risk when serious harm is likely to happen), which is

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[1] Hague Court of Appeal, *Urgenda Foundation v. Netherlands*, Case No. 200.178.245/01, Decision, 9 October 2018.

[2] OHCHR Press Release, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E.

[3] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda*), ICJ, Judgment, 3 February 2006, ICJ Reports 2006, par. 127.

[4] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana-Roxana Olteanu, "*Scurtă culegere de jurisprudență/Memento de jurisprudence*", Hamangiu, 2018, p. 71

[5] *Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, par. 106.

[6] *Corfu Channel case (United Kingdom v Albania*), ICJ Judgment 1949, ICJ Rep. 4, p. 22.

similar to the obligation of a State to refrain from activities that may cause transboundary harm to the environment of another State: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[1] As authors have already noticed, the seriousness of the risk implies a greater possibility to apply the *due diligence* principle: "the more obvious the risk, the more States must demonstrate that they have taken all necessary measures to prevent it from materializing".[2]

These arguments could be used by the small island States to file claims against those big greenhouse gases emitters that, undoubtedly, contribute to the degradation of the environment of the Oceanic States (however, establishing a direct consequence by clear and convincing evidence can prove to be a major hurdle for a successful claim). Thus, responsibility is very hard to be found, as pollution is a phenomenon engendered by numerous industrialized States and it would be a very burdensome task to clearly identify the exact responsible State for the submergence of an atoll in the Pacific Ocean. Actually, climate change, and particularly sea-level rise, leave little prospect of establishing with undeniable certainty a causal link between the author of the internationally wrongful act and the injury caused by its effects. However, it cannot be ignored that the amount of GHG emissions produced by the most developed countries disproportionately affects the least developed States in such a way that the denial of the problem cannot continue anymore and the inaction may only lead to disastrous results, considering that, beyond the responsibility for the wrongful act and the difficulty of calculating with precision the direct causal link and the contribution to the damage, States have an obligation to respect the principle of international cooperation. Nevertheless, there is still a high reluctancy from the "determinable authors" of the phenomena caused by climate change to admit liability, while constantly wagering on the scientific uncertainty. For instance, we must recall the United States withdrawal from the 2015 Paris Agreement (President Joe Biden signed on 20th January 2021 the readmittance of the US into the Paris Agreement)[3] or the fact that USA have signed the Kyoto Protocol but has not yet ratified the treaty (President Bill Clinton signed the treaty in November 1998, but the United States

[1] *Trail Smelter Arbitration (United States v Canada)* (1938–41), RIAA Vol. 3, p. 1965.
[2] Richard Tol and Roda Verheyen, '*State Responsibility and Compensation for Climate Change Damages: A Legal and Economic Assessment'* 32 Energy Policy 1109, 2004, p. 1117.
[3] https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/.

Senate did not ratify it), while Canada withdrew from it in 2012. We hope for a remarkable turnaround of the perspectives, at the dawn of a new administration, which can change the policy at the next important event on climate change, scheduled to be held in Glasgow, when the UK will host the 26th UN Climate Change Conference of the Parties (COP26). The NGO Climate Coalition made a plea for the substantial financing of the fight against climate change in anticipation of the Glasgow event: "Finance to support developing countries to adapt has been stagnating at only 20% of overall climate finance for many years, falling short of the Paris Agreement commitment from developed countries to provide a balance between adaptation and mitigation finance."[1] Until now, States like China and Japan have presumably assumed important steps towards a more secure climate: "China, the world's largest carbon dioxide polluter, recently pledged to eliminate its emissions by 2060. Japan pledged to do the same by 2050".[2]

Industrialized States may fear the specter of an economic crisis in the context of adjusting their policies to reduce the negative impacts of climate change ("Bush administration officials argued that the same aggressive effort [the U.N. advocated to hold GHG emissions in check] would throw the world's economy into recession")[3]. The challenge is not always proportionate to the ability of a State to adapt: "Many of those who will be most harmed by climate change have contributed little to causing the problem. Furthermore, those that are most vulnerable to climate change are often least able to pay for adaptation measures needed to protect them from climate change impacts. Therefore [lesser developed countries] will be unable to implement programs for irrigation in the case of drought, dikes in the event of flooding."[4] In our opinion, it is very hard to compare the effects of sea-level rise on Florida's coastline with the deeper wounds that may be left on the coastlines of States like Bangladesh, Maldives or the Pacific low-lying islands. It looks like the most able States to financially adapt to climate change are also the least affected ones and that may be the case in the context of sea-level rise, where only the small sized nations are objectively threatened with extinction: "the fact that these nations [the more developed ones] feel far fewer disastrous effects from climate change, coupled with their superior ability to adapt to any changes felt, creates their

[1] The Climate Coalition, The Glasgow Action Plan, 2020, p. 4.
[2] https://www.nytimes.com/2020/11/09/climate/trump-legacy-climate-change.html.
[3] Tiffany Duong, "*When islands drown: The plight of climate change refugees and recourse to international human rights law."* University of Pennsylvania Journal of International Law, no. 31, 2010, p. 1244, note 20.
[4] Derald Hay, *Post-Kyoto Stress Disorder: How the United States Can Influence International Climate Change Policy*, 15 Missouri Environmental Law & Policy Review, p.506, 2008.

false belief that climate change will not happen anytime soon, that it is a vague and uncertain issue for the future, and that it is not serious".[1]

4. A Contentious Procedure Based on State Responsibility Before the ICJ?

Despite all difficulties, climate change liability should not be theoretical and illusory. Is every State responsible, even in an extremely small proportion, for the negative impacts of sea-level rise? "The argument, from the perspective of the developed nations, is that they cannot be held completely responsible for causing climate change since even the smallest island nations put some carbon dioxide into the atmosphere".[2] Is it right to invoke Article 47 of the Articles on State Responsibility on the plurality of responsible States: "1) Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act; 2) Paragraph 1: (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered; (b) is without prejudice to any right of recourse against the other responsible States."?

The Commentary of Article 47 of the Articles on State Responsibility notes that "each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act."[3] Furthermore, the Commentary goes on to mention that several States by separate internationally wrongful conduct may play a part in causing the same damage. "For example, several States might contribute to polluting a river by the separate discharge of pollutants. […] In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations".[4] Consequently, as other authors have noticed, "this means that a State could only be held responsible for harm caused by its own emissions, which would make it necessary for the injured State to establish causation between

[1] Tiffany Duong, op.cit., p. 1246.
[2] Ibid., p. 1245.
[3] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, Commentary to Art. 47, par. 1.
[4] ILC Articles on Responsibility of States for Internationally Wrongful Acts (n 279) 317–18, Commentary to Art. 47, par. 8.

the specific harm suffered and the conduct of the emitting State",[1] which is a very difficult task. When speaking about GHG emissions that caused the melting of the polar ice and subsequently sea-level rise, we are in a situation where several States, by separate internationally wrongful acts, have jointly conduced to the same damage (and one example could be the pollution of a river that crosses different countries). Therefore, the task of calculating each State's contribution to the polluting activities arises and presents the challenge. To what extent does a State bear the responsibility for the damage? There are treaties which expressly state joint liability (United Nations Convention on the Law of the Sea, Convention on International Liability for Damage Caused by Space Objects), but one of the best examples could be the "mixed agreements" where the European Union and all of the member parties to that treaty that are also part of the EU share a common responsibility. All the same, it may be noticed that these "*lex specialis*" treaties that provide joint liability may concern lawful activities and a careful analysis should be done in order to establish if the Articles on State Responsibility could apply. We would like to recall that not all the industrial-related activities that are contributing to climate change and sea-level rise are part of an internationally wrongful conduct. For the activities that are not prohibited *per se* by the international law and which provide the risk of causing harmful consequences to another State, we may address the provisions of Draft articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the International Law Commission in 2001.

Therefore, the path of establishing State responsibility for climate change and sea-level rise would not prove to be a very fruitful one, but international cooperation could play a key role and we could hold those responsible States accountable in other ways, such as establishing agreements that would force them to host a certain quota of environmentally displaced persons or raising contribution obligations to the adaptation fund set up under the Kyoto Protocol of the UNFCCC: "the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation".[2] We could also argue that the nowadays effects of climate change are the result of historical

[1]Walter Kälin, and Nina Schrepfer, *'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches'* (Study for the Swiss Ministry of Foreign Affairs, April 2011), p. 7.

[2] Article 12, pt. 8, Kyoto Protocol to The United Nations Framework Convention on Climate Change, United Nations, 1998.

emissions issued many decades ago and that today's pollution will affect tomorrow's generations, thus complicating, even more, the search for the responsible State. Besides, sea-level rise is not influenced only by glacier melting due to warmer temperature caused by pollution, but it may also be conditioned by land subsidence (sinking) as a result of the tectonic activity or other geological factors (mainly, abrupt events, such as earthquakes).[1] However, something must be done and sea-level rise might be tackled through international cooperation, as we supported before, as the affected States are one of the poorest in the world and lack almost totally the appropriate resources to alleviate the suffering of their citizens ("The poorest half of the world's population, 3.9 billion people, generate only 10 per cent of global emissions. Conversely, the richest 10 per cent produce half of global emissions. […] Just 100 businesses (known as "carbon majors") are responsible for 71 per cent of industrial greenhouse gas emissions since 1988").[2] Expressing more sharply and concisely these inequalities, "the wealthiest 1 per cent have a carbon footprint that is 2,000 times larger than that of the poorest 1 per cent".[3]

Despite all the hardships of establishing accountability, some possible courses of action must be found. In fact, we have to remember that, according to the international law principles regarding liability, the wrongful act or omission of a State should be sufficient to hold that State accountable for its consequences. Especially as "the nature of the relationship between greenhouse gas emissions and the predicted impacts of climate change is not like other forms of transboundary pollution, such as oil spills, where there is a directly demonstrable link between the pollutant and the impact".[4] Moreover, Article 2 of the ILC's Draft Articles on Responsibility (titled as "draft", but already a collection of customary law norms) does not mention culpability, damage or causal link as essential conditions for the existence of an internationally wrongful act: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law"; [subjective condition] and "(b) constitutes a breach of an international obligation of the State" [objective condition]. Therefore, could it be more rewarding to follow the path of establishing an objective liability? From the outset, it should be noted that a

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[1] Rovere, Stocchi, and Vacchi, '*Eustatic and Relative Sea Level Changes'*, Current Climate Change Reports, No. 2, 2016, p. 221.

[2] UN General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Seventy-fourth session, A/74/161, 15 July 2019, par. 13.

[3] Oxfam, *Extreme Carbon Inequality: Why the Paris climate deal must put the poorest, lowest emitting and most vulnerable people first*, Oxfam Media Briefing (Oxfam, 2015).

[4] Gregory Wannier & Michael Gerrard, Eds., *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, p. 412.

contentious procedure at a high level, between two States in front of the ICJ, is hard to imagine, owing to the fact that, if the presumably responsible State has not consented to the compulsory jurisdiction of the ICJ (relevant States responsible for emissions, such as People's Republic of China or the United States, have not submitted declarations recognizing the jurisdiction of the Court as compulsory) it would probably refuse a litigation in front of this court, besides the political risks involved, as in the *Marshall Islands Case* relating to nuclear disarmament[1]. Remembering the interesting case of the Marshall Islands, we should also take into account the importance of establishing the existence of a dispute before submitting an application before the ICJ (the plaintiff State must prove that negotiations have taken place and no practical result has been achieved and an opposition of thesis must be highlighted, not only some declarations made at different consultations and conferences that found no echoes).

As the respect for the right to a healthy environment is just an emerging peremptory norm (and partially recognized as an *erga omnes* obligation) at the present time,[2] it is improbable that a lawsuit based on the violation of an *erga omnes* obligation would have great chances of success, despite the fact that the protection of the human rights, in general, engender this type of universal obligations and this was, as presented before, already admitted in the caselaw of the ICJ (also, at national level, it was admitted that the protection of human rights is an *erga omnes* obligation that could be violated by failing to reduce greenhouse gas emissions, if we remember the above cited *Urgenda Case*). We should stress that, if considered an *erga omnes* obligation, the lack of compliance with the duty to protect the environment could be invoked by any State under article 48 of the ILC's Draft Articles on State Responsibility, whether or not he suffered any damage (for example, a landlocked State could raise claims regarding the damage caused by rising sea levels in the Pacific or Indian Ocean area). The issue of reparations still subsists, as, "within such a framework, small islands states could successfully invoke the responsibility and stop breach of international law, but it is not a matter of certainty that damage they suffer can actually attract compensation when they act in the collective interest or in the interest of the international community, and not in their own

[1] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, ICJ, Judgment, 5 October 2016, ICJ Reports, 2016.

[2] Adrian-Nicusor Popescu, *The rising waters of the oceans: a crisis in human rights law*, in *The Law of Crisis/Crises in Law*, Universul Juridic, Timișoara, 2021.

capacity".[1] However, as presented before, the right to a healthy environment was not expressly recognized by the ICJ (refused to give it value in the *Pulp Mills Case* and was acknowledged only in separate opinion with value of doctrine), as the Court, over time, was not positive about allowing a State to sue another State for violations of *erga omnes* environmental obligations.[2]

Therefore, we should firstly resort to finding the violation of a treaty provision. As sea-level rise is, in a very high proportion, the result of greenhouse gas emissions, we could visualize a situation where a State, threatened by the rising waters, would want to signal a violation of the UNFCCC (197 signatory parties as of 2020). It should be mentioned that the simple fact of signing and ratifying this environmental law framework does not constitute a sufficient evidence for fulfilling their international obligations. In fact, a number of Pacific States made a strong statement and declared that joining the UNFCCC "shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law".[3] According to the Paris Agreement, the developed States have the obligation, under the principle of common, but differentiated responsibility (Article 2.2), to assist the developing countries to cope with the adverse effects of climate change and to provide financial aid, where needed to match the costs of adaptation (Article 11.1). Furthermore, "developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances" (Article 4.4). Broadly, these are some of the treaty obligations that could be breached and used as examples of wrongful acts (there is also a UNFCCC procedure to manage disputes between Parties, but these are brought before a conciliation commission, whose awards are only recommendatory).

Apart from treaty provisions, we should also resort to norms of customary law and the *due diligence* principle, already acknowledged by the ICJ (in the *Corfu Channel Case* or in the advisory opinion on the *Legality of*

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[1] Yukari Takamura, *Climate Change and Small Island Claims in the Pacific*, *Climate Change: International Law and Global Governance: Volume I: Legal Responses and Global Responsibility*, ed. by Oliver C. Ruppel et al., 1st ed., Nomos Verlagsgesellschaft MbH, Baden-Baden, 2013, p. 672.

[2] Hanna Lubber*: The erga omnes obligation to protect the Arctic marine environment. An evaluation of the obligation of Arctic Coastal States to protect the marine environment erga omnes against pollution resulting from mining activities in the extended continental shelf*, University of Amsterdam, July 2018, p. 38-39.

[3] Declaration by the Parties, UNFCCC, Fiji, Kiribati, Nauru, Papua New Guinea.

the Threat or Use of Nuclear Weapons), as previously discussed, should be relevant ("All States must, under rules of customary international law, exercise due diligence in limiting their emissions of greenhouse gases in such a way as to prevent damage to the global environment and to the environments of other States").[1] The greenhouse gas emissions produced on the territory of a State must not exceed the agreed levels, irrespective of the actual origin of the wrongful act (we should include the activities of the private entities). Even though the State has signed and ratified environmental law treaties, if it fails to control all activities on its territory that could harm the environment and contribute to climate change, it can be held responsible for not proving sufficient diligence (if the State failed to ensure that the activities of the companies operating on its territory are not harmful, the wrongful act could be attributable to the State). Of course, it is a "duty of care", not an obligation to achieve a specific result, but States must prove that they have taken all the necessary measures (including legislative regulations), especially when the harm is obvious. There is no importance if the wrongful act was committed or not with the intention of doing harm (the fault does not exclude State's liability). However, a case-by-case analysis should be conducted, as it is equitable to take into consideration the capacity of a State to implement the required measures (from the industrialized States we could reasonably expect to a higher level of diligence).

According to the ILC's Draft Articles on Responsibility, after the internationally wrongful act has been proved, the State must stop exercising that act (Article 30: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require") and repair the damage done (Article 31: "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State"). Concerning the provisions of Article 30, "an obligation of cessation attaching to net positive emissions may be impossible for a State to achieve in the immediate term, and in the absence of action from other contributors to the harm, especially the major historical emitters, could be argued to be unreasonable".[2] Speaking of the reparations of the injury suffered, the discussion that gravitates around the "causal link" may be recalled. As long as "causal link" is not among the essential criteria for determining the

[1] Gregory Wannier & Michael Gerrard, Eds., op. cit., p. 416.

[2] https://voelkerrechtsblog.org/judging-climate-change-obligations-can-the-world-court-raise-the-occasion-2/.

wrongful act, it should not be an unnecessary burden (although the caselaw and the doctrine generally "exclude reparation for injuries that are too indirect, remote, and uncertain to be appraised").[1] Certainly, a State could not be held responsible for historical emissions, but only for those that exceed the permissible levels established by the recent environmental law treaties (any other calculations would be too difficult, although other authors found that it would be more righteous to compel the big emitters to "share a greater burden based on historic responsibility and contribute to a fund to help the displaced populations, especially the inhabitants of small island states; and work with international organizations to address the legal questions raised by climate refugees and by the submergence of small island developing states").[2] However, even if we admit that scientific efforts would finally find a way of quantifying the amounts of one State's greenhouse gas emissions that certainly had a contribution to climate change and sea-level rise in particular, we remember that the damage produced in the Pacific islands, for example, is the result of a joint involvement. As already displayed before, this should not preclude the process of recovering reparations for the emissions attributable to one particular State. An international court as the ICJ does not have the power to force the introduction in the litigation of another presumably responsible State and, if we also consider high reluctancy to accept an international trail, it is hard to envisage that the ICJ would have the opportunity to judge the joint liability of several States in a sea-level rise matter. That being said, if a State finally finds a judicial arena to claim that sea-level rise is the result of a wrongful activity exercised by another State, it should resort to violations of environmental law treaties (human rights-related obligations would prove to be too inconsistent as arguments in front of the ICJ at the moment, as we have already seen that Ioane Teitiota's claim based on the threat to his right to life posed by the expected sea-level rise was rejected on an international venue, since the threat was not sufficiently imminent, although others have called for a climate justice founded on a human rights approach: "To ensure that communities, individuals and governments have substantive legal and procedural rights to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human

[1] Gregory Wannier & Michael Gerrard, Eds., op. cit, p. 425, quoting *Trail Smelter Case.*

[2] Sumudu Atapattu, *Climate change and displacement: protecting 'climate refugees' within a framework of justice and human rights*, Journal of Human Rights and the Environment, Vol. 11 No. 1, March 2020, p. 110.

rights")[1] and, based on objective liability, the wrongful act could be found, but when it comes to reparations, the determination of the exact quota of emissions that caused the rise of coastline water levels in another State remains a thorny issue (that could be alleviated by reversing the burden of the proof, as long as the defendant State is accused of breaching a no harm obligation, so that it will have to prove there is no causal link between its actions and the damage produced to the plaintiff State).

The unsolved problem of the causal link should gradually be untangled over time, as science has proved in the last years that extreme natural events are occurring due to climate change, from extreme heatwaves in Siberia[2] to extreme rainfalls in Texas[3] (we have also the example of a Peruvian citizen who raised claims against a private entity from Germany to hold it responsible for the melting of snow and ice in the Peruvian Andes, that caused flooding in his town, calculating that they have to pay a share of 0,47% of the costs supported by the community, relating to the entire contribution of the company to the deterioration of the environment over the years). Studies have shown that "there have been major developments in attribution science, which can draw a link between certain extreme weather events and human-caused climate change- event attribution, and can also quantify the contribution made by particular states and non-state actors, such as fossil fuel companies -source attribution".[4] A 2014 research came to the conclusion that "63% of worldwide greenhouse gas emissions could be traced back to 90 international fossil fuel companies - nicknamed carbon majors".[5]

5. Seeking for an Advisory Opinion of the ICJ

Summing up, it is possible that the contentious procedure would not be the best option for the moment (even if this path will be explored, it is expected that everything will end early with a bilateral agreement). Over time, States like Tuvalu took into consideration an international litigation at the ICJ against Australia or the United States, but this idea did not

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[1] International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report, 2014, p. 35.

[2] https://www.worldweatherattribution.org/siberian-heatwave-of-2020-almost-impossible-without-climate-change/.

[3] https://www.worldweatherattribution.org/rapid-attribution-of-the-extreme-rainfall-in-texas-from-tropical-storm-imelda/.

[4] https://www.lowyinstitute.org/the-interpreter/see-you-court-rising-tide-international-climate-litigation.

[5] Richard Heede, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, Climatic Change volume 122, 2014, Abstract.

materialize, since the "opponents" are not willing to accept the legal outcome of a "Hague decision".[1] Nevertheless, the ICJ still offers another solution: the path of the advisory opinion (which could be regarded as more authoritative since it does not have effects only *inter partes litigantes*, but it addresses to the international community as a whole). A coalition of States affected by sea-level rise could initiate the request of such a procedure by the UN General Assembly. Article 65 of the Statute of the International Court of Justice states that "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". Accordingly, the UN Charter provides in Article 96 that "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question", while "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities". Thus, the abovementioned coalition must find enough political support to gather the votes for a successful request, which is also a rather demanding task, as most States, that contribute to climate change, would try to elude a legal question that may imply their liability, even in a procedure that provides no actual remedies. One possible legal question could be: Is a State that fails to mitigate its greenhouse gas emissions to a such extent that it harms the global environment (or at least contributes to it) or the environment of a certain State (for example, by accelerating the sea-level rise phenomenon) responsible for that injury and held to make reparations? Furthermore, an advisory opinion is nonbinding and it holds only a value of doctrine, which would be still sufficient, considering the scarcity of "high level" legal opinions on the subject of sea-level rise.

Pacific States like Vanuatu, for example, have contemplated for some time on the idea of addressing the legal consequences of the anthropogenic slow-onset disasters to the UN General Assembly. As we have admitted before, political support is hard to be raised on this subject (although in a resolution adopted on the 5th of July 2018, the Human Rights Council admitted that "climate change poses an existential threat for some countries, and […] has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments"),[2] but

[1] Anemoon Soete: *The legal position of inhabited islands submerging due to sea level rise*, Gent University, 2013-2014, p. 64.
[2] Human Rights Council, thirty-eighth session, Resolution adopted on 5 July 2018, Human rights and climate change, A/HRC/RES/38/4, p. 2.

authorities from Port Vila still try to find the appropriate legal avenues in order to hold accountable the "big emitters" (a German lawyer, specialized in environmental law thinks that the public perception on climate change is much stronger now, "because we are feeling the effects of climate change to a much greater extent, […] That is why the chances are currently high that a majority will come together").[1] They seek a request for an advisory opinion of the ICJ that would clarify if industrialized States have breached their environmental related obligation and, consequently, have to repair the damages resulted from their wrongful activities (such as sea-level rise in affected States like Vanuatu). Although nonbinding, a favourable advisory opinion "will have symbolic power, setting a legal precedent that any court in any country could then use".[2] Discussed at a 2019 meeting of the Pacific Islands Forum, the proposal has been reviewed positively: "In recognising the need to formally secure the future of our people in the face of climate change and its impacts, Leaders noted the proposal for a UN General Assembly Resolution seeking an advisory opinion from the International Court of Justice on the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change".[3]

It has to be specified that these plans of seeking an advisory opinion were inspired by the efforts of the Pacific Islands Students Fighting Climate Change, an organisation that campaigns for persuading the Pacific Island Forum to unite in order to take the issue of climate change in the UN General Assembly ("With strong support from civil society and international networks of experts, a coalition of countries beginning in the Pacific can strategically build a global alliance sufficient to pass the necessary UNGA resolution")[4] and, eventually, in front of the ICJ's judges to hear their opinion on this subject ("An ICJ advisory opinion on climate change is one powerful method through which parties to the Paris Agreement may be further encouraged to commit to a level of emissions reductions that would enable the treaty to meet its objectives").[5] Their proposal is different from the past ones (the Republic of Palau announced the intention to pursue an advisory opinion back in 2012 without great success, while other States like the Marshall Islands or Bangladesh have

[1] https://www.thenewhumanitarian.org/news-feature/2020/12/1/pacific-vanuatu-disappearing-island-climate-change-cyclone-lawsuit-migration?.
[2] Ibid.
[3] Fiftieth Pacific Islands Forum Funafuti, Tuvalu, 13 – 16 August 2019, Forum Communiqué, p. 4, par.16.
[4] PISFCC, Fact sheet: An ICJ Advisory Opinion on Climate Change and Human Rights, p. 2.
[5] Ibid., p. 1.

also been studying the same pathway)[1] as they would want to concentrate on human rights, rather than on State responsibility. To explain the contrast, Palau's proposal supposed the following legal question: "What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?", while the human rights related question could be formulated in the subsequent way: "What are the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change?".[2] The latter question can be criticized for lacking sufficient "legal weight", for being too general, but it is expected that questions focused on State responsibility would not find enough support on the international arena. The members recommend the adoption of national policies and strategies by the Pacific Islands Forum's member that would encourage the support for a UNGA resolution, the seek for legal experts, technical advisors who would accept to search for legal arguments in their favour (from high ranked foreign universities such as Yale, Cambridge or Harvard, professors who have already announced their allegiance to this initiative),[3] releasing permanent updates of the negative consequences of climate change felt in the region, such as sea-level rise and storm surges, to the civil society for a broader understanding of the urgent need for a legal response.[4] Finally, one of the experts from the Columbia Law School observed that "the national courts of an increasing number of countries are declaring the legal importance of addressing climate change on constitutional, human rights and other grounds, and an ICJ opinion would further support these cases".[5]

As a conclusion, as already observed in the doctrine, beyond all efforts to obtain an advisory opinion of the ICJ or even to initiate contentious procedures at national and international level, it is the "combination of legal initiatives and diplomacy that may offer the greatest chances of catalysing transformative change at the global level and obtaining much-needed reparations for actual climate harm".[6] As far as diplomacy is concerned, we

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[1] PISFCC: An International Court of Justice Advisory Opinion on climate change, p. 1.
[2] Ibid., p. 2.
[3] https://www.pacificclimateresistance.org/news/harvard-cambridge-yale-melbourne-auckland-law-academics-support-usp-students-call-to-take-climate-change-to-the-icj-7k2ag.
[4] PISFCC, Briefing, p. 5.
[5] Michael Gerrard, faculty director and founder of the Sabin Center for Climate Change Law at Columbia Law School, quote available at https://www.climatedocket.com/2019/08/13/pacific-islands-climate-change-human-rights/.
[6] Margaretha Wewerinke-Singh, *Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change*, Climate Policy, Volume 20, 2020, p. 681-692.

may give the example of a communication made by the Federated States of Micronesia and addressed to the government of the Czech Republic, which was asked to initiate a transboundary environmental impact assessment in the context of the refurbishment of a coal power plant (that could have, presumably, the potential to contribute, with its emissions of CO2, to global climate change and, thus, also an impact to the territory of Micronesia, which finds itself at 13,000 km away). Even if Micronesia underlined that the proposed Czech project "failed to reach the minimum 42% net energy efficiency for a new power plant and that this would result in higher emissions of CO2",[1] the assessment of the Czech government showed that "the project cannot seriously affect the environment and populations outside the Czech Republic because its realization will reduce the current emissions of major air pollutants and because the CO2 emissions of the plant are marginal compared to global emissions".[2] This exchange of information between two States from different and very distant regions has proven that climate change is an issue of global interest and no matter how "remote" a State can be, it pays attention to the potentially harmful activities of the industrialized nations.

6. Other International Venues

Beyond the interstate litigations, individuals may also file complaints within the regional human rights protection systems such as the European Court of Human Rights (and to invoke the violation of rights as those inscribed in Article 2: right to life, Article 3: the prohibition of torture and the correlative obligation of non-refoulement, Article 8: right to private life, Article 1 of the of Protocol No. 1 to the Convention: right to property etc.), the Inter-American Commission on Human Rights or even the Organisation for Economic Co-operation and Development. It is important to draw attention on an expected breakthrough case, that could be potentially the first successful application before the ECtHR on the interaction between the protection of human rights and climate change. The case is still pending, as the application was submitted in 2020, but is referred to as *Duarte Agostinho and Others v. Portugal and 32 Other States.* Inspired by national judicial decisions as *Urgenda*, the applicants, basically, claim that climate change affects the enjoyment of the right to life itself and the right to private and family life, guaranteed by Articles 2 and 8 of the European Convention

[1] European Network of Environmental Law Organizations, *Implementation of the Environmental Impact Assessment Directive in the EU: Member States Case law examples from the practice of the European environmental impact assessment litigation*, Justice and Environment, 2013, p. 13.
[2] Ibid., p. 14.

on Human Rights (they even considered to be discriminated, as a young generation that would have to endure the negative consequences of climate change during their lifetime, and also invoked article 14 of the Convention). The infringement of these rights is presumably provoked by correlative violations of various obligations that include "Article 2 of the Paris Agreement and its aspiration of limiting increases in global average temperatures to 1.5C; the objectives of the UNFCCC; as well as provisions in the UN Convention on the Rights of the Child".[1] In our opinion, the ECtHR should have the audacity to admit the link between failing to comply with climate change mitigation commitments and basic human rights, guaranteed by the Convention (even though it does not directly enshrines the right to a healthy environment), as this link was already recognized at the national level (the *Urgenda Case*).

Besides, as presented before, the UN Human Rights Committee could also represent a choice as an international judicial venue. Individuals can submit complaints at the UNHRC (besides the individual complaints of the affected persons, the States themselves are able to file complaints), which oversees the compliance with the provisions under the ICCPR (International Covenant on Civil and Political Rights).

The competence of the Committee to analyse these issues brought by means of individual complaint was established by the First Optional Protocol to the Covenant, but not all States parties to the ICCPR have chosen to ratify the Protocol. The Optional Protocol has 116 States parties from a total of 172 Parties to the ICCPR. The individuals can address the Committee only if they have exhausted the domestic procedures to sustain their claim (Article 2). In principle, there is no statute of limitations for the complaints, but article 99 of the Rules of Procedure of UNHCR states that "a communication may constitute an abuse of the right of submission, when it is submitted five years after the exhaustion of domestic remedies by the author of the communication, or, where applicable, three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication". Additionally, a complaint will not be analysed if it makes the object of another international examination (this does not include procedures under Human Rights Council's mechanisms), it is incompatible with the provisions of the ICCPR or contravenes with the principle of *res judicata*. A similar procedure is provided by the Optional Protocol to the ICESCR in case of alleged violations under the ICESCR brought before the Committee on Economic, Social and Cultural Rights.

[1] https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/.

We consider that this analysis is extremely necessary because the UN Human Rights Committee has recently decided in a case which referred to an individual communication alleging violations of human rights, specifically the right to life, in the context of a forced departure caused by sea-level rise (the abovementioned case of the Kiribatian *Ioane Teitiota*). Even though it has not found a violation, the decision of the Committee was a ground-breaking one, especially because it opened the possibility for future recognitions of the "climate refugee" status or, more precisely, for an enhanced protection guaranteed to the environmentally displaced persons.[1]

Finally, we must signal the initiative of the Torres Strait indigenous people, who experience regular flooding because of sea-level rise. They also filed a complaint with the UN Human Rights Committee in 2019, accusing Australia of violating their human rights, protected by the ICCPR, due to the State's contribution to climate change. The islander's representative affirmed that "Climate change is fundamentally a human rights issue. The predicted impacts of climate change in the Torres Strait, including the inundation of ancestral homelands, would be catastrophic for its people".[2] Even though such an effort will only lead to a nonbinding decision, if successful, it has the ability to put a considerable pressure on the Australian government. In their national petition, the Torres Strait people claimed that "international human rights law means that Australia must increase its emission reduction target to at least 65% below 2005 levels by 2030, going net zero by 2050, and phasing out coal".[3] So far, the Australian government used the argument of the possible and distant threat to human rights, as the low-lying islands are not imminently endangered by the effects of sea-level rise and told the Committee to dismiss the case based on the fact that "it concerns future risks, rather than impacts being felt now, and is therefore inadmissible".[4] However, they could be contradicted with the argument that "climate change risk is foreseeable and only preventable through immediate action in the present".[5] The question of Australia's human rights violations remains opened and whatever the decision of the committee, it will be one of interest to the international community as a whole. Hopefully, it will be a step forward after the *Ioane Teitiota Case*, which left opened the door of climate change refugee acknowledgment, and maybe *Torres Strait Case* will

[1] Adrian Nicușor Popescu, *The first acknowledged climate change refugee?* The Romanian Journal of International Law, nr. 23/2020.
[2] https://www.climatedocket.com/2019/05/12/australia-human-rights-torres-strait-islanders/.
[3] https://ourislandsourhome.com.au/#sign.
[4] https://www.theguardian.com/australia-news/2020/aug/14/australia-asks-un-to-dismiss-torres-strait-islanders-claim-climate-change-affects-their-human-rights.
[5] Ibid.

leave opened the door of admitting the obligation of a State to reduce its emissions under human rights law.

7. Filing Claims with National Judicial Bodies

Is it more convenient to search for justice at the international courts (for example, to request an advisory opinion of the International Court of Justice) or to file claims with the national judicial bodies? Over the last few years, we have noticed an increase of the climate change litigations addressed to national judicial courts, despite challenges with establishing the causal link. There are States that guarantee the constitutional right to a healthy environment (Bolivia, Brazil, Colombia, Croatia, Russian Federation or South Africa) and we can think of possible appeals to the constitutional courts in the case of those persons affected by sea-level rise and climate change in general. Recently, in April 2021, the Federal Constitutional Court of Germany decided that „the provisions of the Federal Climate Change Act of 12 December 2019 (Bundes-Klimaschutzgesetz – KSG) governing national climate targets and the annual emission amounts allowed until 2030 are incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards".[1] Thus, the plaintiffs who tackled the act complained that the government should have proved more urgency and precision in its plans to comply with the Paris Agreement and other obligations to prevent the negative consequences of climate change: „the legislator should have taken precautionary steps to mitigate these major burdens in order to safeguard the freedom guaranteed by fundamental rights. […] The legislator must enact provisions by 31 December 2022 that specify in greater detail how the reduction targets for greenhouse gas emissions are to be adjusted for periods after 2030".[2]

Another popular trial is the already presented case of Ioane Teitiota, who could have become the world's first "climate refugee" (*Teitiota v Chief Executive Ministry of Business, Innovation and Employments*, Court of Appeal of New Zealand, 2014). As already presented, Teitiota, a citizen from Kiribati, applied for refugee status in New Zealand, claiming that sea-level rise poses a serious threat to his right to life. The Courts of New Zealand rejected his application, as they did not welcome an extensive interpretation of the refugee's definition provided by the Refugee

[1] https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html, BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, paras. 1-270.
[2] Ibid.

Convention. The denial of his right to permanent residence was based on the fact that the applicant, whose livelihood was affected, still had alternatives to resume his life with dignity in his home country, as the threat of extinction is not an imminent one in the context of a slow-onset event, as sea-level rise. However, the New Zealand judges admitted that their goal was not to ignore the negative consequences of climate change, but to point out that the issue should not have been addressed under the unfavorable Refugee Convention. He could have been granted a "discretionary" protection (especially if he had family ties in New Zealand), but that would not have been equivalent to accepting refugee status or human rights claims. Even if Teitiota was hit by a refusal at the national level, he continued his crusade at the UN Human Rights Committee, where his claims were turned down again, but the opinions expressed on his case left the door open to a potential non-refoulement rule to apply to people fleeing from rising sea levels.

Furthermore, a landmark decision on climate change is the abovementioned *Urgenda Case (Urgenda Foundation v. State of the Netherlands)*. The Urgenda Foundation, a group of Dutch environmentalists, along with other Dutch citizens, sued the Dutch government, requesting a more energic contribution in climate change mitigation. The audacious decision of the Hague Court of Appeal, which was upheld by the Dutch Supreme Court in 2019, concluded that by "failing to reduce greenhouse gas emissions by at least 25% by end-2020, the Dutch government is acting unlawfully in contravention of its duty of care under Articles 2 (right to life) and 8 (right to private life) of the ECHR. […] The court determined that the Dutch government has an obligation under the ECHR to protect these rights from the real threat of climate change".[1]

Other popular cases are *Leghari v. Federation of Pakistan* (where a Pakistani court recognized human rights as relevant to hold liable the government for not thoroughly implementing a climate change policy: "the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens")[2] or a 2018 case from Columbia, *Demanda Generaciones Futuras v. Minambiente*, where the Supreme Court attributed legal personality to the whole Colombian Amazon region and admitted that that the "fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem".[3]

[1] http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.
[2] http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/.
[3] http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/.

Additionally, a Peruvian farmer considered that the melting of the glacier found in the vicinity of his town from the Peruvian Andes and the flooding resulting from it is the consequence of the polluting activity of a German enterprise (RWE, Germany's largest electricity producer). He introduced his application in 2015: *Luciano Lliuya v. RWE AG* (Case No. 2 O 285/15 Essen Regional Court) and he actually calculated the impact of RWE's emissions on the climate from the region of its hometown Huaraz, concluding that he must be compensated with 17.000 euros that correspond to the 0,47% company's contribution to global greenhouse gas emissions. The result of this lawsuit is eagerly awaited by all environmental activists and, if successful, it will be a resounding victory that will fuel the belief that a greenhouse gas emitter may be held liable for environmental damage and negative consequence of climate change caused in different jurisdictions around the world, legally admitting the global impact of the polluting activities.

8. Conclusion

We have seen that choosing a judicial venue is not an easy task, as contentious procedure would take too long and, at first glance, they look like a war of attrition with not many positive final perspectives. Some scholars even argue that the judicial path would not be the most effective to follow: "Relying on the courts to develop the meaning and scope of existing protection instruments to assist those who move in response to the impacts of climate change will be a slow, unpredictable, and jurisdictionally varied method for securing protection Courts can play a vital role in ensuring that human rights treaties are interpreted as living instruments which can respond to changing social circumstances".[1] Nevertheless, we believe, at least, that judicial consultation could provide an essential relief and, thus, a request for an advisory opinion of the International Court of Justice, for example, on the legal consequences of sea-level rise is welcomed (together with national trials in various States that presumably fight against climate change and its effects), especially considering that it is expected to see an evolution of the climate change litigation movement over the next few years: "If States do not raise the level of ambition of their national contributions to the Paris Agreement, if they do not honor their financial and technology transfer commitments, climate litigation cases and adjudicative

[1] Jane McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, Oxford, 2012, p. 268.

approaches could skyrocket in the years to come, not only at the national but also at the international level".[1]

In conclusion, as admitted in a report supported by the London School of Economics, "Litigation is clearly an important part of the armory for those seeking to tackle climate change. Court cases contribute to greater awareness of climate change issues and can force changes in behavior that could reduce greenhouse gas emissions. It remains an expensive and potentially risky option, though, if compared to other routes like policy-making".[2]

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Recenzie de carte / Book Review

Remedies before the International Court of Justice. A Systemic Analysis

(Victor Stoica, Cambridge University Press, 2021, 288 pages)

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Victor Stoica is an Assistant Lecturer of Public International Law, International Organizations and International Relations at the Law Faculty of the University of Bucharest.

International lawyers, diplomats, researchers and students will appreciate this book.

The book is among the first that systematically studies the remedies of international law as applied by the International Court of Justice, in depth. It provides a careful mapping of the cases of the Permanent Court of International Justice and the International Court of Justice. Further, the book is among the first that studies not only the judgments of the International Court of Justice, but also the interpretation that states have towards the remedies of international law, through their pleadings. As such, in my view, the book is of a high degree of originality.

The book contrasts the theoretical controversies regarding the remedies of international law with a complete survey of the large set of cases that have been submitted before the Permanent Court of International Justice and the International Court of Justice.

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Contrary to the theoretical perspectives and controversies, the International Court of Justice applies most remedies of international law differently. In line with this theory, one discrepancy between the general view under international law and the specific perspective of the Court is restitution in kind, which, before the International Court of Justice, is rarely requested and granted, even if it is generally considered as being the primary remedy of international law, as provided by the International Law Commission through the Articles on Responsibility of States for Internationally Wrongful Acts. Another such example is the underestimation of declaratory relief, this remedy being the norm before the International Court of Justice.

The book provides a highly relevant set of conclusions with respect to each remedy of international law. The requests of the parties from all the pleadings before the International Court of Justice and the Permanent Court of International Justice and the findings of the Court, included within the annexes of the book are relevant and useful. The annexes simplify the research methodology regarding the review of the case law of the Court with the result of bringing consistency towards the manner in which the parties frame their pleadings and the International Court of Justice structures its judgments.

The book also contains relevant findings with respect to the political elements that are involved within the resolution of disputes before the International Court of Justice and the Permanent Court of International Justice. The book shows that the political element is not ignored by the judicial body, and nor should it be.

A better understanding of the concepts and how they apply before the Court could also be of use for graduate students to understand the manner in which the Court and the parties approach the resolution of a dispute. Further, the book represents a good example of narrowing down the more general field of state responsibility. As such, the book can be used as supplementary reading for academic courses on state responsibility, with the scope of further understanding its applicability.

We are looking forward to seeing the author endeavor in addressing the manner in which the remedies of international law are applied by other International Courts and Tribunals, such as arbitral tribunals, the European Court of Human Rights or the World Trade Organization.