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I hope this new on-line issue of the RJIL 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

Articole
Articles

L'influence de la CEDH sur l'obtention et utilisation de preuves viciés devant la Cour pénale internationale

(The influence of the ECtHR on obtaining and using tainted evidence before the International Criminal Court)

Elena LAZĂR*,*

Faculty of Law, University of Bucharest

Résumé:

Les éléments de preuve représentent un point essentiel de tout processus pénal. Puisque l'obtention de preuves constitue un domaine qui fait l'objet de l'activité de tout tribunal, pour les besoins de cet article, nous analyserons dans quelle mesure la jurisprudence sur les droits de l'homme sert de base aux décisions de la Cour pénale internationale et quelles sont les conditions et les situations qui attirent au niveau théorique et pratique l'applicabilité de la règle d'exclusion des preuves altérées.

Mot clés : *preuves, admissibilité, droits de l'homme, tribunaux, vices*

Abstract:

Evidence is a crucial aspect of any criminal case. As the acquisition of evidence is a domain that encompasses the activities of every court, for the purposes of this article, we will analyze to what extent human rights caselaw serves as the foundation for judgments rendered by the International Criminal Court, and what conditions and situations theoretically and practically attract the applicability of the rule of exclusion of tampered evidence.

Keywords: *evidence, admissibility, human rights, tribunals, flaws*

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* *Maitre de conférences, Faculté de Droit, Université de Bucarest, e-mail : elena.lazar@drept.unibuc.ro.* Les opinions exprimées dans cet article sont uniquement celles de l'auteur et n'engagent pas l'institution à laquelle elle appartient.

1. Introduction

Dans une société démocratique, la justice est obtenue par le biais d'une procédure préétablie, en respectant un ensemble de règles juridiques qui fixent les limites dans lesquelles une solution honnête et véridique est obtenue, sans jamais méconnaître les droits de chaque partie au litige. Au niveau national, chaque État s'engage à garantir droits fondamentaux et à assurer un standard minimal de protection de ces droits. Ainsi, si l'État échoue dans cette démarche, si un droit fondamental, reconnu au niveau international, est violé, l'individu peut faire appel à une instance internationale spécialisé. Il s'agit d'un dernier recours disponible pour ceux dont les droits ont été violés par l'État. Dans la mesure où la violation alléguée est avérée, l'État peut être obligé de fournir une compensation, d'amender la loi, etc.

L'obtention et l'utilisation de preuves représente un élément essentiel du processus. Les éléments de preuve permettent de prouver des faits essentiels à la résolution d'une affaire. Le respect de l'intégrité d'un procès réside notamment dans la manière dont les preuves sont recueillies. Aussi impératif soit-il de prouver un fait, une preuve obtenue illégalement justifierait son exclusion des preuves – en faisant une application du principe selon lequel "la fin ne justifie pas les moyens".

L'obtention de preuves étant un domaine d'activité de tout tribunal, nous analyserons dans le cadre de cet article dans quelle mesure la jurisprudence en matière de droits de l'homme sous-tend les décisions de la Cour pénale internationale et quelles demeurent les conditions et les situations qui attirent, au niveau théorique et pratique, l'applicabilité de la règle d'exclusion des preuves altérées.

2. L'admissibilité des preuves devant la Cour Européenne des Droits de l'Homme

En ce qui concerne le mécanisme de respect des droits fondamentaux, au niveau international, l'attention se porte sur la Cour européenne des droits de l'homme (Cour EDH), actuellement la juridiction la plus renommée[1] spécialisée dans la protection des droits des individus. La Cour européenne des droits de l'homme veille ainsi à ce qu'un standard minimal[2] de

[1] Petra Viebig - *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series, Volume 4, p. 58.

[2] Corneliu Bîrsan - *Convention européenne des droits de l'homme, Commentaire des articles*, 2e édition, Ch. Beck, Bucarest 2010, p. 12.

protection soit respecté, et sa jurisprudence constitue un point de référence essentiel pour les tribunaux nationaux lorsqu'ils constatent une violation et motivent leurs jugements.

Le standard minimal implique que les États doivent inclure dans leur législation nationale un niveau de protection au moins égal à celui prévu par la CEDH, de sorte que les dispositions nationales soient égales ou même supérieures à la Convention en termes de respect des droits de l'homme, mais jamais inférieures.

Toutefois, la Convention ne fait pas référence à l'obtention ou à l'administration de preuves dans un procès. Cette omission n'est pas fortuite, puisque l'objectif de la Cour EDH est de constater la violation d'un droit fondamental énoncé dans la Convention. Elle n'a pas pour mandat d'examiner dans quelle mesure les autorités d'un État ont ou pas respecté les dispositions nationales[1]. Ainsi, lorsque la Cour examine une situation impliquant un mécanisme illégal d'obtention de preuves, ce n'est pas le mécanisme lui-même qui sera examiné par la Cour, mais la possibilité qu'un droit de la Convention ait été violé par l'utilisation de ce mécanisme[2]. C'est ainsi que la Cour de Strasbourg a statué qu'elle n'est pas habilitée à imposer une quelconque perspective sur l'admissibilité et l'utilisation des preuves dans un procès, ceci étant la prérogative exclusive du législateur national.[3]

Toutefois, afin d'atténuer la rigidité de l'affirmation ci-dessus, il convient de noter que la Cour EDH peut examiner la question de l'admissibilité des preuves en cas de violation prévue par la Convention. À côté de tous les droits substantiels, dont le droit à la vie, à la liberté et à la sûreté, le droit à la liberté de pensée et de conscience, etc., la Convention a également prévu de droits procéduraux, qui ne sont pas incorporés dans les libertés d'une personne, mais offrent "des garanties quant à l'application des droits et libertés qui lui sont reconnus devant les tribunaux".[4] Il s'agit du droit à un procès équitable[5] et le droit à un recours effectif.[1] En vertu de ces

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[1] Petra Viebig - *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series, Volume 4, p. 59.

[2] Corneliu Bîrsan - *Convention européenne des droits de l'homme, Commentaire des articles*, 2e édition, Ch. Beck, Bucarest 2010, p. 1601 ; Carmen Achimescu, *Principiul subsidiaritatii in domeniul protectiei europene a drepturilor omului*, C.H. Beck, 2015, p. 108.

[3] CEDH, *Jalloh c. Allemagne*, arrêt du 11 juillet 2006 (requête n° 54810/00), para. 94 et 95; *Khan c. Royaume-Uni*, décision du 12 mai 2000 (requête n° 35394/97), para. 34 ; *Schenk c. Suisse*, décision du 12 juillet 1988 (requête n° 10862/84), para. 46.

[4] Corneliu Bîrsan - *Convention européenne des droits de l'homme, Commentaire des articles*, 2e édition, Ch. Beck, Bucarest 2010, Art. 6, p. 356.

[5] Art. 6, Convention européenne des droits de l'homme.

dispositions, les preuves obtenues en violation d'un droit substantiel peuvent entraîner une violation des garanties du droit à un procès équitable, et le tribunal est tenu d'examiner dans quelle mesure la manière dont les preuves ont été obtenues a porté atteinte à l'équité du procès. À cet égard, la Cour EDH dispose d'une riche jurisprudence sur la collecte de preuves viciées au mépris des droits des individus, qui a constitué une base d'interprétation essentielle pour la Cour pénale internationale (CPI) dans la motivation de ses jugements.

Bien que la Convention ne prévoie pas de hiérarchie des droits énoncés en fonction de leur importance, dans la pratique, la violation des différents droits fondamentaux n'a cependant pas eu les mêmes conséquences[2]. Un traitement différent a été justifié, entre autres, par la nature absolue ou relative du droit violé. Contrairement aux droits absolus, les droits relatifs permettent une ingérence de l'autorité publique dans leur exercice. En principe, l'obtention de preuves obtenues par la torture permet de conclure à une violation du droit à un procès équitable.[3] En revanche, la même conclusion n'a pas toujours été tirée en ce qui concerne la violation du droit à la vie privée[4], et cette différence de traitement a été critiquée par la doctrine[5], et ces questions seront ultérieurement soulevées dans le cadre de l'analyse des dispositions du Statut de Rome relatives à la preuve. Dans l'ensemble, la Cour de Strasbourg s'est montrée réticente à déclarer des preuves irrecevables.[6] En ce qui concerne l'interdiction de la torture[7], la Cour a considéré que la violation de ce droit entraîne une atteinte à l'intégrité de l'ensemble du procès, car les valeurs protégées par cet article, ainsi que celles du droit à un procès équitable[8], s'avèrent d'une importance fondamentale, de sorte qu'aucun tribunal ne devrait fonder ses décisions sur

[1] Art. 13, Convention européenne des droits de l'homme.
[2] Carmen Achimescu, *Le retour des Black Sites devant le juge de Strasbourg*, Romanian Journal of International Law 19/2018.
[3]CEDH*, Harutyunyan c. Arménie*, décision du 28 juin 2007 (requête n° 36549/03), para. 66.
[4]CEDH*, Khan c. Royaume-Uni*, décision du 12 mai 2000 (requête n° 35394/97), para. 40.
[5]CEDH*, Khan c. Royaume-Uni*, opinion dissidente du juge Loucaides (requête n° 35394/97) ;Gaede K (2009) Beweisverbote zur Wahrung des fairen Strafverfahrens in der Rechtsprechung des EGMR insbesondere bei verdeckten Ermittlungen, Juristische Rundsch, p. 494 ; Carmen Achimescu, *Valoarea interpretativă a noțiunii de demnitate umană în jurisprudența CEDO*, AUB Drept 2016, p.136.
[6] Petra Viebig, *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series, Volume 4, p. 173.
[7] Article 3, Convention européenne des droits de l'homme.
[8] Article 6, Convention européenne des droits de l'homme.

des preuves obtenues en violation de ces valeurs.[1] Cette différence de traitement a également été justifiée dans la pratique par la consécration de l'irrecevabilité des preuves obtenues par la torture, dans la Convention des Nations unies contre la torture (CNUT), qui mentionne *expressément* leur exclusion automatique : *"Tout État partie veille à ce qu'aucune déclaration dont il est établi qu'elle a été obtenue par la torture ne puisse être invoquée comme un élément de preuve dans une procédure, à moins qu'elle ne soit dirigée contre la personne accusée de torture en vue d'établir que cette déclaration a été faite".*[2] De plus, cette disposition de l'UNCAT a été considérée comme ayant une valeur coutumière, puisque le mandat octroyé par l'Assemblée générale de l'ONU aux rédacteurs de l'UNCAT à l'époque était précisément de codifier le droit coutumier.[3] L'élément objectif du droit coutumier a également été prouvé au fil du temps par la pratique uniforme et générale des juges de la Cour EDH d'exclure les preuves obtenues par la torture, en l'absence d'une disposition dictant *expressément* cette exclusion.[4] En tant que règle coutumière avérée, elle sera également contraignante pour les tribunaux internationaux qui reconnaissent la coutume comme source de droit, y compris la Cour pénale internationale.[5]

3. L'admissibilité des preuves devant la Cour Pénale Internationale

Les tribunaux nationaux n'étant pas les seuls à traiter les litiges concernant les particuliers, la question se pose de savoir dans quelle mesure la jurisprudence des juridictions des droits de l'homme affecte le travail procédural des tribunaux pénales internationaux. Le mandat de respecter les droits fondamentaux se pose également dans ces tribunaux, l'interaction entre la Cour européenne des droits de l'homme et la Cour pénale internationale étant axée sur la nécessité d'interpréter les concepts propres au droit international des droits de l'homme. Ainsi, lorsqu'elles sont confrontées au débat sur une éventuelle ingérence illégitime dans l'exercice

[1] CEDH, *Jalloh c. Allemagne*, décision du 11 juillet 2006 (requête n° 54810/00), para. 105 : *" Les éléments de preuve à charge - qu'il s'agisse d'aveux ou de preuves réelles - obtenus à la suite d'actes de violence ou de brutalité ou d'autres formes de traitement pouvant être qualifiés de torture, ne devraient jamais être invoqués comme preuve de la culpabilité de la victime, quelle que soit leur valeur probante. " Voir également Gäfgen c. Allemagne*, Cour européenne des droits de l'homme, décision du 1er juin 2010 (requête n° 22978/05), paragraphe 167.

[2] Art. 15, Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, signée le 10 décembre 1984 et entrée en vigueur le 26 juin 1987.

[3] Résolution de l'ONU AG 32/62 du 3 décembre 1977.

[4] Gerhard Werle, *Völkerstrafrecht, 3e édition. Mohr Siebeck, Tübingen*, 2012, para. 154

[5] Art. 21 para. (1) lit. (b), Statut de Rome.

de ces droits, les juridictions internationales peuvent appliquer et citer dans leurs propres arrêts les mécanismes créés et utilisés en pratique par la Cour EDH.

Le Statut de la Cour pénales internationale énonce les sources du droit qui doivent être appliquées par la CPI et établit une hiérarchie des sources adaptée aux besoins de la Cour. La cour est tenue d'appliquer : (i) le Règlement ; (ii) le Statut ; (iii) ″le cas échéant″, les traités internationaux et les règles générales du droit international humanitaire ; et (iv) les principes généraux du droit tels qu'ils découlent des systèmes juridiques nationaux, pour autant qu'ils soient conformes au Statut et au droit international public. Le Statut de la CPI prévoit également que la Cour peut suivre les ″principes et les règles de droit telles qu'interprétées dans ses décisions antérieures.″

En tant que tribunal chargé de poursuivre et de faire répondre les individus des crimes qui heurtent la conscience de l'humanité, la Cour pénale internationale garde dans son portefeuille toute une série de taches liés à la protection des droits de l'homme, tant pour les victimes que pour les accusés. Tenir des individus responsables de crimes internationaux ne peut faire abstraction du droit à un procès équitable. Ainsi, selon l'État de Rome, la CPI utilisera dans ses décisions des dispositions *"conformes aux droits de l'homme internationalement reconnus et sans aucune discrimination"*. [1] Cette disposition incarne donc une « clause d'habilitation du droit relatif aux droits de l'homme ». Cela contraste fortement avec les Statuts et Règlements respectifs des Tribunaux Ad Hoc[2], qui ne précisent pas les sources du droit international qui leur sont applicables, sans parler de leur relation hiérarchique.

Le Statut de Rome contient de nombreuses dispositions relatives aux droits de l'accusé et à l'impératif pour les autorités de respecter ces droits, tant au stade du procès qu'à celui de l'enquête.[3] C'est ainsi la Chambre préliminaire[4] de la CPI qui est chargée de débattre de l'admissibilité des charges et de la légalité des différentes preuves requises pour l'affaire. Afin de faire répondre les individus soupçonnés d'avoir commis des crimes internationaux, le Bureau du Procureur (BDP) coopère avec les États dans l'administration des preuves nécessaires pour prouver l'imputabilité des actes en question. Cependant, quelle que soit l'ampleur d'une affaire pénale, un tribunal ne peut pas ignorer le caractère équitable des mesures ordonnées. Les pressions exercées pendant l'interrogatoire, l'absence d'un avocat de la

[1] Art. 21 para. (3), Statut de Rome.
[2] Comme par exemple, le Tribunal pénal international de l'ex Yougoslavie.
[3] Art. 55, Statut de Rome.
[4] Art. 64 para. (2), Statut de Rome.

défense, les fouilles sans discernement, etc. représentent des situations qui affectent la crédibilité et la valeur probante.

Selon le Statut de Rome*, "la Cour peut se prononcer sur la pertinence et l'admissibilité des preuves, conformément au Règlement de procédure et de preuve, eu égard notamment à leur valeur probante et à la possibilité qu'elles portent atteinte à l'équité du procès ou à une appréciation équitable de la déposition d'un témoin."*[1]

La Chambre préliminaire détient le pouvoir de statuer sur l'admissibilité et la pertinence des preuves dans les affaires portées devant et dispose d'un droit discrétionnaire[2] à cet égard. Toutefois, il faut préciser que les deux concepts, pertinence et admissibilité, traitent de questions différentes.[3]

4. L'analyse de critères de la pertinence et de l'admissibilité

Pour être pertinente, la preuve doit tout d'abord être relevant, c'est-à-dire avoir un lien réel avec le litige soumis au tribunal. La pertinence sert deux objectifs. Premièrement, il s'agit de la base juridique permettant d'exclure les éléments non pertinents. Deuxièmement, elle révèle d'emblée l'objectif de la preuve en question. Au moment de la proposition d'une preuve, les parties l'octroient un certain but dans l'affaire, ainsi elle ne soutiendra que la preuve du fait dicté au départ, même si la preuve elle-même pourrait révéler d'autres situations factuelles nécessaires à l'affaire.[4] Au-delà du test de pertinence, elle examine leur capacité à prouver réellement une situation factuelle sur laquelle le procès se [5]concentre. Cette capacité constitue la valeur probante[6]. La CPI a soulevé dans la pratique la nécessité de faire la distinction entre les concepts de *valeur probante* (*"probative value"*) *et* de force *probante* (*"evidentiary weight"*), qui, bien que similaires, traitent de questions différentes. La force probante est déterminée par un certain nombre de considérations relatives aux qualités intrinsèques de la preuve, y compris la crédibilité. Avant de déterminer sa capacité à prouver un point, la

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[1] Art. 69 al. (4), Statut de Rome.

[2] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, Third Edition, p. 1736, para. 41.

[3] Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 105.

[4]CPI (Chambre de première instance), *Le Procureur c. Katanga,* Décision relative à l'admission de pièces provenant de la " table du bar ", 17 décembre 2010, para. 17

[5]CPI*, Katanga et al.,* CPI-01/04-01/07, Décision de confirmation des charges, 30 septembre 2008, para. 77.

[6] CPI, *Procureur c. Delalic' et al*, IT-96- 21, Décision sur la requête de l'accusation pour l'admissibilité de la preuve, 19 janvier 1998, para. 17.

preuve doit être crédible *prima facie*.[1] Le poids de la preuve, quant à lui, examine la "force" de la preuve pour prouver un point particulier nécessaire à l'affaire et est déterminé à la fois par les qualités intrinsèques de la preuve et par la valeur et la qualité des autres preuves disponibles pour l'affaire.[2] Ainsi, contrairement à la valeur probante, le poids est déterminé à la fin de l'enquête, lorsque le jury a déjà examiné l'ensemble des preuves et est en mesure de déterminer dans quelle mesure l'admissibilité d'un élément de preuve porte préjudice au procès ou non.

Pour ce qui porte sur la *recevabilité*, une preuve est admissible lorsque son administration au procès ne nuit pas à l'équité du procès. Ainsi, une preuve peut être pertinente sans être admissible. L'équilibre entre la valeur probante et l'effet préjudiciable sur le procès a créé, dans la pratique, le problème de l'exclusion des preuves entachées de vices, identifié dans le langage juridique universel comme "*la règle d'exclusion"*. Comme spécifié par l'expression, *"peut statuer",* le para. (4) consacre un droit d'exclusion discrétionnaire. Au même article, cependant, le para. 7 semble à première vue consacrer une obligation d'exclure les preuves viciées. La relation entre les deux paragraphes a été expliquée par la Première Instance dans l'affaire *Lubanga*, en considérant que l'art 69 para. (7)[3] représente *lex specialis par* rapport aux autres dispositions sur l'admissibilité, y compris l'art. 69 para. (4).[4]

Ce paragraphe de l'art. 69 a suscité de nombreux débats, tant parmi les chercheurs que parmi les juges de la CPI. Toutefois, afin d'entamer le débat

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[1]TPIY (Chambre de première instance), *Le Procureur c. Brđanin*, Décision sur l'"Objection à l'interception de preuves" de la Défense, 3 octobre 2003, paragraphe 68 *: "[...] estime qu'il est nécessaire, même à ce stade, d'être convaincu qu'il existe une indication prima facie de fiabilité, faute de quoi il lui incomberait de les exclure [les communications interceptées] d'emblée" ; Voir également* TPIR (Chambre de première instance), *Le Procureur c. Karemera et al.* , Décision sur la requête du Procureur pour l'admission de certaines pièces dans le matériel probatoire, décision du 25 janvier 2008, para 17.

[2] CPI (Chambre de première instance), *Le Procureur c. Katanga,* Décision relative à l'admission de pièces provenant de la "bar table ", 17 décembre 2010, para. 13.

[3] *Art. 69, para. (7) : "Les preuves obtenues par un moyen qui viole le présent Statut ou les droits de l'homme internationalement reconnus ne sont pas recevables :*
(a) si la violation remet sérieusement en question la crédibilité des preuves ; ou
(b) si l'admission de ces preuves est de nature à porter préjudice à la procédure et à en compromettre sérieusement l'intégrité.".

[4] CPI (Chambre de première instance) CPI-01/04-01/06, *Le Procureur c. Thomas Lubanga Dyilo*, Décision relative à l'admission de pièces provenant de la "bar table ", 24 juin 2009, para. 34 et 43 ; *Voir également* Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 109 ; *Voir également Le Procureur c. Katanga,* Décision relative à l'admission de pièces provenant de la "bar table ", 17 décembre 2010, para. 39.

sur une éventuelle irrecevabilité au titre de l'article 69, para. 2, du Statut de Rome, certaines clarifications conceptuelles sont nécessaires.

En ce qui concerne la syntagme '*Preuve obtenue par un moyen qui viole*', l'une des premières questions posées sur ces dispositions concerne l'auteur et le contexte de l'infraction. La question de preuves viciés soulève-t-elle la conséquence de l'exclusion uniquement dans le cas de violations commises par l'agent désigné par la CPI, ou l'article s'applique-t-il également aux violations commises au niveau national par les autorités sans l'assistance du Bureau du Procureur ? Cette situation est connue en droit américain sous le nom de "doctrine international du plateau d'argent"[1]("the international silver platter doctrine"), qui prévoit que la règle excluant les preuves viciées ne s'applique pas aux violations commises à l'étranger. Au même temps, la perplexité vient aussi du libellé de l'art. 69, para. 8, qui stipule que lorsqu'elle "se prononce sur la pertinence ou l'admissibilité d'un élément de preuve recueilli par un État, la Cour ne se prononce pas sur l'application du droit national de cet État." Comme en droit international en général, et également au niveau de la CPI, le droit national n'est qu'une situation de fait. Contrairement aux différentes approches des tribunaux nationaux, la CPI n'applique pas la doctrine ci-dessus, considérant que les valeurs telles que les droits internationalement reconnus doivent être protégées indépendamment du contexte de leur violation. [2]

L'enquête de la Cour sur les mesures nationales ne portera pas sur la violation des dispositions nationales, mais sur la conformité de ces mesures ordonnées par les autorités étatiques avec les dispositions du Statut de Rome et les droits de l'homme internationalement reconnus. Ainsi, une violation du droit national peut en même temps entrainer une violation d'un droit fondamental, c'est pourquoi il ne s'agit pas d'un contournement d'une disposition nationale mais d'une violation des principes sur la base desquels la CPI fonctionne. La Cour analysera la situation factuelle au niveau national uniquement pour vérifier dans quelle mesure les valeurs que la CPI cherche à protéger en vertu de l'article 21 du Statut, ont été atteintes. En tout

[1] *États-Unis c. Lee*, Cour d'appel des États-Unis pour le deuxième district, décision du 7 juin 2013, n° 12-0088-cr. ; *voir également* Scharf Michael, *Tainted provenance : when, if ever, should torture evidence be admissible ?* 2008, p. 152; Ambos Kai, *The transnational use of torture evidence*, 2010, p. 373.

[2] Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 181

état de cause, la Cour disposera d'un droit d'appréciation[1] sur l'existence de telles violations.

Qu'entendons-nous exactement par *"droits de l'homme internationalement reconnus"* ? S'agit-il des droits de l'homme en général, tels qu'ils sont décrits dans chaque législation nationale, ou bien doivent-ils être consacrés par un instrument international ? L'expression clé pour évaluer cette approche est la "reconnaissance internationale"[2], de sorte que non seulement les droits reconnus *expressément verbis* par le Statut de Rome bénéficieront d'une protection, mais aussi les droits qui entrent dans le large champ d'application approuvé par l'art. 21 para. 3 du Statut.[3] Cette phrase demeure également l'un des principaux points de repère de ce document. Pour interpréter la notion de "droits internationalement reconnus", la CPI se réfère à la fois aux instruments internationaux adoptés par l'ONU[4] et d'autres organisations intergouvernementales[5] et à la jurisprudence des cours et tribunaux spécialisés dans la protection des droits fondamentaux. Si un droit prétendument violé est inscrit dans ces instruments[6] internationaux, la CPI établira également son statut de droit internationalement reconnu.

Comme mentionné ci-dessus, la Cour EDH est actuellement la juridiction internationale la plus connue dans ce domaine. Bien que le portefeuille de la CPI soit fortement axé sur le jugement d'individus du continent africain, le plus souvent, cette cour s'est tournée vers la jurisprudence de l'instance strasbourgeoise pour présenter une qualification appropriée aux situations impliquant les droits des individus. La pratique de la Cour EDH étant la plus étendue dans le domaine des droits de l'homme, le choix de la CPI est fondé sur des raisons pratiques. La jurisprudence de la

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[1] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, Third Edition, p. 1745, para. 60.

[2] Idem, p. 1747, para. 65.

[3] *"L'application et l'interprétation de la loi, telles que prévues par le présent article, doivent être conformes aux droits de l'homme internationalement reconnus et exemptes de toute discrimination fondée sur des motifs tels que le sexe tel que défini à l'article 7, paragraphe 3, l'âge, la race, la couleur, la langue, la religion ou la croyance, les opinions politiques ou autres, l'origine nationale, ethnique ou sociale, la fortune, la naissance ou toute autre situation.".*

[4] La Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, signée le 10 décembre 1984 et entrée en vigueur le 26 juin 1987.

[5] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Deuxième édition, Oxford University Press, p. 1095.

[6] Friman Hakan, *Droits des personnes suspectées ou accusées d'un crime. Dans: Lee R (ed) The International Criminal Court: the making of the Rome Statute: issues, negotiations, results*, Kluwer Law International, La Haye, 1999, p.248.

Cour européenne des droits de l'homme est impressionnante, et capable de fournir des directions d'interprétation portant sur l'obtention et l'utilisation de preuves.

N'étant pas en mesure d'être partie à la CEDH, la CPI n'est pas liée par ses décisions, mais celles-ci se sont avérées, dans la pratique, être des lignes directrices sur l'interprétation des "droits internationalement reconnus" et les conditions dans lesquelles l'ingérence des autorités nationales puisse être considéré légitime ou pas.[1]

Dans la mesure où un droit ne bénéficie pas d'une telle reconnaissance, aussi essentiel qu'il puisse s'avérer en droit national, sa violation ne peut donner lieu à l'applicabilité de l'article 69, para. (7), le droit national n'étant pour la CPI qu'une situation de fait.[2]*Allant plus loin, pour ce qui est de la syntagme "non admissible", il résulte du libellé de cette disposition que la règle d'exclusion doit s'appliquer si les conditions visées à l'article 69 sont réunies. Ainsi, contrairement à l'alinéa (4), le (7) n'autorise pas le pouvoir judiciaire discrétionnaire d'exclure les preuves entachées de la manière indiquée. Aussi claire que cette phrase puisse paraître à première vue, cette exclusion " impérative " a été contestée par la doctrine en raison de la présence des deux conditions attachées à l'hypothèse de l'alinéa (7) : la crédibilité et l'atteinte à l'intégrité, qui seront détaillées dans les paragraphes suivants. Divers auteurs ont fait valoir que la nature de ce paragraphe est en fait discrétionnaire.[3] Aucune disposition du Statut ou du Règlement ne prévoit une situation dans laquelle les preuves sont en soi irrecevables[4]. Ainsi, même la violation d'une disposition du Statut de la CPI ou d'un droit fondamental internationalement reconnu, aussi grave soit-elle, ne peut déclencher la règle de l'exclusion des preuves viciées que dans la mesure où cette violation produirait l'une des conséquences énoncées au paragraphe 1. (7)(a) et (b) :* "la violation remet sérieusement en cause la crédibilité des preuves" et l'admission de telles preuves serait de nature à compromettre la procédure et à porter gravement atteinte à son intégrité".

L'exactitude des preuves (*la fiabilité*) a été décrite dans la pratique comme "*le fil d'or invisible qui traverse toutes les composantes de*

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[1] Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 174

[2] Article 69(8), Statut de Rome.

[3] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Second Edition, Oxford University Press, p. 1089.

[4] CPI*, Bemba,* Décision en vertu de l'art. 61(7) (a) et (b) du Statut de Rome sur les charges du Procureur contre Jean-Piere Bemba Gombo, 15 juin 2009, para. 46

l'admissibilité".[1] Dans l'approche de la pertinence et de la valeur probante, les preuves doivent être *prima facie* crédibles.[2] Au même temps, seules les vices qui mettent "substantiellement" en doute la crédibilité des preuves sont susceptibles d'entraîner l'exclusion, et ici la disposition met l'accent sur l'expression "*mettre* substantiellement *en doute"*[3]*,* qui suggère qu'un seuil de gravité a été dépassé en termes de circonstances produites par le vice. Bien sûr, le Statut de Rome n'explique pas ce que nous entendons par violation grave, mais nous pouvons supposer que le témoignage d'une personne préalablement menacé par le procureur afin d'étayer une situation factuelle dictée peut jeter un doute sérieux sur la crédibilité des preuves. Les situations de témoignage résultant de la torture sont les plus courantes dans la pratique.[4] Ainsi, le Tribunal international pour l'ex-Yougoslavie a jugé, sur la question de la crédibilité des preuves, que : "les *déclarations qui ne sont pas volontaires, mais qui résultent d'un comportement oppressif, ne peuvent pas passer le test de la règle 95".*[5] La règle 95 constitue la règle d'exclusion dans la version prévue par le Règlement de procédure et de preuve des Tribunaux internationaux *ad hoc* pour l'ex-Yougoslavie et le Rwanda.

Le para. 7(b) constitue un recours pour les situations où la preuve est en fait crédible mais où son admission au procès est susceptible de compromettre la procédure et de porter gravement atteinte à son intégrité. Ainsi, à première vue, l'effet dommageable viendrait de l'admission de la preuve elle-même, et non de la violation d'une disposition du Statut de la CPI ou d'un droit internationalement reconnu.[6] Pourtant, les spécialistes se sont demandé si la violation d'un droit fondamental devait *ipso facto être de nature à* porter atteinte à l'intégrité d'un procès.[7] En pratique, cette

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[1] *Delalić et al.* (IT-98-21-T), Décision sur la recevabilité de la pièce 155, 19 janvier 1998, para. 32. *Voir également* William A. Schabas, *An Introduction to the International Criminal Court*, quatrième édition, Cambridge, p. 312.

[2] William A. Schabas, *An Introduction to the International Criminal Court*, quatrième édition, Cambridge, p. 312; William A. Schabas - *The International Criminal Court, A Commentary on the Rome Statute*, deuxième édition, Oxford University Press, p. 1088.

[3] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, Third Edition, p. 1748, para. 68.

[4]Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 132.

[5]TPIY (Chambre de première instance), *Procureur c. Stakic'*, Ordonnance provisoire sur les normes régissant l'admission des preuves et l'identification, 25 février 2002, para. 8.

[6] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary,* Third Edition, p. 1748, para. 69.

[7] Alexander Zahar, Goran Sluiter, *International criminal law: a critical introduction*. Oxford UniversityPress, Oxford, 2008, p. 382; *voir également* Salvatore Zappalà., *Human*

affirmation n'a pas été acceptée, l'opinion étant que toute violation d'un droit n'est pas automatiquement de nature à porter atteinte à l'intégrité du procès[1], mais seulement les violations qui sont considérées comme "graves" et qui portent atteinte à l'intégrité du procès *dans son ensemble*. A partir de ce moment, la question de savoir ce que le législateur entend par "atteinte grave à l'intégrité" a fait l'objet de nombreuses discussions.

En premier lieu, il a été considéré que la "gravité" de l'atteinte est donnée par la nature du droit enfreint. Bien que les instruments internationaux en la matière ne prévoient pas de hiérarchie des droits, en pratique, comme l'a observé la jurisprudence de la Cour EDH, la violation de certains droits s'est avérée avoir un impact plus important que la violation d'autres droits, l'exemple le plus éloquent étant l'interdiction de la torture par rapport à la violation d'autres droits. Dans certains systèmes juridiques, l'interdiction de la torture, considérée comme un "super" *droit*[2], entraîne automatiquement l'exclusion des preuves ainsi obtenues, quelles que soient les conséquences que cette inadmissibilité entraîne.[3] Dans la pratique des tribunaux *ad hoc, la* question de l'admissibilité des preuves obtenues par la torture n'a jamais été soulevée. Certains auteurs ont tenté de soutenir la thèse de l'exclusion automatique en invoquant certains raisonnements[4] de ces tribunaux, mais ceux-ci, trop généraux, n'ont pas pu réellement soutenir

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rights in international criminal proceedings. Oxford University Press, Oxford, 2003, p. 152.

[1] CPI (Chambre préliminaire) CPI 601/04601/06, *Le Procureur c. Lubanga,* Décision sur la confirmation des charges, 29 janvier 2007, para 84 ; *voir également* CPI (Chambre préliminaire), *Le Procureur c. Mbarushimana,* Décision sur la confirmation des charges, 16 décembre 2011, para 61.

[2]Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 172.

[3]Chambre des Lords, *A. et autres c. Secretary of State for the Home Department*, décision du 8 décembre 2005, [2005] UKHL 71, paragraphe 1. 37, 38. 51.

[4] Voir Alamuddin, Collection of evidence. Dans: Khan K, Buisman C, Gosnell C (eds) *Principles of evidence in international criminal justice*. Oxford University Press, Oxford, 2010, p. 303, citant TPIR (Chambre premier instance), *Le Proureur c. Nchamihigo,* Décision relative à la demande du Procureur d'admettre comme preuve la transcription de l'entretien de l'accusé en tant que suspect et la demande de la Défense de retenir la preuve, 5 février 2007, para 21 : *Il est bien établi que la déclaration d'un suspect ne sera pas admise comme preuve à son procès si ses droits pendant l'enquête n'ont pas été respectés."* De même, voir également David McKeever, *Evidence obtained through torture before the Khmer Rouge tribunal unlawful pragmatism?* J Int Crim Justice 8:615-6302010, 2010, p. 627, citant TPIY, (Chambre premier instance), *Le Procureur. Delalic' et al*, Decision sur Hazim Delic's Motions en conformité avec la Règle 73),1er septembre 1997, para 15:. *" Le principe selon lequel les aveux faits par des accusés en l'absence de leur volonté et résultant de menaces, d'incitations ou de l'espoir d'obtenir une faveur de la part de personnes en position d'autorité sont irrecevables en tant que preuves, est bien établi [...]".*

cette thèse. Ainsi, il n'existe aucune disposition dans la forme actuelle du Statut permettant l'exclusion automatique des preuves. En outre, la gravité et l'impact de la violation d'un droit particulier sont laissés à la discrétion des juges de la CPI.

Deuxièmement, il a été considéré que la gravité de l'infraction serait dictée non pas particulièrement par la nature du droit enfreint, mais par l'impact du vice sur le processus. Ces deux approches ont donné lieu à une certaine confusion quant au fondement de la règle d'exclusion. Les travaux préparatoires ont permis de clarifier cet aspect. Au moment de la rédaction des dispositions statutaires, il n'y avait pas de consensus sur ce qui déclenche exactement l'exclusion : la manière dont les preuves ont été obtenues (violation de la loi ou d'un droit fondamental) ou les effets que cette obtention engendre sur d'autres valeurs telles que la crédibilité et l'intégrité du procès.[1] La solution proposée était un compromis. A la suite de discussions informelles en mars-avril 1998, le comité préparatoire a accordé un certain poids à la manière dont les preuves sont recueillies (c'est-à-dire à la violation d'un droit fondamental), étant entendu que l'exclusion n'intervient que si l'une des deux conséquences négatives se produit. Cela a également amené à la conclusion que les deux conditions sont alternatives, fonctionnant en parallèle, de sorte que, comme mentionné dans les paragraphes précédents, les preuves pertinentes pour l'affaire peuvent toujours être exclues pour leur effet préjudiciable sur le procès.

Bien que l'article 69 al (7) prévoit l'exclusion obligatoire des preuves obtenues en violation d'un droit internationalement reconnu, en incluant les conséquences négatives des lettres (a) et (b), la règle se transforme en une appréciation discrétionnaire de l'exclusion de ces preuves.[2] L'ajout des deux conditions à l'hypothèse de l'alinéa 7 vient de créer une antithèse apparente. L'exclusion est obligatoire, mais seulement dans la mesure où les juges estiment qu'il y a une question de crédibilité ou d'atteinte à l'intégrité.

Après avoir fourni un large aperçu des conditions dans lesquelles l'article 69(7) s'applique, la question se pose de savoir dans quelles situations celles-ci ont fait l'objet de débats devant la CPI et dans quelle mesure les juges ont déclaré des preuves irrecevables en vertu de l'article 69. La source d'inspiration de cet article a été la jurisprudence elle-même, qui sera présentée dans les paragraphes suivants.

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[1]Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary,* Third Edition, p. 1721, para. 16.

[2]Petra Viebig, "Illicitly Obtained Evidence at the International Criminal Court", *International Criminal Justice Series*, Volume 4, p. 107.

5. L’affaire Procureur c. Thomas Lubanga Dyilo-l’analyse de preuves entachées de vices

Une affaire qui a comporté des implications particulières pour la règle d'exclusion des preuves entachées est celle de Thomas Lubanga Dyilo, citoyen de la République démocratique du Congo (RDC), président de l'Union des patriotes congolais (UPC) et première personne à être condamnée devant la CPI pour avoir enrôlé et recruté des enfants de moins de 15 ans dans le conflit armé non international dans la région de l'Ituri. [1]

L'affaire est particulièrement complexe et donne lieu à des discussions intéressantes, mais aux fins du présent document, la décision de la Chambre préliminaire sur l'admissibilité des preuves revêt une importance particulière. Dès que la date de la première audience sur les charges a été confirmée, la Défense a soumis à la Cour des considérations concernant un certain nombre d'éléments de preuve qui n'auraient pas dû être admissibles en vertu du Statut de Rome, soit en raison de leur manque de valeur probante, soit parce qu'ils ont été obtenus en violation de droits internationalement reconnus.

Avant d'entrer dans une analyse détaillée de l'application des dispositions du Statut, il convient de garder à l'esprit le contexte factuel de l'affaire. Au moment de la confirmation des charges, en 2007, le Procureur a présenté à la Chambre préliminaire des preuves qui avaient été obtenues au niveau national en violation des règles de procédure congolaises.[2] Ainsi, au moment de la perquisition, le suspect Thomas Lubanga Dyilo était en détention par ordre des autorités nationales.[3] La défense a demandé que tout élément de preuve obtenu lors de cette perquisition soit irrecevable au procès, car "empoisonné" [4]par son obtention illégale. En ce qui concerne ces

[1] CPI (Chambre préliminaire) CPI 601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 258 *; Voir également* Bogdan Aurescu, Ion Galea - *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Editura Hamangiu 2018.

[2] Code de procédure pénale congolais, art. 33 : *"La perquisition ne peut être effectuée qu'en présence de l'accusé/suspect du crime en question et en présence du propriétaire du logement, à moins que ces personnes ne soient pas présentes ou ne veuillent pas y prendre part."*

[3] CPI (Chambre préliminaire) CPI 601/04601/06, *Le Procureur c. Lubanga,* Décision sur la confirmation des charges, 29 janvier 2007, para. 62.

[4] Doctrine du fruit de l'arbre empoisonné, *Silverthorne Lumber Co, Inc. et al. v. United States*.

arguments de défense, la Cour les a rejetés, estimant qu'elle n'était pas liée par les décisions prises au niveau national. [1]

Cependant, la principale question soulevée par la défense dans cette affaire n'était pas la violation du droit national, mais l'obtention de preuves en violation d'un droit de l'homme internationalement reconnu, en l'occurrence le droit à la vie privée. [2]

En réalité, il n'y a pas d'organismes internationaux chargés de l'application des lois qui mènent des enquêtes devant la CPI. Dans la pratique, il n'a jamais été nécessaire non plus de créer un tel organe pour assumer l'entière responsabilité des poursuites. Les enquêtes devant la CPI sont menées dans le respect de la souveraineté des États. Pour bien mener son travail, la Cour coopère pleinement avec les autorités nationales de l'État dans lequel l'enquête doit être conduite. En vertu du Statut de Rome, les États sont tenus de coopérer *"pleinement* avec *la Cour dans les enquêtes et les poursuites relatives aux crimes relevant de sa compétence".*[3] Cette coopération s'est avérée être un compromis entre la coopération horizontale prévue entre les Etats souverains et la coopération verticale[4] entre les Etats et les Tribunaux pénaux internationaux *ad hoc*. En vertu de l'article 93[5], intitulé "Autres formes de coopération", la Cour peut formuler des demandes portant *notamment* sur l'obtention de preuves. Le libellé de l'article indique clairement que les États sont libres de s'y conformer, mais ne sont pas obligés de laisser au Bureau du Procureur une liberté absolue d'agir de quelque manière que ce soit pendant les enquêtes nationales.

Toujours pour des raisons de respect de la souveraineté des États, il existe un nombre limité de situations exceptionnelles dans lesquelles le

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[1] Art. 69 para. (8), Statut de Rome : *" Lorsqu'elle se prononce sur la pertinence ou l'admissibilité d'éléments de preuve recueillis par un État, la Cour ne se prononce pas sur l'application du droit national de cet État. "*

[2] CPI (Chambre préliminaire) CPI 601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 74.

[3] Art. 86, Statut de Rome

[4] TPIY (Chambre d'appel), *Procureur c. Blaškic'*, Arrêt sur la requête de la République de Croatie pour la révision de la décision de la Chambre de première instance II de juillet 1997, 29 octobre 1997, para. 47 et 50.

[5] Petra Viebig, *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series, Volume 4, p. 100.

Procureur de la CPI peut agir de manière indépendante[1], sans l'assistance des autorités nationales. Et même dans ces situations, l'État concerné peut fixer des limites que le Procureur doit respecter. Les doctrinaires ont exprimé leur mécontentement quant aux pouvoirs limités du Bureau du Procureur dans les enquêtes nationales. Ils ont fait valoir qu'une participation plus active de sa part aurait mieux garanti le respect des dispositions du Statut et la conformité avec la norme internationale en matière de respect des droits fondamentaux.[2] Dans ces conditions, une grande partie des enquêtes sur les crimes internationaux sont menées au niveau national sans l'intervention du Bureau du Procureur. Le Procureur n'ayant pas participé à la collecte des preuves, des débats ont été soulevés quant à la pertinence de l'obtention illégale de preuves au niveau national, la CPI pouvant prétendre à une éventuelle innocence et n'étant que le bénéficiaire du "fruit de l'arbre empoisonné[3]".

En l'espèce, la défense a cherché à justifier l'exclusion de la preuve viciée précisément comme une mesure visant à discipliner et à dissuader les comportements illégaux et irréguliers dans l'obtention des preuves, la violation étant d'autant plus grave, vu qu'elle est supervisée par un fonctionnaire de la CPI. Constatant que la responsabilité d'un comportement irrégulier au moment du prélèvement incombe aux autorités nationales chargées de l'enquête, la Cour a estimé qu'elle ne pouvait en aucun cas être tenue responsable pour des violations commises.[4] En outre, il a été constaté qu'il n'y avait pas de lien de causalité entre l'auteur (qu'il s'agisse d'un représentant du ministère public ou des autorités nationales) et la règle excluant les preuves viciées, de sorte que les arguments de la défense à cet égard ont été rejetés.

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[1] Art. 99 para. (4), Statut de Rome : *" Sans préjudice des autres articles du présent chapitre, lorsque cela est nécessaire pour l'exécution effective d'une demande qui peut être exécutée sans recourir à des mesures coercitives, notamment lorsqu'il s'agit d'entendre ou de recueillir les déclarations d'une personne agissant de son plein gré, y compris en dehors de la présence des autorités de l'État partie requis, lorsque cela est déterminant pour la bonne exécution de la demande, ou lorsqu'il s'agit d'inspecter un site public ou un autre lieu public sans le modifier, le procureur peut exécuter l'objet de la demande directement sur le territoire de l'État [...]"*

[2] Petra Viebig, *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series, Volume 4, p. 103.

[3] CPI (Chambre de première instance) CPI-01/04-01/06, *Le Procureur c. Thomas Lubanga Dyilo*, Décision relative à l'admission de pièces provenant de la "bar table ", 24 juin 2009, para. 45.

[4] CPI (Chambre de première instance) CPI-01/04-01/06, *Le Procureur c. Thomas Lubanga Dyilo*, Décision relative à l'admission de pièces provenant de la "bar table ", 24 juin 2009, para. 46.

Afin de déclencher l'applicabilité de l'art. 69 para. (7), il était nécessaire d'identifier une violation soit d'une disposition du Statut, soit d'un droit fondamental internationalement reconnu. Comme la recherche a été menée au niveau national et que la Cour n'est pas concernée par les violations du [1]droit interne, il n'est pas question d'une violation d'une disposition du Statut de Rome. Ainsi, la Défense devait prouver devant la CPI non pas la violation d'une disposition nationale, mais la violation d'un droit fondamental. En effectuant une perquisition illégale, les autorités ont pénétré illégalement dans le domicile du suspect en violation de son droit à la vie privée. La Cour a ensuite identifié les instruments qui consacrent ce droit, notamment la Convention européenne des [2]droits de l'homme, la Convention internationale sur les [3]droits civils et politiques et la Convention interaméricaine des [4]droits de l'homme, et a conclu que le droit à la vie privée est reconnu au niveau international.

L'analyse suivante s'est concentrée sur la légitimité de l'ingérence de l'autorité publique dans l'application de ce droit, car le droit à la vie privée n'est pas connu comme un droit absolu. Pour être légitime[5], l'ingérence des autorités étatiques dans l'exercice des droits protégés par l'article 8 doit être prévue par la loi, poursuivre un [6]but légitime et apparaître nécessaire dans une société démocratique.[7] La jurisprudence européenne a ajouté une quatrième condition, à savoir que l'ingérence doit être proportionnée à l'objectif poursuivi.[8] Selon les orientations de la Cour EDH[9] concernant l'article 8, les mesures impliquant l'entrée dans des domiciles privés doivent être légales, ce qui implique le respect de la procédure juridique nationale[10] et des garanties prévues par la loi[11]. À titre d'exemples d'ingérences légitimes, le guide prévoit les situations suivantes : actions intentées par

[1] Art. 31 Constitution de la République démocratique du Congo.
[2] Art. 8, Convention européenne des droits de l'homme.
[3] Art. 17, Convention internationale sur les droits civils et les politiques civiles.
[4] Art. 11, Convention interaméricaine des droits de l'homme.
[5] Art. 8 para. 2, Convention européenne des droits de l'homme.
[6] CEDH, *Smirnov c. Russie,* arrêt du 7 juin 2007, (requête n° 71362/01), para. 40.
[7]CEDH*, Camenzind c. Suisse*, arrêt du 16 décembre 1997, (requête n° 21353/93), paragraphe. 47.
[8]CEDH, *Miailhe c. France*, arrêt du 25 février 1993, (requête n° 12661/97), para 39 ; *Iliya Stefanov c. Bulgarie*, arrêt du 22 mai 2008, requête n° 65755/01, para. 42.
[9] Guide sur l'article 8 de la Convention européenne des droits de l'homme, *Droit au respect de la vie privée et familiale*, première édition, p. 58.
[10] CEDH, *L.M. c. Italie*, arrêt du 8 février 2005, (requête n° 60033/00), para. 29, 31.
[11] CEDH, *Panteleyenko c. Ukraine*, arrêt du 29 juin 2006, (requête n° 11901/02), para. 50-51.

l'autorité nationale de la concurrence pour garantir une [1]concurrence loyale, répression de l'[2]évasion fiscale, recherche de preuves circonstancielles et matérielles dans le cadre de procédures pénales, concernant par exemple les infractions de faux, d'abus de confiance et d'émission de chèques sans provision, le trafic[3] de drogue et le commerce illégal de médicaments.[4] En ce qui concerne les perquisitions, la Cour européenne a rappelé qu'elles constituent le plus souvent une ingérence légitime dans la vie privée d'une personne si elles visent "le déplacement de certains objets afin de recueillir des preuves matérielles visant la commission d'infractions"[5]. Dans ces situations, elle a estimé que c'est à la législation nationale à qui incombe la responsabilité primaire de fournir toutes les "garanties contre d'éventuels abus de la part des autorités compétentes." [6]

La Cour a rappelé qu'un mandat de perquisition doit être accompagné d'une liste de limitations, afin que l'ingérence des autorités dans la vie privée d'une personne ne soit pas potentiellement illimitée et donc disproportionnée. Le libellé du mandat doit préciser l'objectif du mandat (pour garantir que la perquisition se concentre strictement sur les infractions faisant l'objet de l'enquête) et les critères de sa mise en œuvre (pour faciliter le contrôle de l'ampleur de l'opération).[7] Un mandat rédigé en termes généraux et dépourvu d'informations claires sur le mécanisme d'enquête et les objets à saisir risque d'accroitre aux autorités nationales des pouvoirs trop larges, qui mettent en péril les droits des parties. [8]

En principe, lorsque la question de la violation du droit à la vie privée se pose, ce que la Cour de Strasbourg recherche précisément, c'est le respect par l'État du principe de proportionnalité. Une perquisition policière peut être considérée comme disproportionnée lorsque la mesure n'est pas précédée de mesures de précaution disponibles et raisonnables, comme l'absence de vérification préalable de l'identité des résidents des lieux

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[1] CEDH, *Delta Pekárny a.s. c. République tchèque*, arrêt du 2 octobre 2014, (requête n° 97/11), para. 81.
[2] CEDH, *K.S. et M.S. c. Allemagne*, arrêt du 6 octobre 2016, (requête n° 33696/11), para. 48
[3] CEDH, *Işıldak c. Turquie*, arrêt du 30 septembre 2008, (requête n° 12863/02), para. 50.
[4] CEDH, *Wieser et Bicos Beteiligungen GmbH c. Autriche*, arrêt du 16 octobre 2007, (requête n° 74336/01), para. 55.
[5] Corneliu Bîrsan - *Convention européenne des droits de l'homme, Commentaire des articles*, 2e édition, Ch. Beck, Bucarest 2010, Art. 8, para. 202, p. 711.
[6] Corneliu Bîrsan, *Convention européenne des droits de l'homme, Commentaire des articles*, 2e édition, Ch. Beck, Bucarest 2010, Art. 8, para. 202, p. 711.
[7] Guide sur l'article 8 de la Convention européenne des droits de l'homme, *Droit au respect de la vie privée et familiale*, première édition, p. 58.
[8] CEDH*, Van Rossem c. Belgique*, arrêt du 9 décembre 2004, (requête n° 41872/98), para.. 44-50 ; *Bagiyeva c. Ukraine*, CEDH, arrêt du 28 avril 2016, requête n° 41085/05, para. 52.

perquisitionnés, ou lorsque l'intervention des autorités a été excessive.[1] Une intrusion de la police à 6 heures du matin, sans motif adéquat, au domicile d'une personne absente au moment de l'intervention, qui n'était en fait pas l'auteur mais la victime, s'est avérée inutile dans une société démocratique.[2] La Cour a également conclu qu'il y eu une violation de l'article 8 dans le cas de perquisitions et de saisies de domiciles privés par rapport avec des actes prétendument commis par une autre personne, qui n'était pas le principal suspect dans l'affaire.[3]

Prenant comme référence pertinente et nécessaire la jurisprudence des juridictions internationales spécialisées dans la protection des [4]droits fondamentaux, en particulier la jurisprudence de la Cour EDH[5], la CPI a procédé à l'analyse de la proportionnalité de la mesure ordonnée par les autorités.

Afin de constater une violation du principe précité, il était nécessaire de détailler la manière dont la perquisition a été menée : *"des centaines de documents ont été saisis, notamment de la correspondance, des photographies, des invitations, des textes législatifs, des rapports, des agendas et des "informations personnelles"." Il n'existe aucun moyen de déterminer la pertinence, le cas échéant, de l'un des documents saisis par les autorités congolaises."*[6] Compte tenu de la saisie générale et indiscriminée d'un grand nombre d'objets qui ne figuraient pas initialement sur la liste établie par les autorités, la Chambre préliminaire a estimé que la mesure était disproportionnée, même si elle avait été supervisée par le procureur désigné de la CPI.[7]

Ayant constaté que la mesure ordonnée par les autorités nationales n'était pas proportionnée, il était nécessaire d'analyser dans quelle mesure l'art. 69 du Statut de Rome est applicable, ce qui fait l'objet du présent article.

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[1] CEDH, *Vasylchuk c. Ukraine*, arrêt du 13 juin 2013, (requête n° 24402/07), para. 80 et 84
[2]CEDH, *Zubal' c. Slovaquie*, arrêt du 9 novembre 2010, (requête n° 44065/06), para. 41-45
[3] *Buck c. Allemagne*, Cour européenne des droits de l'homme, arrêt du 28 avril 2005, requête n° 41604/98, paragraphe 1. 52.
[4] CPI (Chambre préliminaire) C601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 73.
[5] *Carmenzind c. Elvetiei*, arrêt du 16 décembre 1997, requête n° 21353/93, paragraphe 2. 45.
[6] CPI (Chambre préliminaire) CPI 601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 80.
[7] *Le Procureur c. Thomas Lubanga Dyilo,* CPI-01/04-01/06, Chambre de première instance, Décision relative à l'admission de pièces provenant de la " table du bar ", 24 juin 2009, Para. 3.

En ce qui concerne la première conséquence potentielle prévue par l'art. 69 al. (7), les juges ont admis la possibilité que certains modes de collecte des preuves, tels que "le témoignage d'une personne sous pression", puissent créer le danger que ce témoignage ne reflète pas des faits qui se sont réellement produits ou qu'il présente une réalité qui omet des aspects pertinents. La Chambre préliminaire a cherché à préciser que toute violation d'un droit fondamental ne met pas forcément en doute la crédibilité des preuves ainsi obtenues. La crédibilité des preuves est affectée en particulier dans le cas de déclarations, lorsque la personne concernée est contrainte d'admettre des situations factuelles qui ne sont pas conformes à la réalité par crainte de subir des conséquences de la part de la personne qui la contraint. Dans le cas de mesures telles que les saisies/perquisitions spéciales, les objets saisis ne sont pas altérés du simple fait d'une violation des dispositions nationales. [1]

Indépendamment de la pertinence des preuves obtenues, le para. (b) de l'al. (7) ne concerne pas le contenu de la preuve elle-même, mais l'impact de son administration en l'espèce, étant donné qu'elle soit obtenue à la suite de la violation d'un droit fondamental reconnu internationalement. Comme aucun consensus n'a été atteint sur cette question dans la jurisprudence internationale en matière de droits de l'homme, la CPI a cherché à trouver un juste équilibre entre les droits de l'accusé et les attentes de la communauté internationale. Ainsi, elle n'a pas considéré comme justifiant l'exclusion que les situations de "violations graves".[2] Dans l'affaire *Schenk c. Suisse*, la Cour européenne des droits de l'homme a estimé qu*'"il n'est pas exclu, en principe et dans l'abstrait, que des preuves obtenues illégalement soient admissibles, et l'exclusion ne devrait être ordonnée que dans la mesure où leur administration rend le procès dans son ensemble inéquitable.* "[3] Dans une expression plus agréable, "*l'admission de toute*

[1] CPI (Chambre préliminaire) C601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 85.
[2] CPI (Chambre préliminaire) C601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 86.
[3] CEDH*, Schenk c. Suisse*, arrêt du 12 juillet 1988, requête n° 10862/84, para. 46 ; voir également *Saunders c. Royaume-Uni*, arrêt du 17 décembre 1996, requête n° 19187/91 ; *Khan c. Royaume-Uni*, arrêt du 12 mai 2000, requête n° 35394/97 ; et *Van Mechelen et autres c. Pays-Bas*, arrêt du 23 avril 1997, requête n° 21363/93. Le même raisonnement a été suivi par la Cour interaméricaine des droits de l'homme dans l'*affaire Ivcher Bronstein*, arrêt du 6 février 2001. Les cas de *Castillo Páez, Loayza Tamayo* et *Paniagua* vont également dans le même sens.

preuve pertinente est requise, sauf si la nécessité d'assurer un procès équitable l'emporte sur la nécessité de l'administrer." [1]

Se fondant sur la vision doctrinale, la jurisprudence des tribunaux internationaux *ad hoc* [2] et celle des juridictions spécialisées dans la protection des droits fondamentaux, la Chambre préliminaire a considéré que la preuve était pertinente pour l'affaire, que la violation du droit à la vie privée n'était pas d'une gravité considérable et que son acceptation à ce stade de la procédure n'empêchait la première instance de les prendre en compt[3]e.

Dans le cadre de l'appel de la défense contre la décision de la Chambre préliminaire, les juges ont à nouveau examiné la manière dont la perquisition a été menée, en examinant tour à tour la pertinence *prima facie*, la valeur probante et l'équilibre entre la valeur probante et l'effet préjudiciable que la perquisition pourrait avoir.[4] Finalement, la première instance a confirmé la décision de la chambre préliminaire et a admis les preuves dans l'affaire. Il n'a pas été constaté qu'il était nécessaire d'exclure les preuves entachées d'une violation d'un droit internationalement reconnu.

Cette solution a suscité de nombreuses discussions et la question a été légitimement posée de savoir dans quelle mesure la violation du droit à la vie privée soulève la question de l'inadmissibilité. Théoriquement, les preuves obtenues par une perquisition illégale ne peuvent être exclues que si l'obtention de ces preuves perturbe l'ensemble de la procédure, de sorte que l'exclusion serait la seule solution pour garantir un procès équitable. Qu'est-ce que cela signifie en réalité ? En interprétant les arguments de la CPI, on peut déduire qu'un élément de preuve obtenu illégalement peut avoir un impact considérable sur le procès dans une situation où il serait le seul fondement d'une condamnation : un dispositif électronique saisi en l'absence d'un mandat de perquisition incorporant une admission des faits dont le

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[1] Salvatore Zappala, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p. 149.

[2] *Le Procureur c. Delalić et al*, IT-96-21, Décision sur la requête de l'accusation concernant l'admissibilité des preuves, 19 janvier 1998; *Voir également* la décision orale du juge May du 2 février dans l'affaire *Le Procureur c. Kordić et Cerkez*,. IT-95-14/2-T, p. 13694 du procès-verbal des audiences, dans lequel il estime que *"même si l'illégalité était établie [...] [nous] sommes parvenus à la conclusion que [...] les preuves obtenues par l'écoute des appels téléphoniques d'un ennemi au cours d'une guerre ne relèvent certainement pas des comportements visés par la règle 95. Ce n'est pas contraire à l'intégrité de la procédure et cela ne la compromettrait certainement pas."*

[3] CPI (Chambre préliminaire) C601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 90.

[4] CPI (Chambre de première instance) CPI-01/04-01/06, *Le Procureur c. Thomas Lubanga Dyilo*, Décision relative à l'admission de pièces provenant de la "bar table ", 24 juin 2009, para. 4.

suspect est accusé. Comme il s'agit du seul élément de preuve sur lequel la solution du tribunal pourrait être fondée, l'impact est substantiel. Dans une telle situation, cependant, la présence d'autres éléments de preuve à l'appui de la condamnation atténuerait la gravité de la violation du droit à la vie privée et, conformément au raisonnement de la CPI, n'entraînerait plus l'exclusion des preuves, du dispositif en question- comme par exemple : en plus de l'appareil en question, il y aurait également 2 témoins déclarant avoir une connaissance directe des déclarations du suspect. Selon nous, le problème persiste toutefois, vu qu'à la base de cette solution, les preuves viciées seront également prises en compte. Il n'y a aucune garantie que le matériel enregistré n'a pas joué un rôle important dans l'issue d'un procès. Elles s'apparentent aux situations dans lesquelles un juge national découvre l'auteur d'un meurtre par le biais de preuves viciées qu'il doit déclarer irrecevables en droit. La preuve ne fera plus partie du corps de la preuve, mais il serait "naïf" de penser qu'elle quitte le fonds intérieur du juge.

Nous pouvons donc affirmer, en première conclusion, que, bien que la règle d'exclusion soit impérative, il appartient aux juges de déterminer dans quelle mesure la violation est grave et, au même temps, dans quelle mesure cette violation cause un préjudice considérable à l'équité du procès.

La jurisprudence de la Cour EDH soutient l'interprétation du concept de droits internationalement reconnus et fournit des lignes directrices sur l'admissibilité des preuves altérées à travers sa pratique. Dans le cadre du pourvoi contre l'arrêt de la chambre préliminaire, la première instance a donné tour à tour des exemples de jugements qui posent la question de la violation de l'article 8 et de la mesure dans laquelle l'ingérence dans l'exercice du droit à la vie privée était ou non justifiée et proportionnée. [1]

Ainsi, dans l'affaire *Camenzind c. Suisse,* la Cour européenne des droits de l'homme a pris note de la nécessité d'ordonner des perquisitions et des saisies, en indiquant que " au cas par cas, il convient d'examiner dans quelle mesure les motifs qui sous-tendent ces mesures sont pertinents et suffisants et si leur ordonnancement était conforme au principe de proportionnalité. "[2] M. Camenzind avait été soupçonné d'utiliser un téléphone sans fil sans autorisation, en violation des dispositions nationales suisses. Comme il y avait déjà des enregistrements audios de ses conversations dans les archives de la police, le suspect a estimé qu'il était inapproprié de fouiller son domicile pour prendre physiquement possession de l'objet. La Cour EDH a,

[1] CPI (Chambre de première instance) CPI-01/04-01/06, *Le Procureur c. Thomas Lubanga Dyilo*, Décision relative à l'admission de pièces provenant de la "bar table ", 24 juin 2009, para. 22-24.
[2] CEDH*, Camenzind c. Suisse*, precitée.

en revanche, estimé que les autorités ont respecté les dispositions nationales. Même en l'absence d'un mandat de perquisition, elle a considéré que le consentement du suspect au moment de la perquisition et sa présence à toute l'opération couvraient l'absence de mandat. Ainsi, la Cour a accepté comme justifiée l'intervention des autorités afin de présenter à la juridiction nationale le *corpus delicti* comme preuve du crime. L'ingérence des autorités dans l'exercice du droit à la vie privée du requérant a été jugée justifiée et proportionnée.

Dans l'affaire *Miailhe c. France, la* Cour a estimé que la saisie sans discrimination d'un grand nombre (" des milliers ") d'objets sans rapport avec l'objet de l'affaire était disproportionnée et qu'il était nécessaire de restituer ceux qui n'avaient pas fait partie de l'objet du mandat. [1]

Il résulte donc de cette analyse que le CPI a également emprunté d'importantes jugements de la Cour EDH sur les limitations des droits de l'homme, la Chambre de première instance reproduisant donc ici la jurisprudence de la Cour EDH portant sur l'article 8 de la Convention EDH (c'est-à-dire les arrêts *Camenzind, Miailhe et Stefanov)* et son analyse justificative fondée sur les exigences de motifs pertinents et suffisants et d'une ingérence proportionnée. La Chambre de première instance a estimé que la violation d'une norme internationalement reconnue en matière de droits de l'homme dans la collecte de preuves était compensée par les facteurs suivants, conformément à l'article 69 al. (7) du Statut de la CPI : (i) la preuve était toujours pertinente, nonobstant l'illégalité ; (ii) la violation du droit au respect de la vie privée était essentiellement imputable aux autorités congolaises ; (iii) la violation n'était pas grave ; et (iv) le droit au respect de la vie privée n'était pas celui de l'accusé. La Chambre de première instance a ainsi confirmé une décision antérieure rendue par la Chambre préliminaire qui avait souligné la nature nuancée du droit au respect de la vie privée par l'approbation de la technique de proportionnalité façonnée par la CEDH.

La jurisprudence de la Cour européenne des droits de l'homme concernant les perquisitions et les saisies spéciales au domicile privé est vaste et donne lieu à de nombreux débats doctrinaux. Toutefois, aux fins du présent article, l'accent est mis sur les cas étudiés par la CPI en vue d'appliquer le test de proportionnalité aux mesures ordonnées par les autorités au domicile de M. Lubanga Dyilo. Sur le plan théorique, la Cour a repris les concepts et suivi les méthodes et mécanismes appliqués par la Cour de Strasbourg. Toutefois, la jurisprudence de la Cour européenne des droits de l'homme ne peut contraindre la Cour pénale à adopter la même

[1] CEDH*, Miailhe c. France*, arrêt du 25 février 1993, (requête n° 12661/97), para. 39.

interprétation pour juger ses propres affaires. Cela ne peut cependant pas être critiqué en raison de la différence majeure entre les deux juridictions. Outre les différentes branches du droit qu'ils traitent, nous devons garder à l'esprit que la Cour européenne des droits de l'homme ne remet pas en cause une poursuite et un procès pénaux. La Cour de Strasbourg a pour mandat d'examiner dans quelle mesure une affaire nationale déjà réglée a échoué à protéger un droit fondamental de l'individu. En revanche, la CPI est concernée non seulement par l'impératif de respecter les droits de l'accusé, mais aussi par l'impératif de mener un procès qui exige le respect de toute une série de procédures. La CPI a donc l'obligation de trouver un juste équilibre entre les différentes valeurs fondamentales qu'elle s'est engagée à protéger.[1]

6. Conclusion

Il résulte qu'en matière de preuves, même si la règle d'exclusion soit impérative, il appartient toujours aux juges de déterminer dans quelle mesure la violation est grave et, au même temps, dans quelle mesure cette violation a causé un préjudice considérable à l'équité du procès.

En observant les controverses sur l'exclusion des preuves altérées dans la pratique des tribunaux nationaux, il est facile de supposer que ces controverses occuperont également une place sur la plate-forme du droit pénal international à l'avenir.

Cependant, les futures discussions de la CPI sur la règle d'exclusion ne seront pas uniquement basées sur une approche méthodologique améliorée de la Cour, mais aussi sur le développement de la relation dynamique entre le droit international visant la procédure pénale et le droit international des droits de l'homme.[2] Bien que le corpus de lois de la CPI soit beaucoup plus détaillé que les statuts des tribunaux pénaux internationaux qui l'ont précédée, la Cour bénéficie toujours d'un soutien législatif minimal pour la conduite des enquêtes. Par conséquent, l'interprétation de la règle d'exclusion des preuves entachées de vices devant la CPI dépend de manière significative du contenu que le contexte international attribue à la notion de droits internationalement reconnus.

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[1] CPI (Chambre préliminaire) C601/04601/06, *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, 29 janvier 2007, para. 90, para. 84.

[2] Petra Viebig, *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series, Volume 4, p. 258.

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Challenges to Black Sea Governance. Regional Disputes, Global consequences?

Carmen ACHIMESCU, Viorel CHIRICIOIU, Ioana OLTEAN [*]

Faculty of Law, University of Bucharest

Abstract: *The Black Sea is a strategic crossroad between Europe, Middle East and Asia, but it is also an area dense with frozen and "defrost" conflicts. In recent years, the coastal states have faced numerous difficulties involving sovereignty, annexation, exploitation of resources and armed conflicts. The states are also members of different organisations and positioning towards the European Union and NATO has not been constant, especially with the added pressure of the current global situation.*

Key words: *security, maritime delimitations, straits regime*

1. An overview of key features of the region

The Black Sea costal States are Russia, Ukraine, Romania, Bulgaria, Turkey and Georgia. However, some authors consider that the "Black Sea region" is broader than the six riparian States and should include the Republic of Moldova, Armenia, Azerbaijan and Balkan countries (ex-Yugoslavian States and Greece).[1]

Since Crimea War (1856) to the end of Cold War (1990), Russia clearly dominated the Black Sea. During the communist regime in Europe, Ukraine was part of the USRR. Bulgaria and Romania were also under Russian influence, as Member States of the Warsaw Pact and of the Council for Mutual Economic Assistance.[2] Since 1952, Turkey's membership in the North Atlantic Treaty Organization (NATO) was a way to counterbalance Russian influence on the region. Romania and Bulgaria became NATO

[*] Dr. *Carmen ACHIMESCU serves as a lecturer and teaches International Law at the Faculty of Law, University of Bucharest. Viorel CHIRICIOIU and Ioana OLTEAN are both PhD candidates at the Faculty of Law, University of Bucharest.* *This study was carried out within the Project Challenges to Ocean Governance: Regional Disputes, Global Consequences? (OCEANGOV), Research Council of Norway, No 315163.* The opinions expressed in the present paper are solely the authors' and do not engage the institutions they belong to.

[1] Doru Cojocariu, *Géopolitique de la Mer Noire*, ed. l'Harmattan, 2007, pp. 70-111.

[2] The two international organisations were dissolved in 1991.

members in 2004 and, since 2007, they are also members of the European Union (EU). On the Northern side of the Sea, we have, on one hand, the states of Russia and Ukraine, which are in an armed conflict, and, on the other hand Russia and Georgia, whose relations are marked by the frozen conflicts in Abkhazia and South Ossetia.

Ukraine and Georgia have also declared their aspirations to NATO membership. At the 2008 Bucharest Summit, based on NATO's *"open door policy"*, the Allies agreed that Georgia and Ukraine would become members of NATO in future[1].On the other side, Russia has always seen a security threat in NATO's enlargement after the Cold War. Despite a certain progress Russia-NATO relationship after 1997,[2] the cooperation was suspended in March 2014, after Russia's aggressive actions against Ukraine.

Currently, Russia pleads that NATO enlargement after 1997 and the Alliance's *"open doors policy"* applied to Georgia and Ukraine (since 2008) are threats to Russia's national security. On the other hand, the international community - especially NATO and EU Member States, is constantly accusing Russia of violating sovereignty, undermining institutions and destabilising economies of states in the region.

The annexation of Crimea in 2014 by Russia was the moment when dialogue between Russia, on one side, NATO and EU, on the other side, turned into a long list of accusations and mutual sanctions. In January 2022, tensions between Russia and Ukraine have raised again, after Russia having concentrated military forces at eastern Ukrainian borders - in Russia, Belarus and Crimea. In reaction to Russia's actions, NATO has send troops in regional Member States.

Security in the Black Sea region is therefore the most controversial subject of the moment. On the Black Sea coast, Ukraine and Georgia are the States the most affected by Russia's "unorthodox" foreign policy. In this regard, NATO's secretary general, Jens Stoltenberg, had declared in January 2022 that there was *"a real risk for a new armed conflict in Europe"*, while the Russian deputy defence minister, Alexander Fomin had confirmed that relations with the alliance are at *"critically low level"*.[3]

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[1] https://www.nato.int/cps/en/natolive/topics_49212.htm

[2] In 1997, NATO and Russia signed the Founding Act on Mutual Relations, Cooperation and Security, creating the NATO Russia Permanent Joint Council. In 2002, this was upgraded, creating the NATO-Russia Council (NRC), https://www.nato.int/cps/en/natohq/topics_111767.htm

[3]https://www.theguardian.com/world/2022/jan/12/nato-chief-warns-of-real-risk-of-conflict-as-talks-with-russia-over-ukraine-end

On 24st of February 2022, Russia initiated a "*special military operation"* in Ukraine,[1] which turned into a real military invasion. Recently, the UN General Assembly has adopted a Resolution to condemn Russia's acts of aggression,[2] while an important number of States and international organisations (e.g. CoE,[3] EU[4]) are already applying political and economic sanctions against Russia.

2. Russia-Ukraine old and new conflicts

Ukraine is situated at the crossroads between NATO zone and Russia. It presents interest to both NATO and European Union in the perspective of accession, which would significantly diminish Russian influence in Eastern Europe and would cut off access to the Black Sea. Some Ukrainian regions– Crimea Donetsk and Luhansk districts are no longer under its effective control.

One of the situations that have had a lasting impact on the area is represented by the annexation of Crimea. In 2014, Russia justified its intervention in the region by invoking the right to secession. The spark that gave the opportunity to the conflict were the protests held in 2013, generated by president Yanukowych refuse to sign an EU association agreement.[5] At that time, despite Ukraine's rapprochement with the EU after the Orange Revolution of 2004, the country was divided between the European economic integration project and a competing Russian proposal for a customs union. In Kyiv, spontaneous pro-European protests took place in the Independence Square, or "Maidan", which gave its name to the movement. At the beginning of 2014, violent clashes between demonstrators and governmental forces had dramatic consequences. Finally, president Yanukowych leaved the county and demonstrators negotiated an early presidential election. The events were qualified by President Putin as "a

[1] https://www.mid.ru/en/foreign_policy/news/1800154/

[2] GA/12407, Ukraine: Vote on Draft "Uniting for Peace" Resolution* : What's In Blue : Security Council Report

[3] https://www.coe.int/en/web/kyiv/home/-/asset_publisher/Pur4r4szNjUn/content/citing-ukraine-pace-renews-sanctions-against-russian-delegation-including-suspension-of-voting-rights?inheritRedirect=false

[4] https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/

[5] https://www.kyivpost.com/article/content/ukraine-politics/yanukovych-confirms-refusal-to-sign-deal-with-eu-332493.html

coup d'état" and Russia declared its intention to "use all available options, including force as a last resort".[1]

Afterwards, independence was proclaimed by the Autonomous Republic of Crimea and the city of Sevastopol. It was maintained by the Sevastopol City Council that they where a sovereign state.[2] Subsequently, independence was recognised by Russia and the two concluded The Treaty on Accession of the Republic of Crimea to Russia, which gave way for the Russian troops that were stationed in Crimea to ensure the control over the territory. The use of force was authorized by the Russian Council.[3] While military troops in Crimea were continually claimed to be local self-defence units,[4] Ukrainian press reported the presence of Russian soldiers,[5] using Russian material resources (weapons, vehicles etc), although not sporting the official symbols of the army.[6]

After Crimea has declared itself independent, President Vladimir Putin stated that work must be done in order to ensure the return of Crimea to Russia.[7] Shortly afterwards, the Russian military openly took over the peninsula. Both states are party to the UN Charter and therefore under the obligation to respect state territorial integrity and the prohibition of use of force. Even more, these obligations were reiterated in the 1997 Treaty concluded between the two states.[8] With regard to the breaching of these dispositions, Russia maintained the fact that, through the Declaration of Independence, a new state has emerged and it cannot be bound by any previous treaties. On the other side, events in Ukraine could also be qualified as an internal revolution, which does not imply State succession.[9]

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[1]https://www.france24.com/en/europe/20220228-from-the-maidan-protests-to-russia-s-invasion-eight-years-of-conflict-in-ukraine

[2]https://www.consilium.europa.eu/en/press/press-releases/2022/02/25/ukraine-declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-illegal-annexation-of-crimea-and-sevastopol/

[3] ITAR-TASS Press Report, Putin's Letter on Use of Russian Army in Ukraine Goes to Upper House, 1.3.2014.

[4] Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine, Kremlin Press Conference, 4.3.2014, http://en.kremlin.ru/events/president/news/20366

[5] https://ua.krymr.com/a/schodennyk-okkupatsyi-krymy-2-bereznya/29799832.html

[6]https://www.rferl.org/a/from-not-us-to-why-hide-it-how-russia-denied-its-crimea-invasion-then-admitted-it/29791806.html

[7] Vladimir Soldatkin, *Putin says plan to take Crimea hatched before referendum,* available athttps://www.reuters.com/article/us-ukraine-crisis-putin-crimea-idUSKBN0M51DG20150309

[8] Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, signed 31.5.1997, Article 3.

[9] Andreas Zimmermann, *State Succession in Treaties*, MPEPIL, November 2006, par. 1.

Two types of arguments were used in order to justify Russian interference in Crimea, respectively those to protect nationals in the peninsula and that the intervention was requested.

Regarding the first, Russia upheld that the Russian minority living in Crimea and the military based in Sevastopol along with the Black Sea Fleet was in grave danger.[1] The hypothesis of saving nationals abroad stated by Russia to fall under the scope of self-defence as defined by the UN Charter[2] is not convincing, as state practice has not been uniform regarding the mater. An interesting theory was that, since population is an element of statehood,[3] an armed attack against nationals of a state could amount to an armed attack against the state itself. Nevertheless, State practice has also been inconsistent with treating the saving of nationals abroad as a potential exception from the prohibition of use of force.[4] Some authors considered it a new custom of international law, as long as the intervention is limited to humanitarian purposes, but international practice has not confirmed their optic.[5] Regardless, the burden of proof lies with Russia, which failed to persuade that there was any danger for the lives of its nationals abroad and that Ukraine was not taking sufficient measures to ensure their protection.

In what concerns the invitation to intervene, former president Yanukovych has confirmed that, after his removal from office, he requested Russia to employ countermeasures in Ukraine.[6] It is arguable whether this consent to intervene could have been legitimately expressed by a former president. Another aspect that must be considered when analyzing the relationship between the two states is the fact that in 2010 the Black Sea Fleet Status of Forces Agreement was extended until 2042.[7] This implies

[1] https://ecfr.eu/publication/waves-of-ambition-russias-military-build-up-in-crimea-and-the-black-sea/

[2] Art. 51 the Charter of the United Nations.

[3] Art. 1, Montevideo Convention on the Rights and Duties of States (1933).

[4] According ILA's 2018 report on aggression and the use of force: *"The rescue of nationals abroad has long presented a challenge to the application of the rules on use of force. It is the subject a long list of contrasting opinions, numerous cases with inconsistent state practice, and ambiguous case-law."*

[5] Independent International Fact-Finding Mission on the Conflict in Georgia, available at https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.

[6] Louis Charbonneau, Russia: Yanukovich asked Putin to use force to save Ukraine, available at: https://www.reuters.com/article/us-ukraine-crisis-un-idUSBREA2224720140304.

"*In this context, I appeal to the President of Russia Vladimir V. Putin to use the armed forces of the Russian Federation to re-establish the rule of law, peace, order, stability and to protect the people of Ukraine*"

[7] https://www.loc.gov/item/global-legal-monitor/2014-04-03/russia-ukraine-legislature-adopts-law-on-dissolution-of-black-sea-fleet-treaties/.

that Russia has the naval facilities in Crimea and access to them must be assured.

The annexation of Crimea has been condemned by states and international organizations, with the UN[1] and NATO issuing a statement calling upon Russia to bring an immediate end to all violations and abuses in illegally annexed Crimea.[2] Also, whilst addressing the Summit, the Deputy Secretary General of NATO stated that Crimea is the territory of Ukraine,[3] position which was strengthened by the Secretary General.[4]

Further, the Venice Commission analyzed the compatibility with constitutional principles of the decision taken by the Supreme Council of the autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian federation, or restoring Crimea's 1992 constitution. Regarding the first, the Venice Commission stated that there are several provisions in the Ukrainian Constitution prohibiting for the object of a referendum to be the secession of a part of its territory.[5] Concerning the return to the 1992 Crimean constitution, offered as an alternative to secession, this cannot maintain validity on its own and could only be regarded as consultative.[6] Furthermore, the context of the referendum connotes an incompatibility with international standards, given the absence of Ukrainian legislation regarding referendums, the massive presence of military and paramilitary forces in the area, the concerns regarding freedom of expression and the short time between announcing the referendum and the actual act.

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[1] Resolution adopted by the General Assembly on 17 December 2018, *Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov*, available at: https://undocs.org/en/A/RES/73/194**;** Resolution adopted by the General Assembly on 9 December 2019 - *Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov*, available at: https://undocs.org/en/A/RES/74/17**;** Resolution adopted by the General Assembly on 7 December 2020 - *Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov*, available at: https://undocs.org/pdf?symbol=en/A/RES/75/29.

[2] NATO - News: Statement by the North Atlantic Council on Crimea, 18-Mar.-2019.

[3] NATO - News: NATO Deputy Secretary General: Crimea is Ukraine , 23-Aug.-2021.

[4] NATO - Opinion: Keynote interview with NATO Secretary General Jens Stoltenberg at Reuters Next event , 01-Dec.-2021.

[5] "However, in its *Report on Self-determination and secession in constitutional law* quoted above, the Venice Commission concludes that self-determination is understood primarily as internal self-determination within the framework of the existing borders and not as external self-determination through secession"

[6] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e.

Since 2014, Russia also sustained separatist movements in the eastern Ukrainian region of Donbas. Recently, on the 15th of February 2022, the Russian Parliament *"decided to send an appeal to the president"* to recognise as independent the two separatist-held areas - Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR.)[1] Duma's decision was considered a breach of Minsk Agreements of 2014 and 2015: *"Kremlin approval of this appeal would amount to the Russian government's wholesale rejection of its commitments (...), which outline the process for the full (...) reintegration of those parts of Ukraine's Donbas region controlled by Russia-led forces and political proxies".*[2] On 21st of February 2022, president Putin signed the decree recognising the independence of the two separatist republics and initiated a *"special military intervention"* in Ukraine in the early morning of February 24.

Moreover, Russian president constantly declared that certain actions in Donbas war zone could be qualified as genocide. This reference to genocide was in fact a way to prepare public opinion for a new Russian military intervention in Ukraine.[3] In reaction, international community rejected Russian argument related to the "humanitarian purposes" and "self-defence" of the military intervention. A large number of states and the most important international organisations have already condemned Russia for having again used force against its neighbour and applied unprecedented tough sanctions against it.[4]

3. The frozen conflict in Abkhazia and South Ossetia

Although the Republic of Georgia is a small nation of approximately four million people,[5] its placement along the Black Sea, and close to Russia, Armenia, Azerbaijan, and Turkey has given it substantial strategic importance. Like Ukraine, Georgia is confronted with separatist actions in two regions –South Ossetia and Abkhazia. Situated on the Black Sea board, Abkhazia is a strategic point for Russia's security policy in the Black Sea.

In 2008, Russia recognized the independence of Abkhazia,[6] upon secession from Georgia. In international law, the right to remedial secession

[1] Russian MPs urge Putin to recognise two separatist-held areas in eastern Ukraine as independent | Euronews
[2] https://ua.usembassy.gov/russian-duma-resolution-on-eastern-ukraine/.
[3] See Ukraine's application against Russia before the ICJ.
[4] https://www.bbc.com/news/world-europe-59599066.
[5] https://www.worldometers.info/world-population/georgia-population/.
[6] http://press.tsu.ge/data/image_db_innova/socialur_politikuri/nikoloz_samkharadze.pdf.

is restricted to very narrow situations. However, the parties disagreed to the degree of misrepresentation of the Abkhaz people.[1] Russia initially participated in the conflict as a mediator, only to progress to an involvement in internal affairs. Afterwards, the Russian Government started to offer citizenship to the Abkhazians.[2]

Given the fact that the Parliament of Russia authorized the intervention of the military under any circumstance, it was only natural for the dependence of the Abkhaz to grow continually[3] and continues to the present day.The Georgian Parliament has stated that Russia was *"directly involved in the initiation of conflicts in Abkhazia, first through an intensive delivery of arms to conflicting sides, and later through direct participation of its military personnel serving in Gudauta military base, in military actions against Georgia."*[4]

Georgia holds Russia accountable for the perpetuation of the conflict. The political, economic, and military support of the government in Abkhazia prompted the Georgian Parliament to adopt a resolution on July 17 resolution, through which it authorised the Government to start procedures and suspend the peacekeeping operation of Russia, since they remain the major obstacle in the way of solving the conflicts peacefully.[5]In absence of Russian support, Abkhazia as a state would not exist. The Abkhaz and Russian economies are intertwined, and so are other state structures. Russia represents about 90% of Abkhazia's exports. Further, 99% of Abkhazia's foreign direct investment comes from Russia[6]. The railway and air travel is Russian owned and the Russian military patrols the border with Georgia. President Vladimir Putin stated that that he would be financing the defence modernisation of the country.[7]

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[1] Pål Kolstø, (2019). Biting the hand that feeds them? Abkhazia-Russian client-patron relations. *Post-Soviet Affairs* available from https://doi.org/10.1080/1060586X.2020.1712987.

[2] International Crisis Group, Europe report No. 176, pp. 9-10.

[3]https://jamestown.org/program/russia-declares-new-initiatives-to-modernize-army-of-breakaway-abkhazia/.

[4] Parliament of Georgia, Some Facts of Russian Policy Towards Georgia, http://www.parliament.ge/index.php?lang_id=GEO&sec_id=63&info_id=13323.

[5]http://www.crisisgroup.org/library/documents/europe/caucasus/179_abkhazia___ways_forward.pdf.

[6] Thomas Ambrosio, & William A. Lange, (2015). The architecture of annexation? Russia's bilateral agreements with South Ossetia and Abkhazia. *The Journal of Nationalism and Identity*. [online]. 44(5), pp. 673-693. available at: https://doi.org/10.1080/00905992.2016.1203300.

[7] Paul Pryce, (2020). Why is Russia Modernizing Abkhazian Forces?. available at https://www.offiziere.ch/?p=37289.

Since the independence of Georgia from the USSR the relationship between the two states has often oscillated, especially since Georgia is leaning towards the west. The election of a Russian member of Parliament sparked anti-Russian protests in Tbilisi.[1] Moreover, the Georgian President stated that Abkhazia is *"under a form of gangster occupation which hopes the international community will lose interest and reward the results of ethnic cleansing"* and *"[the] painful, but factual truth is that these regions are being annexed to the Russian Federation."*[2]

In recent developments, Russia plans to strengthen its forces in Abkhazia,[3] fuelling further conflicts within the area and it does not seem the situation will change in the near future.

4. Turkish authoritarian regime

After the *coup d'état* from 2016, the ruling regime deepened its authoritarian characteristics. The president in office has brought forth a new constitutional interpretation of law and has assumed the power to denounce treaties without additional conditions, aspect that is relevant to international law. The first treaty denounced through this mechanism was the Istanbul Convention on preventing and combating violence against women and domestic violence.[4]

Under the constitutional law of Turkey, withdrawal from such agreements must follow specific rules: Turkey's parliament must first pass a law announcing the exit from the convention before President Erdogan can act on the law. Regardless, the executive power that the president wields is

[1] https://agenda.ge/en/news/2020/291.

[2] Reuters AlertNet, Georgia Demands Removal of Russian "Peacekeepers," REUTERS, Sept. 22, 2006, http://www.alertnet.org/thenews/newsdesk/N22174158.htm.
Senator John McCain has expressed concern that RF President Vladimir Putin is "trying to re-establish the Russian empire." William Mulgrew, McCain Talk Possible Presidential Bid, More In Philadelphia Visit, BULLETIN, Dec. 4, 2006, http://theeveningbulletin.com/.

[3] https://jamestown.org/program/russia-declares-new-initiatives-to-modernize-army-of-breakaway-abkhazia/.

[4] The Turkish government's withdrawal from the Istanbul Convention entered into force on 1 July 2021, https://www.euronews.com/2021/07/01/istanbul-convention-turkey-officially-withdraws-from-treaty-protecting-women.

based on a presidential circular,[1] which has no basis in Turkish Law. The resident states that the decision of unilateral denouncing of the treaty is not an attribute of Parliament.[2]

This matter is relevant to the present paper, given the fact that the current situation in Turkey is not stable in terms of rule of law, or even in the independence of the judiciary.[3] Therefore, one must question what would happen if the president of the country would decide to simply denounce the treaties referring to the Black Sea and exploitation of its resources. Given the fact that the context described places the country's leadership in an unpredictable conduct, the Turkish political regime constitutes an alarming factor to the future of its international relations.

5. Bulgarian and Romanian political situation

Political changes seem to persist among the coastal states of the Black Sea, Bulgaria and Romania being no exception. The year 2021 marked an unprecedented status, with Bulgaria having organized three general elections and Romania having established a much controverted left-right government coalition. This type of political conduct naturally stems in the way international relations between states are maintained and evolved.[4]

The two countries' interaction is related to delimitation of the Danube frontier, the Romanian minority in Bulgaria and the construction of

[1] EŞİK - Women's Platform for Equality, "Presidential decision on the Istanbul Convention is Non-Existent, the Convention is in Force," EŞİK - Women's Platform for Equality Website (March 20, 2021), https://esikplatform.net/sozlesme-yururluktedir/; EŞİK - Women's Platform for Equality, "Urgent Appeal to the Council of Europe."; Çali, "Withdrawal from the Istanbul Convention by Turkey: A Testing Problem for the Council of Europe.

[2] "No legal problem in withdrawal from Istanbul Convention: Erdoğan," Hurriyet Daily News (March 26, 2021), https://www.hurriyetdailynews.com/no-legal-problem-in-withdrawal-from-istanbul-convention-erdogan-163455.

[3] "Turkey's Judicial Council: Guarantor or Annihilator of Judicial Independence?," Stockholm Center for Freedom Website (March 2021), https://stockholmcf.org/wp-content/uploads/2021/03/Turkish-Judicial-Council-HSK-Report.pdf.

[4] https://nova.bg/news/view/2021/12/11/349695/%D1%84%D1%80%D0%B0%D0%BD%D1%81-%D0%BF%D1%80%D0%B5%D1%81-%D0%B1%D1%8A%D0%BB%D0%B3%D0%B0%D1%80%D0%B8%D1%8F-%D0%BF%D1%80%D0%B5%D0%B6%D0%B8%D0%B2%D1%8F%D0%B2%D0%B0-%D0%B5%D0%BF%D0%B8%D0%BB%D0%BE%D0%B3%D0%B0-%D0%BD%D0%B0-%D0%BF%D0%BE%D0%BB%D0%B8%D1%82%D0%B8%D1%87%D0%B5%D1%81%D0%BA%D0%B0%D1%82%D0%B0-%D0%BA%D1%80%D0%B8%D0%B7%D0%B0/.

bridges. Regarding the delimitation of maritime areas in the Black Sea, the process has slowed down in recent years because political instability sets back decisions on the subject until new elections. We can add the fact that the region is highly important in terms of resources, which alongside the other issues makes the decision even harder to make. As a preliminary conclusion, it is difficult for the parties to reach an agreement, fact proven by the four years of negotiations, which have proven to no avail.

6. Settled and pending maritime disputes in the region

Decision-making process at domestic level is essential for maritime delimitations. Nevertheless, State's foreign affairs agenda priorities are different, difficult to harmonise and changing from an electoral cycle to another. Regarding the Black Sea costal States, we must also take into account that the necessary time to make and implement a decision can be variable. While slow decision processes are specific to democratic regimes - according to the rule of law standards, totalitarian regimes have the "advantage" of rather accelerated decision-making.

The Black Sea has only three established delimitations up to this point, which generally followed the equidistance principle. The most known one is between Romania and the Ukraine, giving the dispute settlement by the ICJ in the case.[1]

The second one is the delimitation between Turkey and Bulgaria[2], which has been registered with the United Nations. This delimitation line has a few points pinned down: P1-P2-P3 etc. The last delimitation segment, P9-P10, contains a mention regarding its flexible nature, subject to further negotiations. The reality of the situation is that segment P9-P10 is also relevant for an eventual delimitation between Romania and Turkey. Therefore, the strict application of the equidistance rule would in turn generate a Romanian-Turkish segment.

The oldest is represented by the delimitation between the USSR and Turkey,[3] settled by agreement in 1986, which initially was applicable to the continental shelf, but was extended via notifications to be applicable to the economic exclusive zone. As mentioned above, the final section of the continental shelf boundary to the tripoint with Romania and the entire

[1] https://www.icj-cij.org/en/case/132.
[2] https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-BGR1997MB.PDF.
[3] https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/RUS-TUR1987EZ.PDF.

exclusive economic zone boundary remain to be negotiated.[1] After URSS dissolution, Russia's succession of the USSR's treaty obligations was not questioned. Ukraine and Georgia were also considered successors to the maritime boundary delimitation treaties, taking into account they had established objective legal regimes. Moreover, in 1997, Turkey and Georgia re-confirmed maritime borders established by the above-mentioned treaties.[2]

Regarding the delimitation between Ukraine and Romania, it is important to mention that, after Crimea annexation, Russia's EEZ illegally claimed became directly adjacent to the EEZ of Romania. Moreover, on 25 February 2022, Russia took control over Ukrainian Snake Island, situated very close to Romania and Ukraine coasts. Overall, Ukraine considers that the 2009 delimitation agreement with Romania is still in force. Even if Crimea were to be annexed lawfully by a third state, the rule provided by Articles 11 and 12 of the 1978 Vienna Convention and widely applied in State's practice is that boundaries and territorial regimes, including for maritime zones, survive a succession of States.[3]

Some delimitations are left to be made, but the one between Romania and Bulgaria might be the only likely to be solved jurisdictionally or via agreement. With regard to the other states, as far as sovereignty claims are still being disputed, we contend that the delimitation of their continental shelf is not possible in the near future. Regarding Romania and Bulgaria, there is no indication as to what will be the next move of the parties - the tendency seems to be a joint exploitation front.[4] It is only a supposition, since the parties have kept all information confidential. The last rounds of negotiations that took place in March 2017 have been followed by a total silence.[5]

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[1] https://www.state.gov/wp-content/uploads/2019/12/LIS-109.pdf.

[2] https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-GEO1997BS.PDF.

[3]International Court of Justice, Reports of Judgments, Advisory Opinions And Orders, Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment Of 25 September 1997, para. 123, available at: https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf; see also Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Editura Hamangiu 2018, p. 135; see also Kristian Atland, Redrawing borders, reshaping orders: Russia's quest for dominance in the Black Sea region, European Security, vol. 30, 2021, Issue 2, pp. 305-324, available at https://www.tandfonline.com/doi/full/10.1080/09662839.2021.1872546.

[4] https://www.consilium.europa.eu/en/press/press-releases/2016/12/12/baltic-sea-quotas/.

[5]http://stiri.tvr.ro/litigiu-romano-bulgar-pentru-un-perimetru-strategic-de-17-kilometri-patrati--in-dreptul-cadrilaterului_817130.html#view.

In 2021, announcements were made by Turkey[1] regarding the uncover of great gas resources in its continental shelf, the reserve being placed around 5 km from the P9-P10 segment and could potentially be part of the disputed area between Romania and Bulgaria. An interesting aspect to remember is that the delimitation lines between Turkey and Bulgaria, Romania-Ukraine and Turkey-USSR potentially meet in one single point, but since their negotiators have left the lines free, they currently do not meet. In the hypothesis in which the delimitation line between Romania and Bulgaria would strictly follow the equidistance line, it is possible to reach the P9-P10 segment mentioned earlier, which implies that Romania would have territorial contact and delimitation with Turkey. If the parties decide to deviate from this delimitation, the process would be interesting to follow, since it would produce unpredictable results.

To sum up, existing delimitations can affect third parties rights: Russia-Turkey Agreement can interfere with a future Romania-Bulgaria delimitation if the equity method is applied. Romania-Bulgaria delimitation is likely to occur in the future (even though it is not a top priority for any of the two state), while Russia – Ukraine and Russia –Georgia delimitations are impossible, as long as sovereignty on Crimea and Abkhazia is controversial.

It is also important to remember that criminality and dysfunctional state institutions in separatist regions by the Black Sea constantly affect Georgia and Ukraine. The consequences are that in the areas where there are ongoing territorial disputes, the possibilities for international companies to exploit local resources seem implausible. However, the potential resolve of the Romanian-Bulgarian conflict could be the impulse needed by concession companies to advance their exploitation in the region.Overall, the delimitations in the area will produce massive impact on exploitation, since the exact configuration of the perimeters is unknown and would clearly be taken into consideration by companies.

7. The Black Sea straights

The Black-Sea is a semi-enclosed sea, related to Azov Sea at East through Kerch Strait and to Marmara Sea at West through Bosphorus Strait.

Since March 2014, Russia has been in control of both sides of the Kerch Strait, which made it easier for Russia to impose restrictions on the

[1] https://www.worldoil.com/news/2021/6/3/turkey-expected-to-announce-new-black-sea-natural-gas-discoveries.

commercial ship traffic between the Black Sea and the Sea of Azov, which is an important export route for Ukrainian coal, steel and agricultural products.[1] Ukraine did not miss the opportunity to address to the International Tribunal for the Law of Sea (ITLOS) in relation with an incident that took place in the Kerch Strait in November 2018. In May 2019, the Tribunal prescribed provisional measures and ordered Russia to release the three Ukrainian naval vessels and their crewmembers involved in the incident.

The ITLOS based its competence on art. 290 (5) of Montego Bay Convention from 1982 (UNCLOS), according to which the ITLOS has jurisdiction only for provisional measures, while the principal jurisdiction belongs to an arbitration tribunal formed according to Annex VII of UNCLOS. The most difficult issue was the determination of the *prima facie* jurisdiction, as both Ukraine and the Russian Federation made reservations according to art. 298 (1) b) of UNCLOS, excluding the settlement mechanisms related to *"disputes concerning military activities"*. ITLOS admitted that the incident comprised use of force in the context of a law enforcement operation. Nevertheless, it did not try to give a definition of the *"military activities"* exception (in order to include what appears to be a mixed law enforcement and military activities operation), but decided to *"increase the margin of the determination of the prima facie jurisdiction."*[2]

Bosphorus Strait transit is controlled by Turkey, since it is a part of its territory. However, the regime of the straits is governed by the Montreux Convention Regarding the Regime of the Straits from 1936. The Convention derogates from the customary law and prescribes a favourable regime to Turkey. Under the treaty, Turkey agreed to free passage of civilian and trade vessels, but settled a strict control of warships access. Moreover, non-riparian warships have a very restricted access to the Black Sea - they must notify Turkey 15 days in advance, while riparians war vessels must give 8-days notification.[3] Civil aircraft can be transited along routes authorised by

[1] https://www.tandfonline.com/doi/full/10.1080/09662839.2021.1872546.
[2] Ion Gâlea, *The Interpretation of "Military Activities", as an Exception to Jurisdiction: the ITLOS Order of 25 May 2019 in the Case Concerning the Detention of Three Ukrainian Naval Vessels,* RRDI 21/2019.
[3] https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1936-Convention-Regarding-the-Regime-of-the-Straits.pdf.

the Turkish government. According to Reuters, Ankara also applies the restrictions on the passage of aircraft carriers.[1]

It is public information that the president of Turkey is willing to construct the Istanbul Canal, in order to offer an alternative to the Bosporus straight transit.[2] Istanbul Canal will theoretically fall outside of the Convention. However, since the Istanbul straight will short-circuit the Bosporus straight and not Dardanelle, the regime established by the Montreux Convention will not automatically be affected.

The Montreux Convention is an objective treaty, opposable *erga omnes*, which has provided substantial stability to the area for almost a century. It could be taken into consideration whether or not president Erdogan will choose to apply the denunciation powers he has recently manifested in order to denounce the Montreux Convention, which has a complex regime regarding renegotiation and denouncement. A representative for the Justice and Development Party, or A.K.P., told a television presenter that the president had the power to do so if he wanted.[3] Recently, the President has stated publicly that the Montreux Convention is an important achievement for the country, but he has not denied a future possibility of renouncing the treaty.[4]

Assuming that the Montreux Convention is denounced according to its own provisions, assuming renegotiation is not possible, then international customary regime of straits will be applicable: the right of free passage through straights, as codified by the Montego Bay Convention. In these circumstances, customary international law is unfavourable to Turkey. Russia would also suffer great losses if the treaty is changed, giving the size of its fleet and constant battle to secure access to the Black Sea.

On 24 February 2022, immediately after Russia having invaded Ukraine, the traffic of vessels in the Black Sea was seriously perturbed. A Turkey-controlled commercial bulker was hit by a shell or missile while

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[1] https://www.reuters.com/world/europe/pact-gives-turkey-oversight-warship-transit-russia-ukraine-2022-02-22/.

[2] "The statement issued the previous night is an act entirely outside this framework. The connection between Canal Istanbul and the Montreux (Convention) is fundamentally incorrect."

[3] https://yetkinreport.com/en/2021/04/04/turkey-rolls-into-yet-another-coup-debate-out-of-the-blue/.

[4] *"Despite everything, we consider the Montreux (Convention's) achievements to our country important and maintain our commitment to this contract until we have the opportunity for better (...). This is our struggle for sovereignty. Are we sovereign on the Bosporus right now? Unfortunately (no). In other words, Canal Istanbul is a project that will strengthen our claim to sovereignty in the Bosporus."*

sailing in the Black Sea.[1]Few days before, the Ukrainian Foreign Ministry had also issued a protest over Russian actions, who blocked access to the Black Sea and to the Sea of Azov. According to the Ukrainian protest, Russian maneuvers in the sea *"make navigation in both seas virtually impossible"*, being an *"open disregard for international law, including the UN Charter, UN General Assembly resolutions, and the UN Convention on the Law of the Sea."*[2]

After Ukraine's request for Turkey to close the Bosphorus and Dardanelles straits to Russian ships, President Tayyip Erdogan has declared Turkey will do what is necessary as a NATO ally if Russia invades, without any further details. It is useful to remember that, in 2008, when Russia recognised the independence Abkhazia and Ossetia, Turkey did not agree to let USA warships pass the straits. Turkey's position towards Russia is delicate, since the country relies on Russia for tourism and has developed a close cooperation with Moscow on energy and defence. Nevertheless, Turkey has recently sold drones to Ukraine, called the Russian actions against Ukraine unacceptable[3] and voted for the UN Resolution condemning Russian invasion in Ukraine.[4]

Even if Turkey does not yet apply economic sanctions against Russia, on February 28 it decided to close the Straits for Russian vessels, by using *"the authority given by the Montreux Convention on ship traffic in the straits in a way that will prevent the crisis from escalating".*[5]

8. Regional instruments and bodies

The regional instruments and bodies (intergovernmental cooperation and NGOs)in the Black Sea area are numerous, but not quite effective. Some authors explained their lack of success by the absence of a regional identity[6], due to the constant pressure put by Russia on its neighbours. It is beyond doubt that, Russia has constantly claimed its influence position on the region, even after the cold war. In 1997, ex-soviet republics Georgia,

[1]https://www.maritime-executive.com/article/turkish-controlled-bulker-reportedly-hit-by-shell-in-the-black-sea.
[2]https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-decision-russian-federation-block-parts-black-sea-and-sea-azov-and-kerch-strait
[3] https://www.reuters.com/world/europe/pact-gives-turkey-oversight-warship-transit-russia-ukraine-2022-02-22/.
[4] https://www.jpost.com/breaking-news/article-699136.
[5]https://edition.cnn.com/2022/02/28/middleeast/mideast-summary-02-28-2022-intl/index.html.
[6]Doru Cojocariu, *op. cit.*

Ukraine triedto counterbalance Russian influence, together with Azerbaidjan and Moldavia, by establishing the Organisation for Democracy and Economic Cooperation (GUAM). Romania and Bulgaria succeeded in their adhesion to NATO and EU, while Turkeystaid at an equal distancebetween Russian and Western influences. Black Sea costal States, excepting Russia, are therefore rather "followers" than "trend-setters" for the region's dynamic[1] and the regional instruments they have created rarely had a real impact on it.

One of the most ambitious and important initiatives of regional development and cooperation is the Organization of the Black Sea Economic Cooperation (BSEC), formed in 1992 and with its Charter signed in 1999. The BSEC currently has 13 members, the most recent of which is North Macedonia.[2] The BSEC performs its activities through working groups, operating in a wide array of fields such as Education, Combating Crime, Tourism, Transport or Banking and Finance. Therefore, the Black Sea Trade and Development Bank (BSTDB) was established in 1997 to serve the eleven member founding countries of the BSEC. It supports economic development and regional cooperation by providing loans, guarantees, and equity for development projects and trade transactions for both public and private enterprises in member countries. It does not attach political conditionality to its financing.

The Three Seas Initiative is a forum comprised of 12 EU Member States geographically located on a North-South axis connecting the Baltic Sea, the Adriatic Sea and the Black Sea (Estonia, Latvia, Lithuania, Poland, Czechia, Slovakia, Austria, Hungary, Slovenia, Croatia, Romania and Bulgaria). The initiative was called 'a new concept' designed to promote unity, cooperation and cohesion among the States,[3] by seeking to develop the infrastructure of these countries in terms of digital, energy and transport systems, in order to 'catch up' with the rest of the Europe.[4]

As of December 2021, six summits have been held. A total number of 81 priority projects are developed by the Three Seas Initiative (2 of which already marked as completed, both in Croatia), the majority of which (52%)

[1] Elisabeth Sieca-Kozlowski, Alexandre Toumarkine, *Géopolitique de la Mer Noire*, ed. Kartala, 2000, p.6.
[2] http://www.bsec-organization.org/member-states.
[3] https://www.president.pl/news/minister-szczerski-three-seas-initiative-to-boost-european-unity--,36389.
[4] https://3seas.eu/.

being in the transport sector, 33% in the energy field and 15% in the field of digitalization and digital infrastructure.[1]

A very ambitious projects considered by the Three Seas Initiative is the so-called 'Rail-2-Sea', which aims to modernize, upgrade and develop a 3,663 km long continuous railway connecting the Polish port of Gdańsk at the Baltic Sea to the Romanian port of Constanța at the Black Sea.[2] The railway is considered for both civil and military use, with NATO itself expressing full support for the project, as it connects two of its closest Eastern-front allies, Poland and Romania.[3] The Initiative's projects are supported by a Fund, founded by Romanian and Polish banking institutions, but also joined by other countries as well as supported by third countries such as the United States.[4]

In December 2016, the Eurasia Tunnel was opened in Istanbul. The Tunnel crosses underneath the Bosporus Strait, separating the Black Sea from the Sea of Marmara and therefore one of the most important strategic points in the region and in the world. The Tunnel, which was financed by, among others, the European Bank for Reconstruction and Development, by the European Investment Bank and by other foreign actors such as Deutsche Bank,[5] was also widely seen as a milestone in opening the way for Turkey's future infrastructure projects in a major private-public partnership framework.[6]

The Baku-Tbilisi-Kars railway, which was opened in October 2017, connects Azerbaijan, Georgia and Turkey, providing an alternative rail route from China, via Central Asia, towards Europe. The main geopolitical and economic advantages of the railway were to connect Europe and Asia, by bringing the Caspian and the Black Seas closer, while, according to some commentators intentionally bypassing Armenia altogether.[7] The European

[1] https://projects.3seas.eu/report.
[2] https://www.railwaypro.com/wp/gdansk-constanta-rail-route-proposed-under-the-three-seas-initiative/.
[3] https://universul.net/rail-2-sea-and-via-carpathia-the-us-backed-highway-and-rail-links-from-the-baltic-to-the-black-sea/.
[4] https://www.atlanticcouncil.org/news/press-releases/us-commits-1-billion-dollars-to-develop-central-european-infrastructure/.
[5] https://web.archive.org/web/20160120170635/http://events.unicredit-cib.eu/uploads/media/Presentation_Basar_Arioglu_Yapi_Merkezi_Insaat.pdf.
[6] https://www.ebrd.com/news/2012/new-bosphorus-tunnel-in-istanbul-will-connect-europe-and-asia.html.
[7] https://web.archive.org/web/20110707162755/http://www.armtown.com/news/en/azg/20050901/2005090101/.

Union deemed the railway a 'major step' in improving infrastructure and transport links between Europe and Central Asia.[1]

Finally, yet importantly, the Commission on the Protection of Black Sea Against Pollution (BSC) deserves to be mentioned, as environmental issues are of common interest for all six costal states. It was established by the riparian states in 1992 to deal with the following key sectors: environmental and safety aspects of shipping, pollution monitoring and assessment, control of pollution from land-based sources, development of common methodologies for integrated coastal zone management, conservation of biological diversity, environmental aspects of fisheries and other marine living resources, information and data management. BSC is also involved in the aassessment of climate change implication on Black Sea biodiversity, via various projects on integrated coastal zone management and climate change.[2]

9. The influence of global and regional players on the energy market infrastructure

The Black Sea region, as the world's second-largest source of natural oil and gas and, moreover, as an essential node for the transfer thereof, has grown to be an important focus for the energy policies of the key players in the field. In truth, the Black Sea functions as a transfer bridge between suppliers (Russia, Azerbaijan, Turkey) and consumers (Central and Western Europe).

According to projections, more than 25% of all European gas and oil comes from Russia, with countries such as Latvia and Estonia being 100% dependent on Russian gas, while Austria and Hungary are only 60% dependent.[3] From the perspective of the Western countries, the best alternative for shaking off at least partially their dependence on Russia would be to appeal to the gas resources of Turkmenistan or Iran, which would realistically be hindered by Russia and/or the United States.[4] In order to combat the growing presence of the United States in Europe's gas markets (via the LNG supply), Russia has already announced an increase in

[1] https://eeas.europa.eu/delegations/azerbaijan_en/34825/EU%20Statement%20on%20opening%20of%20the%20Baku-Tbilisi-Kars%20railway.
[2] http://www.blacksea-commission.org/.
[3] Tim Marshall, *Prisoners of Geography: Ten Maps That Explain Everything About the World*, Scribner, New York, 2016, p. 36.
[4] NATO Parliamentary Assembly, Economics and Security Committee, Sub-Committee on Transition and Development, 'The Black Sea Region: Economic and Geo-Political Tensions', 035 ESCTD 20 E rev.2 fin, 20 November 2020, para. 35.

its own LNG production and export[1], with President Putin offering LNG from the Arctic as "green fuel" in order to 'decarbonise Europe'.[2]

Russia's most powerful weapons, used for political reasons as much as for economic ones, are gas and oil, which Russia uses to its advantage as fully as possible, being the most important gas supplier to Western Europe (with 80% of Russian gas exports eventually passing through the Black Sea region). This strategy is part of its larger policy of interests and development in the Black Sea region. According to commentators, the Russian military policy in the Baltic and Barents Seas (besides even having already declared the Azov Sea as an 'internal waterway').[3]

The Baltic Sea is crossed by Russia's Nord Stream route connecting directly to Germany (as well as the proposed Nord Stream 2, which as of December 2021 seems unlikely to move forward due to the major opposition of Germany and the USA to Russia's manoeuvres in Ukraine),[4] moving further South. The Blue Stream pipeline (the deepest in the world) transports gas from Russia to Turkey underneath the Black Sea, bypassing third countries and enhancing the reliability of gas supplies.[5] These two projects, albeit located separately from a geographic point of view, can only be regarded together, by viewing them as an integral part to Russia's energy policies.

Another abandoned project, the South Stream, was supposed to use almost the same route as Blue Stream - it would have branched off from Bulgaria both towards Serbia-Hungary-Austria and towards Italy. The South Stream project, which was deemed non-compliant with EU legislation,[6] but which was supposed to be Russia's backup route to Europe in case of a dispute with Ukraine, was eventually abandoned in 2014.[7] This reflects

[1] https://www.hellenicshippingnews.com/russia-to-increase-lng-production-to-140-mln-tonnes-per-year-by-2035-says-putin/.

[2] https://thebarentsobserver.com/en/arctic-lng/2021/05/putin-ready-decarbonise-europe-lng-arctic.

[3] NATO Parliamentary Assembly, Economics and Security Committee, Sub-Committee on Transition and Development, 'The Black Sea Region: Economic and Geo-Political Tensions', 035 ESCTD 20 E rev.2 fin, 20 November 2020, para. 8.

[4] https://www.reuters.com/markets/commodities/us-has-understanding-with-germany-shut-nord-stream-2-pipeline-if-russia-invades-2021-12-07/.

[5] https://www.gazprom.com/projects/blue-stream/.

[6] Indra Overland, *The Hunter Becomes the Hunted: Gazprom Encounters EU Regulation*, in Svein Anderson, Andreas Goldthau, Nick Sitter (eds.), *Energy Union: Europe's New Liberal Mercantilism?*, Palgrave Macmillan, London, 2017, pp. 115-130.

[7] https://www.reuters.com/article/us-russia-gas-gazprom-pipeline-idUSKCN0JF30A20141201.

Russia's determination of reducing as much as possible its need to transport gas towards Europe through Ukraine, as well its intention to use the project in order to put pressure on Ukraine.[1]

The alternative embraced by Russia was to reach out to Turkey with a new project, the Turk Stream pipeline, inaugurated in January 2020 as a joint project between Gazprom and Botaș Petroleum after the abandonment of Russia's South Stream. It consists in fact of two parallel pipelines connecting Russia and Western Turkey (in the regions adjacent to Bulgaria and Greece).[2]

Another Black Sea riparian, Bulgaria, is seeking to increase its regional importance by becoming a strategic gas distributor centre through the development of the Balkan Stream project.[3] This pipeline, functioning as an extension of the Turkish Stream pipeline, is intended to allow more Russian gas to flow towards the Western Balkans and from there to Central Europe. The project also grants Russia more leverage against Ukraine and Belarus by completely avoiding their region. The same day that the Serbian section of the Balkan Stream pipeline was opened, Bulgaria also started receive Azerbaijani gas through the Trans-Adriatic Pipeline, which crosses Greece, Albania and eventually reaches Italy.

Sources consider that the next country after Bulgaria to establish itself as a supplier in the Black Sea region is Romania.[4] The BRUA pipeline (standing for "Bulgaria-Romania-Hungary-Austria"), the first phase of which was recently completed in 2021[5] (ensuring the security of the Bulgarian and Romanian gas supplies), is intended to lessen Romania's dependence on Russian gas and energy supply, while providing the country with an opportunity to further export natural gas exploited in the Black Sea to European markets.[6]

Such projects developed by relatively new actors in the Black Sea energy field, such as Bulgaria and Romania, which have seen an increase in

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[1] NATO Parliamentary Assembly, Economics and Security Committee, Sub-Committee on Transition and Development, 'The Black Sea Region: Economic and Geo-Political Tensions', 035 ESCTD 20 E rev.2 fin, 20 November 2020, para. 36.
[2] Ibid., para. 33.
[3] https://globalriskinsights.com/2021/02/the-pipeline-no-ones-celebrating-balkan-streams-operability-and-the-future-of-europes-energy-security/.
[4] https://intellinews.com/balkan-stream-countries-hope-to-avoid-worst-of-international-gas-crisis-223382/.
[5] https://www.energynomics.ro/en/transgaz-opens-brua-phase-1-with-capacity-reservation-on-the-hungarian-route/.
[6] https://www.agerpres.ro/english/2021/08/04/brua-gas-pipeline-project-phase-1-completed-with-21-pct-economy-over-value-auctioned-transgaz--758833.

recent years, are meant to ensure a higher degree of market demand, higher predictability and better energy security. Several projects exist in order to increase the region's independence from Russian gas supply, such as the Romanian project to connect the Black Sea shore at Amzacea to the Romanian national system at Podișor west of Bucharest, as part of the larger BRUA agreement,[1] which is expected to be completed by the end of 2023.

The European Union has constantly noted that the increased Russian military presence in the Black Sea has a negative impact on the strategic infrastructure, affecting not only the relationship between Russia and the NATO Alliance, but also the commercial shipping. Moreover, EU has already insisted for Russian infrastructure projects sponsored by Gazprom to comply with the Third Energy Package, a framework designed especially for ensuring fair competition.[2]

Conclusion

EU and NATO enlargement, energy transport corridors from Caspian Sea to Western Europe or international control over maritime illegal traffic[3] are exogenous factors with a great influence on regional dynamic. In the same time, the historical heritage and the transition process to democratic institutions and capitalism also had a great impact on coastal States capacity to create and adhere to international cooperation instruments and bodies.

As it was observed, there are a number of ongoing or paused conflicts between the coastal states. These conflicts imply disputed sovereignty relating to the territories involved and have an obvious impact on the security and cooperation in the Black Sea area, but also on the exploitation and delimiting of resources. Even assuming that the ongoing war in Ukraine will not last, still bilateral relations Russia-Ukraine and Russia-Georgia would not have a good evolution in the near future. Moreover, NATO membership of Turkey, Romania and Bulgaria will probably continue to be considered by Russia a threat to its national security.

The security problems in the Black Sea region are not isolated from the wider regional and international context after the cold war. NATO's

[1]https://www.transgaz.ro/sites/default/files/uploads/users/admin/information_leaflet_for_black_sea-podisor_project_v2.pdf
[2]https://www.euractiv.com/section/energy/opinion/russias-trojan-stream-under-the-black-sea/
[3] Doru Cojocariu, *op cit.,* p. 112.

intervention in Balkans conflict in the '90s was qualified by Moscow as an USA and NATO attempt to weaken the role of UN Security Council in the international decision processes for peacekeeping.[1] In the same time, in order to legitimate its own military interventions in Georgia and Ukraine, Russia itself did not hesitate to use the same controversial theories that NATO had invoked in relation to Kosovo (a wide interpretation of humanitarian intervention and people's right to self-determination).

On the other side, Georgia and Ukraine (ex-soviet republics) are both looking for closer ties with the EU and NATO. Certain authors considered that fact a proof of Moscow's inability to create attractive regional cooperation alternatives for its neighbours.[2] Therefore, despite the significant number of existing Black Sea cooperation mechanisms, they do not offer effective solutions to problems that costal States are facing. Their effectiveness is weak, especially due to the colliding views on security issues.

Unstable security climate had an immediate consequence – a collapse of regional transports infrastructure, including maritime navigation. It will probably have long-term effects on the regional economy, including resource exploitation projects in the Black Sea. As mentioned above, some maritime delimitations in the Black Sea are impossible to be conceived in the near future. Moreover, investors are putting on hold ongoing projects and, in the near future, they will probably not take the risk to start them over or to initiate new ones. This situation has already a dramatic impact on the energy market and economists are not optimistic about its evolution.[3]

In a context of military invasion, border instability and territorial annexing, the entire regional dynamic will be disturbed, which is likely to have wide and long-lasting geopolitical, economic and social effects.

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[1] Peter Bonin, Janusz Bugajski, apud Doru Cojocariu, *op. cit.,* p. 110.
[2] Peter Bonin, apud Doru Cojocariu, *op. cit.*, p. 109.
[3] https://www.theguardian.com/environment/2022/mar/10/oil-and-gas-companies-are-looking-at-a-bonanza-from-the-ukraine-war; https://www.cnbc.com/2022/03/02/russia-ukraine-war-lessons-for-global-energy-markets.html.

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Studii și comentarii de jurisprudență și legislație
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Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the *Front Polisario* Cases of 29 September 2021

Ion GÂLEA[*]

Faculty of Law, University of Bucharest

Abstract: *This study has the purpose to examine the judgments rendered on 29 September 2021 by the General Court of the European Union Front Polisario/Council (T-279/19 and T-344/19, T-356/19), from the wider perspective of the European Union case law concerning the territorial scope of agreements concluded between the Union and the Kingdom of Morocco. Thus, the judgments represent a continuation of previous cases Council/Front Polisario (C-104/16P) of 2016 and Western Sahara Campaign (C-266/16) of 2018. In those cases, the Court of Justice of the European Union interpreted "neutral" territorial clause of two agreements between the EU and the Kingdom of Morocco as excluding the application of those agreements from the territory of Western Sahara. The Court of Justice relied essentially on interpretation in accordance with any other relevant rule of international law in force between the parties (rule reflected in article 31 (3) c) of the 1969 Vienna Convention on the Law of Treaties between States) and invoked the principles of self-determination and relative effect of treaties. Subsequent to these judgments, the EU and the Kingdom of Morocco modified the respective agreements (the" liberalisation agreement" and the" fisheries agreement") in order to*

[*] *Ion Gâlea is Senior Lecturer in Public International Law and International Organizations at the University of Bucharest, Faculty of Law. He held the position of director general for legal affairs (legal advisor) within the Ministry of Foreign Affairs of Romania between 2010 and 2016. Between 2016 and 2021, he was the Ambassador of Romania to the Republic of Bulgaria.* The opinions expressed in this paper are solely the author's and do not engage the institutions he belongs to.

provide explicitly for their application to Western Sahara and its adjacent waters. Thus, the judgment of the General Court of 29 September 2021 were rendered following the action for annulment filed by the Front Polisario, against the decisions of the Council for the conclusion of those agreements.

The study explores the legal questions that were necessarily examined by the General Court, including the locus standi of the Front Polisario, the concept of „people" as subject of international law, the rule „land dominates the sea" and the legal effect of the principles of self-determination and legal effect of treaties. Even if the General Court did not mention it, the study attempts to examine, also, the consequences of the fact that doctrine (including the International Law Commission) and a significant number of States consider the right to self- determination to represent a jus cogens norm.

Key words: *self-determination, consent, territorial application of treaties, national liberation movements, locus standi*

1. Introduction

The question of the territorial application of agreements concluded by the European Union with third countries, which are involved in outstanding territorial issues, is not new. In particular, in the case of Israel, institutions and Member States regarded the question of territorial application of treaties "in the negative way": their concern was for agreements concluded by the European Union *not* to apply to the disputed territories. For example, in the case of Israel, the European Court of Justice ruled in the *Brita* case of 2010 that the interpretation of the EC-Israel Association Agreement must lead to the conclusion that products originating in the West Bank do not fall within the territorial scope of the agreement.[1] The case had originated in the refusal of German customs authorities to grant the tariff treatment provided by the said agreement to products originating in the West Bank. Moreover, the European Union institutions paid great attention to indicating the origin of products from Israel and the occupied territories, in order to ensure that "in

[1] Judgment of 25 February 2010, C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECR [2010] I-1319, para. 53.

line with international law, [the European Union] does not recognize Israel's sovereignty over territories occupied by Israel since June 1967".[1]

Nevertheless, in the case of Western Sahara, the approach of the EU institutions was rather different. Based on initially "neutral" clauses concerning the territorial scope of the agreements between the European Union and the Kingdom of Morocco, the practice developed in the sense that trade and fisheries agreements covered *de facto* products originating from Western Sahara and fishing in waters adjacent to this territory. In 2012, the Front Polisario ("*Frente Popular de Liberación de Saguía el Hamra y Río de Oro"*) challenged before the General Court of the European Union Decision of the Council for the conclusion of the "2012 Liberalisation Agreement".[2] The Front Polisario argued that, despite the fact that its territorial scope was the "territory of the Kingdom of Morocco", the agreement had as a practical effect the importation within the EU of agricultural products originating from Western Sahara, as well as the exploitation of fishery resources of waters adjacent to this territory. We have analysed the case before the General Court[3] and the judgment in appeal of the European Court of Justice[4] in a previous study published in 2017.[5] The solution reached by the Court of Justice relied essentially on the interpretation of the 2012 liberalisation agreement: when the territorial application clause was "neutral", the Court found that the agreement must be interpreted as not applying to the territory of Western Sahara. Practically, the European Court of Justice "saved" the agreement by way of interpretation, deciding that its meaning cannot be other than in the sense of

[1] Interpretative Notice on indication of origin of goods from the territories occupied by Israel since 1967, 2015/C 375/05, Official Journal of the European Union C 375/4, 12.11.2015; also referred to in the judgment of 12 November 2019, C-363/18, *Organisation juive europenne, Vignoble Psagot Ldt v. Ministère de l'Economie et des Finances,* ECLI:EU:C:2019:954, para. 12.

[2] Agreement, in the form of an Exchange of Letters, between the European Union and the Kingdom of Morocco, concerning the reciprocal liberalisation measures on liberalisation products, processed agricultural products, fish and fishery products, approved by Council Decision no. 2012/497/EU of 8 March 2012, Official Journal L 241, p. 2.

[3] Judgment of 10 December 2015, T-512/12, *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro v Council of the European Union*, ECR [2015] ECLI:EU:T:2015:953 (hereinafter "T-512/12").

[4] Judgment of 21 December 2016, C-104/16P, *Council of the European Union v Front populaire pour la liberation de la saguia-el-hamra et du rio de oro*, ECR [2016] ECLI:EU:C:2016:973 (hereinafter "C-104/16P")

[5] Ion Gâlea, *The Law of Treaties in the Recent Case-Law of the European Court of Justice: the Frente Polisario Case, Interpretation and Territorial Application of Treaties*, Analele Universității din București, Seria Drept, nr. I/2017, p. 139-155.

not applying to Western Sahara.[1] Subsequent jurisprudence confirmed this approach in 2018 and 2019.[2]

Following the above-mentioned case law, the institutions of the European Union adopted a different avenue. In 2017 and 2018, the Council authorized negotiations on extending the territorial scope of the liberalisation agreement and of a fisheries agreement between EU and Morocco, in order to include the territory of Western Sahara.[3] The agreements (hereinafter referred to as the ”2018 liberalisation agreement” and the ”2019 fisheries agreement”) were signed in 2018[4] and the decisions of the Council for concluding those agreements were adopted in 2019.[5] It is

[1] C-104/16P, para. 126.

[2] Judgment of 27 February 2018, C-266/16, *Western Sahara Campaign UK,* EU:C:2018:118 (“hereinafter “*Western Sahara Campaign*”), para. 85; T-180/14, Order of 19 July 2018, *Front Polisario v. Council,* EU: T:2018:496; Order of 8 February 2019, T-376/18, *Front Polisario v. Council,* EU: T:2019:77.

[3] Opening of negotiations related to the Agreement between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part were authorized on 29 May 2017 (“liberalisation agreement”). Opening of negotiations on negotiations with the Kingdom of Morocco with a view to amending the Agreement and agreeing on a new Implementation Protocol. Following those negotiations, a new Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco was authorized on 16 April 2018 (“fisheries agreement”).

[4] The Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, was signed on 25 October 2018 (hereinafter referred to as the ”2018 liberalisation agreement”). Signature was approved by Council Decision (EU) 2018/1893 of 16 July 2018 relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ L 310, 6.12.2018, p. 1). The Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement was signed in Brussels, on 14 January 2019 (hereinafter referred to as ”the 2019 fisheries agreement”). Signature was approved by Council Decision (EU) 2018/2068 of 29 November 2018 on the signing, on behalf of the Union, of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the exchange of letters accompanying the Agreement (OJ L 331, 28.12.2018, p. 1).

[5] Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement

against the decisions on the conclusion of these agreements that the Front Polisario filed actions for annulment before the General Court of the EU, based on article 263 of the Treaty Establishing the European Union ("TFEU") that gave rise to the two judgments of the General Court of 29 September 2021.[1]

The purpose of this study is to examine the elements of novelty brought by the judgments of 29 September 2021, as these judgments occurred on the background of a context, which was, on its turn, new. Thus, a first section will try to examine the background of the dispute, which would include the main conclusion derived from the interpretation given by the Court of Justice in 2016 and 2018, and the provisions of the contested agreements concerning the territorial scope. A second section will analyse aspects related to the subjects of international law – the national liberation movements and the "peoples" – including from the perspective of their relation to the *locus standi* criteria under article 263 (4) TFEU. A third section will attempt to examine the manner in which the General Court assessed the conformity of the contested decisions (and of the contested agreements) with two principles applicable in international law: the right of peoples to self-determination and the relative effect of treaties.

2. Background of the dispute

2.1. Consequences of the previous case law of the European Court of Justice

The contested agreements and the contested decisions had as a purpose to extend the scope applicable liberalisation and fisheries agreement to the territory of Western Sahara, but also to achieve this territorial extension in conformity with the previous case law of the European Court of

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establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2019 L 34, p. 1) – hereinafter "Council Decision (EU) 2019/217"; Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019, L 195, p. 1), hereinafter "Council Decision (EU) 2019/441".

[1] Judgment of the General Court of 29 September 2019, T-279/19, *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro v. Council,* ECLI:EU:T:2021:639 (hereinafter "T-279/19"); Judgment of the General Court of 29 September 2021, T-344/19 and T-356/19, *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro v. Council,* ECLI :EU :T :2021 :640 (hereinafter "T-345/19, T-356/19").

Justice.[1] Thus, it would be useful to recall the main reasoning of these cases, as it served as an important starting point for the judgements of the General Court of 29 September 2021.[2]

First, in the case T-512/12, the General Court interpreted the liberalisation agreement" to apply to the territory of Western Sahara.[3] The provisions concerning territorial scope of the agreement scope were "neutral": the agreement did not contain a territorial clause. Moreover, the agreement was subject to the Association Agreement between EU and Morocco, which stipulated that it applied to "the territory of the Kingdom of Morocco".[4] The General Court relied on the practice of the parties to apply *de facto* the agreement to Western Sahara, as being part of the "context" according to which the treaty should be interpreted.[5] Moreover, the General Court held that if the EU institutions wished to make clear that the agreement did not apply to Western Sahara, a specific clause excluding such application should have been included.[6]

Based on this interpretation, the General Court annulled the Council decision on the conclusion of the agreement. It held that the Council failed to exercise its obligation to examine all the relevant facts, in order to satisfy itself that "there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights".[7]

Second, the European Court of Justice did not embrace, upon appeal, the interpretation of the General Court concerning the territorial scope of the liberalisation agreement. The Court of Justice found that the General Court erred in law when it decided that the agreement applied to Western Sahara.

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[1] Council Decision (EU) 2019/441 of 4 March 2019, paragraph 5 of the preamble; Council Decision (EU) 2019/441 of 4 March 2019, paragraph 3 of the preamble.

[2] See, for a general outline, Alvaro de Elera, "The Frente Polisario judgments: an assessment in the light of the Court of Justice's case law on territorial disputes", in *The EU as a Global Actor – Bridging Legal Theory and Practice*, *Liber Amicorum in honour of Ricardo Gosalbo Bono,* Brill/Nijhoff, 2017, pp. 266-290; S. Hummelbrunner, S., A. Pickartz, A, *It's Not the Fish That Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, Utrecht Journal of International and European Law, vol. 32 (2016), pp 19-40; Olivier Peiffert, *Le recours d'un mouvement de libération nationale à l'encontre d'un acte d'approbation d'un accord international de l'Union: aspects contentieux,* Revue trimestrielle de droit européen, no. 2, 2016, pp. 319-336.

[3] T-512/12*,* para. 103.

[4] *Ibid.* para. 74.

[5] *Ibid.*, para. 99.

[6] *Ibid.,* para. 102.

[7] *Ibid.,* para. 241.

In particular, the Court of Justice relied on the customary rule reflected in article 31 paragraph (3) letter c) of the Vienna Convention on the Law of Treaties between States, according to which interpretation must take into account any relevant rules of international law applicable between the parties.[1] The relevant rules of international law, as identified by the Court, were: i) the principle of self-determination, "a legally enforceable right *erga omnes* and one of the essential principles of international law"[2], whose consequence entails that a Non-Self-Governing Territory has a "separate and distinct status";[3] this "distinct status" entails the fact that the formula "territory of the Kingdom of Morocco" cannot be interpreted as including the Western Sahara;[4] ii) the customary rule enshrined in article 29 of the Vienna Convention on the Law of Treaties between States, according to which "unless a different intention appears from the treaty or is otherwise established, that treaty is binding upon each party in respect of its entire 'territory'";[5] iii) the principle of the relative effect of treaties, reflected in article 34 of the Vienna Convention on the Law of Treaties;[6] the Court of Justice held that the people of Western Sahara, as a "third party", would have been affected by the liberalisation agreement. We consider the paragraphs below as being of particular relevance, since they might form the basis for the reasoning of the General Court in its 2021 cases:

> "*More specifically, in that regard, the International Court of Justice noted, in its Advisory Opinion on Western Sahara, that the population of that territory enjoyed the right to self-determination under general international law [...], it being understood that the General Assembly of the UN, in paragraph 7 of its Resolution 34/37 on the question of Western Sahara, […], recommended that the Front Polisario, 'the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara', […].*
>
> *In the light of that information, the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the*

[1] C-104/16P, para. 86; for a criticism related to reliance on interpretation, "in particular" on article 31(3) c) of the Vienna Convention: Jed Odermatt, *Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario),* American Journal of International Law, Vol. 111, Issue 3, pp. 731-738, at p. 737.
[2] *Ibid.*, para. 88.
[3] *Ibid.,* para. 90.
[4] *Ibid.*, para. 92.
[5] *Ibid.*, para. 94.
[6] *Ibid.,* para. 100.

relative effect of treaties, […]. As such, that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party. In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent."[1]

The European Court of Justice also relied on the general rule enshrined in article 30 (2) of the Vienna Convention on the Law of Treaties. As the liberalisation agreement was "subject" or subordinated to the Association Agreement between EU and Morocco, the Court held that its territorial scope coincided with that of the Association agreement, without a special clause being necessary.[2] Moreover, the Court of Justice underlined that the interpretation based on the subsequent practice of the parties (article 31 (3) letter b) of the Vienna Convention on the Law of Treaties) could not be retained, since

"the purported intention of the European Union, reflected in subsequent practice and consisting in considering the Association and Liberalisation Agreements to be legally applicable to the territory of Western Sahara, would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles, as the Commission points out".[3]

Third, the above interpretation, that an agreement between the EU and the Kingdom of Morocco cannot be read as being applicable to the Western Sahara, was also retained in the *Western Sahara Campaign* case. Nevertheless, this case related to fishery activities in the adjacent waters to the territory of Western Sahara, allegedly conducted on the basis of two fisheries agreements concluded in 2006 and 2013 between the European Union and Morocco.[4] Relying on the C-104/16P case, the Court held that the words "territory of Morocco" cannot be interpreted as including the

[1] C-104/16P, para. 105-106.
[2] *Ibid.*, para. 115-116.
[3] *Ibid.*, para. 123.
[4] C-266/16, Western Sahara Campaign, para. 41.

Western Sahara,[1] and that the formula "'waters falling within the sovereignty or jurisdiction' of Morocco cannot, on its turn, be interpreted as including the waters adjacent to the territory of Western Sahara.[2] Moreover, it is important to underline that the Court of Justice referred to the principles of self-determination and relative effect of treaties, as rules of general international law. Thus, it held that:

> *"it would be contrary to the rules of international law [the principles of self determination and relative effect of treaties], which the European Union must observe and which are applicable mutatis mutandis in this case, if it were agreed that the waters directly adjacent to the coast of the territory of Western Sahara were to be included within the scope of that agreement."*
>
> *3*

2.2. The explicit extension of the territorial scope of the liberalisation agreement and of the fisheries agreement

On the background of the case law presented above, it might be appropriate to present certain provisions related to the territorial scope of the 2018 liberalisation agreement, of the 2019 fisheries agreement, as well as of the contested decisions concerning the conclusion of those agreements, that gave rise to the General Court judgments of 29 September 2021.

First, it may be pointed out that the 2018 liberalisation agreement contained a "Joint Declaration concerning the application of Protocols 1 and 4 of the [Association Agreement]". It provided expressly that "*Products originating in Western Sahara subject to the controls by customs authorities of the Kingdom of Morocco shall benefit from the same trade preferences as those granted by the European Union to products covered by the Association Agreement".* The same Joint Declaration stipulated also that Protocol 4 to the Association Agreement "*shall apply mutatis mutandis for defining the originating status of the products*" [referred to above] and that the "*customs authorities of the Member States and of the Kingdom of Morocco shall be responsible*" for applying the rules of origin to those products.[4]

Moreover, the third paragraph of the agreement provided that it is "without prejudice to the respective positions of the European Union with

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[1] *Ibid,* para. 64.
[2] C-266/16, Western Sahara Campaign, para. 69.
[3] *Ibid.*, para. 71.
[4] T-279/19, para. 53.

regard to the status of Western Sahara and of the Kingdom of Morocco with regard to that region". At the same time, the fourth paragraph stipulated that the parties to the agreement "*reaffirm their support for the United Nations process and back the efforts made by the Secretary General to reach a definitive political settlement in line with the principles and objectives of the Charter of the United Nations and based on the Resolutions of the UN Security Council".*[1]

In the same vein, the Council Decision (EU) 2019/217, by which the conclusion of the 2018 liberalisation agreement was approved, contains ample provisions regarding the following elements: a) "since the Association Agreement came into force, products from Western Sahara certified to be of Moroccan origin have been imported to the Union";[2] b) it was admitted that in case C-104/16P, the Court of Justice "specified that the agreement covered the territory of the Kingdom of Morocco alone and not Western Sahara";[3] c) "it should be ensured that the trade flows developed over the years are not disrupted, while establishing appropriate guarantees for the protection of international law"[4]; d) it is noted that the Commission assessed the consequences of the agreement, "particularly with regard to the advantages and disadvantages for the people concerned",[5] and concluded that, essentially, the tariff preferences "will have a positive overall effect for the people concerned"[6]; e) it is also noted that the Commission and the EEAS have "has taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement". Thus, reference is made to the "wide-ranging consultations", leading to the conclusion that "the majority of social, economic and political stakeholders who participated […] were in favour of [the agreement]".[7]

Second, with respect to the 2019 fisheries agreement, the following features can be outlined: a) it defined a "fishery zone", as "the waters of the Center-Eastern Atlantic situated between the parallels 35°47'18'' North and 20°46'13'' North, including the waters adjacent to Western Sahara". It also mentioned that this definition shall not affect potential negotiations concerning maritime delimitations with coast States;[8] b) the agreement

[1] T-279/19, para. 53.
[2] Council Decision (EU) 2019/217, preambular paragraph 4.
[3] *Ibid.,* preambular paragraph 5.
[4] *Ibid.*, preambular paragraph 6.
[5] *Ibid.*, preambular paragraph 7.
[6] *Ibid.*, preambular paragraph 9.
[7] *Ibid.*, preambular paragraph 10.
[8] T-344/19, T-356/19, para. 61.

provided that the EU ships active in the fishery zone "comply with the laws and regulations of Morocco";[1] c) the agreement stipulated a "financial counterpart" to be paid by the EU annually, managed by an EU-Morocco joint commission, whose purpose was to create benefits for the "populations concerned", proportionally with the fishing activities;[2] d) the territorial scope of the agreement was drafted in a peculiar way, in the sense that it applied to "the territories where [… the laws and regulations of the Kingdom of Morocco applied]";[3] e) the parties reaffirmed their support for the UN process towards a political solution and the agreement provided that it is without prejudice to the position of the EU towards the statute of the non-autonomous territory of Western Sahara (and to the position of Morocco that Western Sahara is an integral part of its national territory).[4]

The Council Decision (EU) 2019/441 on the conclusion of the 2019 fisheries agreement contained comparable provisions to the above-described Council Decision (EU) 2019/217. The most important elements can be summarized as follows: a) it admitted that in case C-266/16 Western Sahara Campaign, the Court of Justice held that the previous fisheries agreement does not apply to the waters adjacent to Western Sahara;[5] b) "*It should be possible for Union fleets to continue the fishing activities they had pursued since the entry into force of the Agreement, and the scope of application of the Agreement should be defined so as to include the waters adjacent to the territory of Western Sahara*";[6] c) it is noted – similar to Decision (EU) 2019/217 - that the Commission assessed the potential impact of the agreement, "in particular as regards the benefits of the people concerned and the exploitation of the natural resources of the territory concerned",[7] and concluded that, essentially, the agreement "should be highly beneficial to the people concerned"[8]; e) it is also noted that the Commission and the EEAS have "took all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent".[9] Thus, reference is made to the "extensive consultations", leading to the conclusion that "socioeconomic and political actors who participated […] were clearly in favour of [the agreement]".[10] However, it is noted the

[1] *Ibid.*, para. 62.
[2] T-344/19, T-356/19, para. 63.
[3] *Ibid.*, para. 65.
[4] *Ibid.*, para. 70.
[5] Council Decision (EU) 2019/441, preambular paragraph 3.
[6] *Ibid.*, preambular paragraph 5.
[7] *Ibid.*, preambular paragraph 8.
[8] *Ibid.*, preambular paragraph 9.
[9] *Ibid.*, preambular paragraph 11.
[10] *Ibid.*, preambular paragraph 12.

Front Polisario and other actors refused to participate in the consultation process.[1]

The above mention features of the two agreements and of the contested decisions reveal some preliminary concluding elements.

First, the Council expressly confirmed that, after the entry into force of the Association Agreement, a practice existed in the sense that goods were imported from the Western Sahara based on the liberalisation agreement, and "the Union fleets" carried fishing activities in Western Sahara waters. This acknowledgement occurs on the background that in case T-512/12, the General Court used such practice as "interpretative practice", in accordance to the general rule reflected in article 31 (3) b) of the Vienna Convention on the Law of Treaties.[2] Nevertheless, as outlined above, the Court of Justice held, in case C-104/16P, that such "subsequent practice "*would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties".*[3]

Second, it appears, in an express manner, that the territorial scope of the 2018 liberalisation agreement and of the 2019 fisheries agreement was to include the territory of Western Sahara and, respectively, the waters adjacent to the Western Sahara.

Third, the EU institutions attempted to respond to the considerations resulting from the case law of the Court of justice concerning the "consent of the people of Western Sahara", as a third party to the agreements. As it appears from the preamble of the contested decisions, the Commission and the EEAS conducted "wide-ranging" or "extensive" consultation, in order to ascertain consent of the "people concerned". Such consultations included a variety of "actors" or "stakeholders", the majority of whom expressed themselves "in favour". However, the institutions acknowledge that a number of actors, including the Front Polisario, refused to take part in the consultations.

Fourth, both agreements contained "without prejudice" clauses, by which the parties confirm that the agreements do not affect the EU position with respect to the status of Western Sahara (as well as the position of Morocco according to which it is an integral part of the "national territory"). At the same time, the parties reaffirm their support for the UN process, aiming to a political solution for Western Sahara. We note that it results,

[1] *Ibid.,* preambular paragraph 12.
[2] T-512/12, para. 99.
[3] C-104/16P, para. 123.

indirectly, that the parties "felt the need" to mention that their positions are not affected (as if they might have been in the absence of such clauses).

3. Subjects of international law

In the cases which led to the two judgments (T-279/19 and T-345/19, T-356/19) rendered on 29 September 2021, the General Court was confronted with the legal challenge brought by the Polisario Front to the decisions on the conclusion of the two agreements presented in the sub-section I.2. The agreements contained explicit clauses leading to their application to the territory/adjacent waters of Western Sahara. Nevertheless, the first issue that the General Court was confronted with was the admissibility of the action, which involved the analysis over the legal personality and the *locus standi* of the Front Polisario. Moreover, the requirement of "consent" established by the Court of Justice in case C-104/16P involved the notion of "people of Western Sahara". Thus, this section proposes to analyse aspects related to subjects of international law: the national liberation movements and the "peoples".

3.1. National Liberation Movements. The legal personality of Front Polisario

The General Court had to rule on the admissibility of the actions for annulment. Thus, the conditions that had to be fulfilled by the appellant, in accordance with article 263 (4) TFEU, were the following: the applicant must be a "legal person" and the action must be of "direct and individual concern to it". Thus, the first question that had to be analysed was whether the Polisario Front meets the criteria to be considered a "legal person", in the sense of article 263 (4) TFEU.

It is true, this question had been addressed in 2015 in the case T-512/12. The General Court underlined that the concept of "legal person" does not coincide to the same notion in the domestic legal systems.[1] Thus, an entity might be a "legal person" in the sense of article 263 (4) TFEU, even if it does not have legal personality within a Member State or a Third State.[2] Without mentioning in an explicit way whether the Front Polisario had legal personality in international law, the General Court found that Front Polisario "must be regarded as a legal person", especially because it

[1] T-512/12, para. 48; the General Court quoted also the judgment of 28 October 1982, 135/81, *Groupement des Agences de voyages* v *Commission* ECR, EU:C:1982:371, para. 10.
[2] T-512/12, para. 51.

was accepted as taking part in the UN lead peace-process concerning Western Sahara and was considered the by the UN as an "essential participant" in this process. [1] In 2015, General Court relied, indeed, on the "actorship possessed by Front Polisario under international law",[2] but without expressing a decisive point on its "legal personality" in international law. The Court of Justice annulled, indeed, the 2015 judgment of the General Court. Nevertheless, the error of law identified by the Court of Justice concerned the interpretation of the liberalisation agreement in respect of its territorial scope: the Court did not question the findings concerning the qualification of the appellant as a "legal person".

In all cases before the General Court (both in 2015 and in 2021), the Front Polisario argued that it is a "national liberation movement" deriving its rights and obligations directly from international law.[3] The 2021 cases offered, in our opinion, a "slight step forward", with respect to reliance on international law with respect to evaluating the concept of a "legal person".

First, the General Court took into account the case law subsequent to the year 2015, which acknowledged explicitly that subjects of international law, such as non-member States, are legal persons within the meaning of EU law (the quoted cases related to Cambodia and Venezuela).[4]

Second, the General Court examined the arguments put forward by the Council, Commission and the French Republic in the sense that the international legal personality of Front Polisario did not confer any capacity to act outside the UN process.[5] The General Court did not expressly rule on the "legal personality" of the Front Polisario, but followed a line of reasoning which can be summarized as follows: i) international law recognizes to the "people of Western Sahara" the right to self-determination; ii) the UN General Assembly recognized the applicant as "the representative of the people of Western Sahara" and recommended that it would take part "fully" in negotiations with the Kingdom of Morocco in search for a political solution to the question of Western Sahara.[6] Thus, the General

[1] *Ibid.,* para. 56-60.
[2] Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker,* Common Market Law Review, vol. 55, 2018, pp. 569-588, p. 571.
[3] T-512/12, para. 37; T-279/19, para. 81; T-344/19, T-356/19, para. 134.
[4] T-279/19, para. 87; the General Court quoted, judgment of 22 June 2021, C-872/19P, *Venezuela v. Council,* EU:C:2021: 507, para. 44, order of 10 September 2020*,* T-246/19, *Cambodia and CRF v. Commission*, EU:T:2020:415, paras. 47, 49, 50.
[5] T-279/19, para. 89.
[6] *Ibid.*, paras. 90-93.

Court expressly relied on UN General Assembly Resolutions 34/37[1] and 35/19[2] in order to derive the quality of the Front Polisario as the "representative of the people of Western Sahara".

Third, the General Court offered examples of certain "features" of the legal personality of the Front Polisario: i) the capacity to be a party to a peace agreement concluded with the Islamic Republic of Mauritania; ii) the capacity to "reach agreement on a number of matters" with the Kingdom of Morocco (as the Security Council noted, the Front Polisario and Morocco "gave their agreement in principle" to a set of "settlement proposals" of the Secretary General);[3] and iii) the obligation to comply with international humanitarian law, which is reflected in the four Geneva Conventions of 1949, as well as in the First Protocol of 1977, to which it acceded in 2015[4]

Fourth, we feel the need to underline that both the General Court and the UN bodies identified the "representativeness" of the people of Western Sahara, as being circumscribed to the self-determination process. Thus, the General Court mentioned expressly "the applicant seeks to defend the self-determination of the people of Western Sahara"[5] and was recognized as representative of the people "in the context of the self-determination process".[6] Indeed, these statements coincide with the statements of the UN General Assembly (which, *inter alia,* reaffirmed that the solution to the question of Western Sahara "lies in the exercise by the people of that Territory of their inalienable right, including their right to self-determination and independence").[7]

As a very short conclusion to this sub-section, the General Court recognized that the Front Polisario is a "legal person" within EU law without expressly stating that it has "legal personality" under international law, but deriving its status from the rights and obligations, which international law attributes to it. This approach appears wise, as international doctrine acknowledges that national liberation movements have a certain status in international law: without being "subjects" in the proper sense, they enjoy rights and obligations in close connection to the

[1] UN General Assembly Resolution 34/37 of 21 November 1979, "Question of Western Sahara".
[2] UN General Assembly Resolution 35/19 of 11 November 1980, "Question of Western Sahara".
[3] UN Security Council Resolution 658 (1990), preambular para. 2 and operative para. 3.
[4] T-279/19, para. 94; on the accession of the Front Polisario to Protocol I.
[5] *Ibid.*, para. 100.
[6] *Ibid.*, para. 103.
[7] UN General Assembly Resolution 34/37 of 21 November 1979, para. 1; UN General Assembly Resolution 35/19 of 11 November 1980, para. 4.

regime of non-self-governing territories or to the trusteeship system within the UN.[1] National liberation movements have been a more "common presence" in international relations in the 1970s and 1980s, and the practice of the UN General Assembly to acknowledge a liberation movement as "representative" or "authentic representative" of peoples of non-self-governing territories was not unique.[2] Nevertheless, it is important also that the General Court "pointed out" certain "features" of what is recognized within the doctrine as the "limited" international personality of national liberation movements: capacity to conclude treaties and the rights and obligations deriving from international humanitarian law.[3]

3.2. The "people of Western Sahara"

As it was recalled above, in 2016 the Court of Justice ruled in case C-104/16P that "*the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties"* and that "*that implementation must receive the consent of such a third party".*[4] Thus, having in mind that the 2018 liberalisation agreement and the 2019 fisheries agreement expressly provided for their application over the territory of Western Sahara, certain questions appeared before the General Court related to the notion of "people". This sub-section proposes to examine: first, the scope of the notion of "people" and, second, the scope of the rights of a "people" concerning a territory having the status of a non-self-governing territory.

First, the question that appeared before the General Court was whether the notion of "people of Western Sahara" (in French "peuple du Sahara occidental") is equivalent to "people concerned" (in French "populations concernées"). The latter have been subject to "wide-ranging" or "extensive" consultations conducted by the Commission and the EEAS. In practice, two aspects were relevant: the territorial one (as the "populations concerned" were located on the territory effectively occupied by Morocco) and the question whether the identification of the members of such "people" is needed.

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[1] Malcom N. Shaw, *The international status of national liberation movements,* Liverpool Law Review, vol. 5 (1983), pp. 19-34.

[2] Antonio Cassese, *International Law in a Divided World,* Oxford University Press, 1994, p. 90-91; UN General Assembly Resolution 2918 (XXVII) of 14 November 1972, para. 2, referring to national liberation movements in Angola, Guinea Bissau and Mozambique.

[3] Aantonio Cassese, *International Law in a Divided World, op. cit.*, p. 97; H. A. Wilson, *International Law and the Use of Force by National Liberation Movements,* Oxford Clarendon Press, 1988, pp. 1-209.

[4] C-104/16P, para. 105-106.

International law does not define the concept of "people". It is clear that the people is a subject of law, as self-determination is "a right of peoples".[1] It is clear that self-determination is not a right enjoyed by other groups, such as "national minorities".[2] Nevertheless, international law provides little clue about what is a "people". The Venice Commission attempted to offer a definition in 2014:

> *"Although current international law lacks a treaty definition of "peoples", it is usually accepted that this concept refers to a separate, specific group of individuals sharing the same history, language, culture and the will to live together."*[3]

With respect to the relation between "people" and "territory", the definition provided by the Venice Commission reinforces the idea that the "human factor" is more important than the "territorial one", when analysing the "people of a territory". Doctrine supports this approach: "*it is about giving proeminence to people. The people come first; territory, thereafter"*.[4] It has also emphasized that a certain group is not a "people" in a "objective" sense, but "aspires to be a people through self-determination", requiring two factors: the will of the people and its "recognition" as such by the international community.[5] Indeed, in the case of the "people of Western Sahara", recognition is beyond doubt, as in was emphasized in the ICJ advisory opinion of 1975,[6] as well as in UN General Assembly Resolutions.[7]

The General Court seemed to have captured the importance of the essential link between the concept of "people" and the "recognized" right to self-determination. Thus, the General Court held that:

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[1] Kalana Senaratne, *Internal Self-Determination in International Law,* Cambridge University Press, 2021, p. 51.

[2] *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p. 12, p. 59; Bogdan Aurescu, Elena Lazăr, *Dreptul international al protecției minorităților naționale,* Ed. Hamangiu, Bucharest, 2019, p 43-44.

[3] European Commission for Democracy through Law (Venice Commission), Opinion no. 763/2014, 21 March 2014, CDL-AD (2014)004, para. 25.

[4] Kalana Senaratne, *Internal Self-Determination in International Law,* p. 53.

[5] Frédéric Mégret, "The Right to Self-Determination. Earned, Not Inherent" in Fernando Teson (ed.), *The Theory of Self-Determination,* Cambridge University Press, 2016, pp. 45-69, pp. 56, 60-62.

[6] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12., para. 70 – "the right of that population to self-determination constitutes therefore a basic assumption of the questions put to the Court", also para 161, 162.

[7] UN General Assembly Resolution 34/37 of 21 November 1979, UN General Assembly Resolution 35/19 of 11 November 1980.

> *"it may be inferred that the concept of 'people concerned' referred to by the institutions encompasses, in essence, the inhabitants who are currently present in the territory of Western Sahara, irrespective of whether or not they belong to the people of that territory, […]. This concept therefore differs from that of the 'people of Western Sahara' in that, on the one hand, it can encompass all the local people who are affected, beneficially or adversely, by the application of the agreement at issue in that territory, while on the other hand it does not possess the political import of the second concept, which stems in particular from that people's recognised right to self-determination."*[1]

Second, it is important to mention that the General Court held that the "identification of the members" of the "people of Western Sahara is not a prerequisite (or an "obstacle") to the requirement of expressing the "consent" of the people. Thus, the General Court characterized the right to self-determination as a "*collective right*" and stated that the people of Western Sahara "*have been recognized by the UN bodies as having that right, and hence as existing, irrespective of the individuals of which they are composed and their number*".[2] Moreover, the General Court underlined this argument by mentioning that the people is "*an autonomous subject of the law, capable of expressing their consent to an international agreement, irrespective of the identification of their members*".[3]

The relevance of the consultations conducted by the Commission and the EEAS will be examined in the next section. Nevertheless, we consider that it is important to mention that, in the context of analysing these consultations, the General Court held that the following entities do not constitute "representative bodies" for the people of Western Sahara: i) local elected authorities, established under the constitutional order of Morocco;[4] ii) non-governmental organizations and various economic operators.[5] In the opinion of the Court, these represent only "a sample of entities engaged in activities in the respective territory".[6]

As a very short concluding remark to this section, it would be appropriate to say that, on one hand, the identification of the "people of Western Sahara" as a relevant subject of international law was not a new

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[1] T-279/19, para. 337; T-344/19, T-3567/19, para. 329.
[2] T-279/19, para. 357; T-344/19, T-3567/19, para. 342.
[3] *Ibid.,* T-279/19, para. 357; T-344/19, T-3567/19, para. 342.
[4] T-279/19, para. 375.
[5] T-279/19, para. 377; T-344/19, T-3567/19, para. 354.
[6] T-279/19, para. 378.

element. It was already established in case C-104/16P. On the other hand, the judgments of the General Court of 29 September 2021 brought forward certain new elements: the characterization of the people as a "collective" and „autonomous" subject of law; the element of "recognition" as such by the UN bodies, in the context of the "will" to exercise the right of self-determination; the conclusion that the exercise of this right is independent of the identification of the individuals composing the people".

4. The relevance of principles of international law

4.1. Self-determination and relative effect of treaties

In the essential part of its judgments of 29 September 2021, the General Court had to assess whether the conclusion of the contested agreements (the 2018 liberalisation agreement and the 2019 fisheries agreement) was incompatible with the principles of self-determination and of the relative effect of treaties. As emphasized above, previous case law of the Court of justice has already identified these principles as being relevant.[1]

It is our suggestion not to treat these two principles of international law separately. Thus, this sub-section would attempt to answer the following questions, that might appear relevant from the analysis of the General Court: a) are the two principles interlinked?; b) does self-determination confer a people rights over maritime areas?; c) what is the relevant international law concerning the exploitation of natural resources of a non-self-governing territory?; d) can consent be presumed or established in an implicit manner and how should it be expressed? A second sub-section will attempt to examine the wider consequences, on the international level, of a finding that the contested agreements violate the relevant principles of international law.

a) *Are the principles of self-determination and the relative effect of treaties interlinked*?

As a preliminary remark, it has to be pointed out that the two principles do not enjoy the same "status" in international law. On one hand, self-determination is one of the principles of the UN Charter[2] and forms part of the corpus of seven principles identified in the 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[3] Thus, it can be affirmed that it is part of the fundamental

[1] C-104/16P, para. 123, C-266/16, para. 71.
[2] Article 1 (2) of the UN Charter.
[3] UN General Assembly Resolution no. 2625 (XXV) of 24 October 1970, Annex, (e).

principles of international law. In the context of decolonization, the principles of self-determination, the right to self-determination has been detailed in the 1960 "Declaration on the Granting of Independence to Colonial Countries and Peoples".[1] As the International Court of Justice has emphasized in its Chagos advisory opinion of 2019, the 1960 Declaration "*has a declaratory character with regard to the right to self-determination as a customary norm*".[2] On the other hand, the relative effect of treaties is not a fundamental principle of international law: it is, indeed, one of the most important rules of the 1969 Vienna Convention on the Law of Treaties[3] and might be regarded as a principle within the sub-branch of the law of treaties. It has the origin in Roman law, in the form of the maxim *pacta tertiis nec nocent nec prosunt*[4] and has been widely accepted by State practice and case-law.[5]

Notwithstanding the way in which the two principles are characterized, it is important to underline that, when they are likely to apply to the case of an agreement susceptible of applying to non-self-governing territory, these principles are interlinked. On one hand, the "freely expressed will and desire" concerning the transfer of "all powers" to the non-self-governing territories, with a view to "enable them to enjoy complete independence and freedom" is an essential component of the right to self-determination.[6] In particular, in the case of the people of Western Sahara, the International Court of Justice itself referred to "principle of self-determination through the free and genuine expression of the will of the peoples of the territory".[7]

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[1] UN General Assembly Resolution no. 1514 (XV) of 14 December 1960.

[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 152; see also S. Allen, *Self-determination, the Chagos Advisory Opinion and the Chagossians,* International and Comparative Law Quarterly, 2020, vol. 69 (1), pp. 203-220.

[3] Articles 34-36 of the Vienna Convention on the Law of Treaties; for a commentary see Mark E. Villiger, *Commentary on the Vienna Convention on the Law of Treaties,* Martinus Nijhoff, 2009, pp. 481-485.

[4] International Law Commission, Draft Articles on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, p. 226, para. 1.

[5] *Ibid.,* para. 2.; the ILC quotes *Free Zones of Upper Savoy and the District of Gex,* P.C.I.J. (1932), Series A/B, no. 46, p. 141; *Territorial Jurisdiction of the International Commission of the River Oder*, P.C.I.J. (1929), Series A, no. 23, pp. 19-22; *Status of Eastern Carelia,* P.C.I.J. (1923), Series B, no. 5, pp. 27, 28.

[6] UN General Assembly Resolution no. 1514 (XV) of 14 December 1960, para. 5; UN General Assembly Resolution no. 2625 (XXV) of 24 October 1970, Annex, "The principle of equal rights and self-determination of peoples", para. 2 b).

[7] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12., para. 162 ; Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Editura Hamangiu 2018, p. 53.

On the other hand, the requirement of the consent of the people of Western Sahara for the implementation of an agreement concluded between other two parties on this non-self-governing territory is derived from this "will of the people", which is an element of the right to self-determination.

In this sense, the Court of Justice found in case C-104/16P that the people of Western Sahara "*must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties"* and, as a consequence, "*implementation [of the agreement] must receive the consent of such a third party".* [1] Nevertheless, the General Court substantiated this element in its judgments of 29 September 2021. First, it acknowledged that the Front Polisario sought "*to defend the right to self-determination of the people of Western Sahara on the ground, in essence, that the contested decision fails to respect that right in that it approves the conclusion of an agreement [...] without its consent".*[2] Second, the General Court developed the above quoted statement of paragraph 106 of the judgment of the Court of Justice in case C-104/16P. It concluded, in this sense, that the Court "*inferred from the principle of self-determination and from the principle of the relative effect of treaties clear, precise and unconditional obligations [...] namely an obligation to respect the separate status [of Western Sahara] and an obligation to ensure that its people consented".*[3] Third, the General Court confirmed that the requirement of consent of the people of Western Sahara is "inferred" from the principle of self-determination[4] or "from the principle of the relative effect of treaties, which is applicable to that people by virtue of their right to self-determination".[5]

These elements confirm the assumption that the requirement of consent is *a consequence* of the right of peoples to self-determination. Thus, hypothetically, if an agreement between State A and State B would be likely to apply on the territory of State C, the consent of the latter would be required. Nevertheless, if State C is "replaced" by a non-self-governing territory, it is the principle of self-determination that provided the "link" between that territory and its people.

b) Does self-determination confer to a people rights over maritime areas?

As presented above, the concept of "people of a territory", as the holder of the right to self-determination, has to be regarded from the point of view

[1] C-104/16P, para. 106.
[2] T-279/19, para. 100; T-344/19, T-356/19, para. 152.
[3] T-279/19, para. 281, T-344/19, T-356/19, para. 289.
[4] T-279/19, para. 348; T-344/19, T-356/19, para. 335.
[5] T-279/19, para. 366; T-344/19, T-356/19, para. 347.

that the human factor is more important than the territorial one.[1] This does not mean that territory is not important. As the International Court of Justice recognized, "*the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory*".[2] Moreover, the International Court of Justice confirmed the "*right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination*".[3]

In the cases T-344/19 and T-356/19, the General Court was confronted with the argument of the Commission according to which international law did not establish the "clear" legal relation between a non-self-governing territory and adjacent waters.[4] On the contrary, the Front Polisario argued that the rights of a people extended to the maritime areas governed by customary international law, reflected in the United Nations Convention on the Law of the Sea ("UNCLOS").[5]

The solution identified by the General Court was that non-self-governing territories are likely to enjoy rights, in particular concerning the exploitation of natural resources, on the area defined by the UNCLOS as the territorial sea, as well as beyond this zone, within the limits of the rights recognized to States within the exclusive economic zone.[6] The General Court relied on several arguments. First, the General Court quoted Resolution no. III contained by the Final Act of the Third United Nations Conference on the Law of the Sea. This Resolution provided that in case of a non-self-governing territory, the relevant rights under UNCLOS "*shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development".*[7] The General Court inferred from this text that rights of peoples of non-self-governing territories should be regarded as "analogous" to the rights of States.[8] Second, it is very important to note that the General Court relied on the principle "*land dominates the sea*". In this sense, it quoted the case concerning *Maritime*

[1] *Supra,* subsection I.2.
[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 160.
[3] *Ibid.*
[4] T-344/19, T-356/19, para. 220.
[5] United Nations Treaty Series, vol. 1833, p. 3; T-344/19, T-356/19, para. 221.
[6] T-344/19, T-356/19, para. 225.
[7] *Ibid.*, para. 222; Resolution III of the Third United Nations Conference on the Law of the Sea, para. 1, a), Final Act of the Third United Nations Conference on the Law of the Sea, 1982, p. 183.
[8] T-344/19, T-356/19, para. 222.

delimitation in the Black Sea (Romania v. Ukraine) of 2009.[1] Third, the General Court relied on the "international practice of the Union" in relation with the Palestine Liberation Organization ("PLO"). Thus, it invoked an agreement concluded between European Community and the PLO, acting on behalf of the Palestinian Authority of the West Bank and Gaza Strip which referred to the relevant "territories, including territorial waters".[2]

c) What is the relevant international law concerning the exploitation of natural resources of a non-self-governing territory?

The Council of the European Union argued before the General Court that the relevant "objective" criterion in international law related to the exploitation of resources of non-self-governing territories is that such exploitation would be "beneficial" to its peoples. The question that appears is whether the established "beneficial" character of the conduct of States is sufficient to allow such exploitation, regardless of the "consent" of the people of that territory. In support of its argument, the Council invoked the letter of the UN Legal Counsel addressed to the President of the Security Council on 29 January 2002.[3]

This letter concerned a request for an opinion addressed by the Security Council to the Under-Secretary General for Legal Affairs, the UN Legal Counsel, on the following matter: *"the legality in the context of international law, [...] of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara*".[4] The opinion of the UN Legal Counsel takes into account the fact that the Moroccan authorities provided information on two contracts concerning

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1 *Ibid.*, para. 227; *Maritime delimitation in the Black Sea (Romania v. Ukraine),* I.C.J. Reports, 2009, p. 61, para. 77; the General Court also quoted *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment,* I.C.J. Reports 2007, p. 659, para. 126 and the *Grisbådarna Case* (Norway/Sweden), Award of 23 October 1909, R.I.A.A., vol. XI, p. 159.

[2] T-344/19, T-356/19, para. 229 ; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, signed in Brussels, on 27 February 1997, OJ L 187 of 16 July 1997, p. 3, article 1 para. m) and Protocol 3.

[3] T-279/19, para. 369; T-344/19, T-356/19, para. 351; Letter dated 2002/01/29 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN doc. S/2002/161, hereinafter "S/2002/161".

[4] S/2002/161, para. 1.

"oil-reconnaissance and exploration activities" concerning areas offshore Western Sahara, which indeed provided option for "future oil contracts". [1]

The legal opinion addresses two legal issues: the status of the Western Sahara (section A) and the law applicable to the exploitation of resources of a non-self-governing territory (sections B, C and D). Section A contains very important considerations related to the fact that the Madrid Agreement of 1975[2] could not have transferred to Morocco (or Mauritania) the status of "administering Power", in accordance with article 73 (e) of the UN Charter, status enjoyed by Spain since 1962. Thus, Spain could not have "unilaterally transferred" this status. Moreover, the transfer of authority in 1975 "*did not affect the international status of Western Sahara as a Non-Self-Governing Territory*".[3] Despite this statement, the legal opinion find appropriate to examine the "principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities".[4] Thus, Section B examines the law applicable to the role of such "administering Power". It examines the provisions of the UN Charter and of relevant UN General Assembly resolutions and establishes that the obligation of the administering Power is to "promote to the utmost the well-being of the inhabitants of these Territories".[5] The developments brought by UN General Assembly resolution underline the distinction between activities that are "detrimental" to the peoples of those territories and those activities that are "beneficial" to them.[6] Moreover, the UN Legal Counsel

[1] *Ibid.*, para. 2.
[2] Declaration of Principles on Western Sahara, concluded in Madrid between Spain, Morocco and Mauritania, 14 November 1975.
[3] S/2002/161, para. 6.
[4] *Ibid.*, para. 8.
[5] Article 73 of the UN Charter.
[6] S/2002/161, para. 10-12. The UN Legal Counsel quotes the following UN General Assembly Resolutions: 35/118 of 11 December 1980, 52/78 of 10 December 1997, 54/91 of 6 December 1999, 55/147 of 8 December 2000, 56/74 of 10 December 2001, 48/46 of 10 December 1992, 49/40 of 9 December 1994, 50/33 of 6 December 1995, 52/72 of 10 December 1997, 53/61 of 3 December 1998, 54/84 of 6 December 1999, 55/138 of 8 December 2000 and 56/66 of 10 December 2001.

examines the "principle of permanent sovereignty over natural resources".[1] The opinion concludes that while the "core" of this principle is customary, its scope is still uncertain: the main question is whether this principle "prohibits any activities related to natural resources undertaken by an administering Power […] in a Non-Self-Governing Territory, or only those which are undertaken in disregard of the needs, interests and benefits of the people of that Territory".[2] After examining the case law and the relevant state practice, the opinion concludes that:

> "*recent State practice, though limited, is illustrative of an opinio juris on the part of both administering Powers and third States: where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein*".[3]

With respect to Western Sahara, the UN Legal Counsel found that, having in mind that the respective contracts concerning merely "reconnaissance and evaluation", these contracts are not illegal *per se*. Nevertheless, if exploitation activities would continue "in in disregard of the interests and wishes of the people of Western Sahara", they would be in violation of the UN Charter.[4] The conclusion is very carefully drafted, as it avoids mentioning that exploitation would be "legal" if conducted to the benefit of the people of that territory.

The General Court rejected the argument of the Council. It held that the Council could not "avoid to comply" with the interpretation given by the Court of Justice to the relevant principles of international law, by

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[1] S/2002/161, para. 14. The principle is referred to in UN General Assembly Resolutions, such as: 1803 (XVII) of 14 December 1962, 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order" and 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States; for a contemporary debate on the scope of the principle, see Y. Tyagi, *Permanent Sovereignty over Natural Resources,* Cambridge Journal of International and Comparative Law (2015), vol. 4, Issue 3, pp. 588-615; R. Pereira, O. Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law*, Melbourne Journal of International Law, Vol. 14, no. 2 (2013), pp. 451-495.

[2] *Ibid.,* para. 14.

[3] *Ibid.* para. 24.

[4] *Ibid.*, para. 25.

"substituting" to the criteria derived thereto [consent] a different criterion derived from the opinion of the UN Legal Counsel, which is "non-binding".[1]

The General Court offered four counter-arguments in this sense. First, it mentioned the role of opinions of the UN Legal Counsel, issued in accordance with the functions of the UN Secretariat and noted that such opinions are not equivalent to the advisory opinions of the International Court of Justice.[2] Second, it stated that the legal opinion did not concern an international agreement applicable to Western Sahara, but that of contracts for prospecting and assessing oil resources.[3] Third, the General Court underlined that the opinion of the UN Legal Counsel examined the question on the basis of analogies with the rights and obligations of the "administering Power".[4] Nevertheless, Morocco does not enjoy such a status under the UN Charter (it claims sovereignty over Western Sahara). Fourth, the General Court referred to the words "in disregard of interests and *wishes*" (emphasis added) of the people of Western Sahara and stated that the conclusions of the UN Legal Counsel opinion support the assumption that exploitation activities must be consistent "not only with the interests of the people of that territory, but also with their will".[5]

Therefore, it has to be underlined that the General Court did not found the opinion of the UN Legal Counsel to be invalid or that the conclusions in that opinion are not correct.[6] Moreover, the General Court did not take a position on the question of international law raised by the opinion of the UN Legal Counsel: whether the principle of "permanent sovereignty over natural resources" prohibits any activities in a non-self-governing territory or allows those conducted in the benefit of its people. Nevertheless, we find interesting to note that the General Court relied on the word "wishes" [of the people of a non-self-governing territory] in order to reinforce the argument based on the requirement that the exploitation

[1] T-279/19, para. 385.
[2] T-279/19, para. 385-386; only general reference to the four arguments is made in T-344/19, T-356/19, para. 362.
[3] T-279/19, para. 387.
[4] *Ibid.*, para. 388.
[5] *Ibid.*, para. 389.
[6] It can be noted that the press release related to the judgments of the General Court of 29 September 2021 quoted "*Lastly, the Court notes that the institutions cannot validly rely on the letter of 29 January 2002 from the UN Legal Counsel to substitute the criterion of the benefits of the agreements at issue for the populations concerned for the requirement of the expression of such consent*" - General Court of the European Union PRESS RELEASE No 166/21 Luxembourg, 29 September 2021 Judgments in Case T-279/19 and in Joined Cases T-344/19 and T-356/19 Front Polisario v Council.

activities be conducted in accordance with that people's "will". Indeed, the criterion of the people's "will" is found in UN General Assembly resolutions,[1] considered to reflect customary law[2] and has also been recognized by the International Court of Justice.[3] Finally, the General Court could not have avoided the criterion of "consent", as it was derived from the case law of its superior court, the Court of Justice of the European Union.

d) *Can consent be presumed? How should consent be expressed?*

A first element analysed by the General Court was whether consent of the people of Western Sahara could be presumed or whether such consent must be explicit. The answer is to be found in articles 35 and 36 (1) of the 1969 Vienna Convention on the law of treaties between States. These articles bring supplementary details to the principle of relative effect of treaties,[4] by providing the rules concerning the establishment of an obligation or the creation of a right to a third State. As these rules are considered to reflect customary international law,[5] they also apply to "third parties", even if these third parties are not necessarily "States". Article 35 of the Vienna Convention governs the creation of an obligation for a third party and stipulates that the conditions to that end are: i) the parties intend to establish an obligation; ii) the third party "accepts that obligation in writing".[6] Thus, it is beyond doubt that acceptance of an obligation, according to customary law, must be explicit. Article 36 (1) governs the creation of a right for a third party. In these situations, the conditions are: i) the parties intend to accord that right; ii) the third party "assents thereto". The second phrase of article 36 (1) provides that „its assent shall be presumed so long as the contrary is not indicated, unless the treaty provides

[1] UN General Assembly Resolution no. 1514 (XV) of 14 December 1960, para. 5; UN General Assembly Resolution no. 2625 (XXV) of 24 October 1970, Annex, "The principle of equal rights and self-determination of peoples", para. 2 b).

[2] For considerations linked to Resolution 1514 (XV), see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 152; for Resolution 2625 (XXV), *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 188.

[3] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12., para. 162

[4] The general rule is expressed article 34 of the Vienna Convention of the Law of Treaties; see, for commentaries Robert Kolb, *The Law of Treaties. An Introduction,* Edward Elgar Publishing, 2016, pp. 115-116.

[5] International Law Commission, Draft Articles on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, p. 227, para. 1 – especially with respect to creating an obligation for a third State.

[6] For international case-law, *Free Zones of Upper Savoy and the District of Gex,* P.C.I.J, Ser. A, no. 22 (1929), Order of 19 August 1929, p. 17.

otherwise". Although these conditions reflect a "compromise" formula between two "doctrines" that were expressed within the International Law Commission,[1] it is clear that consent for the creation of a right must not be express.[2]

On the basis of these provisions, the General Court inferred that the consent of the people of Western Sahara "may be presumed" only if the parties intended to confer a right, but it must be "explicit" with regard to obligations, which the parties intended to impose.[3] By examining the text of the contested agreements, the General Court came to the conclusion that, because they grant to one of the parties (the Kingdom of Morocco) the certain competences over the territory of Western Sahara, which that party "is not entitle to exercise itself or, as the case may be, delegate", those agreements impose an obligation. Thus, expression of consent must be explicit.[4]

It is also interesting to note, not only that the General Court applied the rules contained by articles 35 and 36 (1) of the Vienna Convention, but that it provided explanations to the concept of "consent". Thus, it noted that the "principle of free consent" is recognized by the preamble of the Vienna Convention as "universally recognized".[5] Moreover, it quoted international case law (the *Gulf of Maine* case and the *Chagos* advisory opinion) to underline that consent must be "free and authentic", as a condition of validity of the instrument to which it is required.[6]

The second element related to consent was the modality of expressing such consent by the people of Western Sahara. Thus, the Council and the Commission argued that "the particular situation of Western Sahara did not allow them, in practice, to obtain the consent of the people of that territory", and, in particular, that "it was not possible to consult the people directly or through a single representative, namely the [Front Polisario]".[7] For this reason, the institutions argued that the most appropriate way was to

[1] International Law Commission, Draft Articles on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, pp. 228-229, para. 1-8.
[2] Robert Kolb, *The Law of Treaties. An Introduction, op. cit.*, p. 119.
[3] T-279/19, para. 316; T-344/19, T-356/19, para. 311.
[4] T-279/19, para. 322, 323; T-344/19, T-356/19, para. 318.
[5] T-279/19, para. 324; T-344/19, T-356/19, para. 319.
[6] T-279/19, para. 325; the General Court quoted *Delimitation of the maritime border in the Gulf of Maine,* I.C.J. Reports, 1984, p. 246, para. 127-130; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 160, 172, 174.
[7] T-279/19, para. 352; T-344/19, T-356/19, para. 338.

conduct "the most inclusive possible consultations." The General Court rejected this argument, offering several grounds.[1] Some grounds have already been examined: consent cannot be presumed; identifying the members of the "people" cannot be invoked, [2] the Kingdom of Morocco cannot be considered as a *"de facto* administering Power".[3] Nevertheless, two of the grounds retained by the General Court are worth pointing out.

On one hand, the General Court held that the argument according to which the people of Western Sahara was not in the position to conclude a treaty was not decisive. Thus, the General Court pointed out that "it does not follow from the principle of relative effect of treaties […] *that consent […] should necessarily be obtained itself by means of a treaty".*[4] This statement is in line with the reality that international law is certainly not characterized by formalism.[5]

Second – and maybe mostly important – the General Court rejected in an express manner the argument that the Front Polisario could not represent the people of Western Sahara for expressing the consent. It rejected the statement of the Council and the Commission that the Front Polisario would be assign "a right of veto". The Court held:

> *"[…] it should be recalled that [… the applicant's] participation in the self-determination process does not mean that it cannot represent that people in the context of an agreement between the European Union and the Kingdom of Morocco, and it is not apparent from the case materials that the UN bodies have recognised organisations other than the applicant as being authorised to represent that people […]. Consequently, it was not impossible to obtain the people's consent through the applicant."*[6]

This element is relevant because it confirms that a national liberation movement – in this case recognized by the UN bodies as "representative" for a people – is able to represent that people for the purposes of expressing consent. Cases in international practice confirm this statement. For example

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[1] T-279/19, para. 355-364; T-344/19, T-356/19, para. 340-346.
[2] *Supra,* subsection II.2.
[3] *Supra,* subsection III.1., point c).
[4] T-279/19, para. 361; T-344/19, T-356/19, para. 344.
[5] In this sense, as an analogy to consent of States, it can be pointed out that, according to article 11 of the 1969 Vienna Convention on the Law of Treaties, consent can be expressed "by any other means". See, in this sense, Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties. Challenges and Perspectives,* Edward Elgar Publishing, 2017, pp. 107-108; Mathias Forteau, *Les sources du droit international face au formalisme juridique,* L'Observateur des Nations Unies, vol. 30, 2011, pp. 61-71.
[6] T-279/19, para. 364; T-344/19, T-356/19, para. 346.

the Oslo Accords of 1993 and 1995 were concluded by Israel and the Palestine Liberation Organization, "representing" the Palestinian People.[1] Moreover, as recalled by the General Court itself,[2] the Front Polisario concluded the "Mauritano-Sahraoui Agreement", signed in Algiers, on 10 August 1979, and the text provides "on behalf of the Sahraoui people".[3]

In any case, it was clear from the General Court's judgment that "consultations", however "extensive" or "wide-ranging", could not substitute "consent". In essence, consultations were not conducted with the proper "subjects" ("people of Western Sahara" versus "population concerned"), as emphasized above.[4] Moreover, their purpose was to obtain "majority opinion" of the relevant actors, and not "consent", as required by the relevant principles of international law, as interpreted by the Court of Justice of the EU.[5]

As a short conclusion to this section, it is important to underline that the main line of arguments of the General Court was based on the interpretation of the principles of self-determination and relative effects of the treaties given by the Court of Justice in the previous cases C-104/16P and C-266/16. The General Court developed this interpretation and determined that the two interconnected principles imposed the "requirement of consent" of the people of Western Sahara. It appeared that the EU institutions did not observe this requirement, as "consultations" could not substitute "consent".

4.2. The consequences of not observing the principles of self-determination and relative effect of treaties

It is true, the two judgments of the General Court of 29 September 2021 had as an object the annulment of the decisions on the conclusion of the two contested agreements. The decisions have been adopted on the basis of article 218 paragraph 6 of the TFEU and represent the act by which the

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[1] "Oslo I" – Declaration of Principles on Interim Self-Government Arrangements, was signed on 13 September 1993 and stipulated in the preamble, as a party, the "PLO team […] representing the Palestinian People"; "Oslo II" – Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip was signed on 28 September 1995 and provided, as a party, "the Palestine Liberation Organization, the representative of the Palestinian people"; for an overview, Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements,* Oxford University Press, 2000, pp. 41-53.

[2] T-279/19, para. 94.

[3] Mauritano-Sahraoui Agreement signed in Algiers, on 10 August 1979, annexed to the letter dated 18 August 1979 of the Permanent Representative of Mauritania to the United Nations to the Secretary General, UN Doc. A/34/427.

[4] *Supra,* subsection II.2.

[5] See, in this sense, T-279/19, para. 341, T-344/19, T-356/19, para. 333.

EU expresses its consent to be bound by a treaty.[1] It can be noted that the General Court used its powers under article 264 TFEU and maintained the effect of the annulled decisions for a period of two months or, if an appeal is lodged, until the rendering of the judgment of the Court of Justice on appeal.[2]

What is more important, in our view, is the fact that the General Court underlined the "inseparable nature of the international agreement and the decision to conclude it on behalf of the EU.[3] Thus, an action for annulment of the decision for the conclusion of the agreement involves "to review its legality in the light of the content of the agreement approved by that decision". An opposite interpretation would "exempt the contested decision from the review of its substantive legality".[4]

Thus, even if the General Court annulled the decisions for the conclusion of the agreements, the reality is that the judgment relied on the fact that the agreements, though their territorial scope, violated the requirement of the consent of people of Western Sahara. As expressed in the sections above, this requirement was derived by the case law of the Court of Justice from the principles of self-determination and relative effect of treaties. Of course, the General Court could not have annulled the agreements themselves.[5] Nevertheless, although the judgments produce effects only in the EU legal order, the main line of reasoning was based on the content of the agreements, which were producing effects on a third party without its consent. This consent was required by the principles of self-determination and relative effect of treaties. Shortly, the agreements were concluded in violation of the above two principles of international law.

Even if such statement is derived in an indirect manner from the text of the judgments, it might be regarded, within a certain degree, as an

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[1] Opinion 2/00 (Cartagena Protocol), 6 December 2001, EU:C:2001:664, para. 5; for general comments: Joni Heliskoski, *The procedural law of international agreements: A thematic journey through article 218 TFEU,* Common Market Law Review, vol. 57, Issue, 1 (2020), pp. 79-118; Anne Pieter van der Mei, *EU External Relations and Internal Inter-Institutional Conflicts. The Battlefield of Article 218 TFEU,* Maastricht Journal of European and Comparative Law, vol. 23, no. 6, (2016), pp. 1051-1076.

[2] Appeals have been lodged and are pending at the date of the finalization of this study: C-779/21P, C-799/21P, C-778/21P, C-798/21P.

[3] T-279/19, para. 152, T-344/19, T-356/19, para. 183.

[4] T-279/19, para. 157, T-344/19, T-356/19, para. 189.

[5] The General Court underlined that the case does not concern the "international dispute" to which the applicant is a party, and rejected the arguments of the institutions that accepting the *locus standi* of the Front Polisario the General Court would transform itself into a "quasi-international" jurisdiction, T-279/19, para. 109, T-344/19, T-356/19, para. 158.

element of novelty in international law. This is mainly because of the legal nature of the principle of self-determination as a *jus cogens* norm.

A peremptory norm of international law (*jus cogens*) represents a "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[1] The most important legal consequence of a peremptory norm of international law is nullity of treaties in conflict with it – either if such conflict appears *ab initio* or if the peremptory norm emerges after a treaty enters into force.[2]

It is not necessary to analyse in detail the conditions for a *jus cogens* norm to be recognized as such. It is sufficient to point out that the right to self-determination has been included in the illustrative list drawn by the International Law Commission. Thus, in its draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading in 2019, the International Law Commission retains eight *jus cogens* norms, among which the "right to self-determination".[3] Nevertheless, members International Law Commission referred to the right to self-determination as *jus cogens* even since 1963, in the context of the law of treaties.[4] Moreover, in the context of the *Chagos* advisory opinion of the International Court of Justice, three judges expressed views that the Court should have addressed and confirmed the *jus cogens* nature of the right to self-determination.[5] Judge Cançado Trinidade noted that 18 delegations expressed views during

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[1] Article 53 of the 1969 Vienna Convention on the Law of Treaties; International Law Commission, Peremptory norms of general international law (jus cogens), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, doc. A/CN/L.936, 29 May 2019, Draft Conclusion 2 [3 (1)].

[2] Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties; Alexander Orakhelashvili, *Peremptory Norms in International Law,* Oxford University Press, 2006, p. 134; on the concept of "international public order", linked to *jus cogens,* Robert Kolb, *Théorie du jus cogens international. Essai de relecture du concept,* PUF, Paris, 2001, pp. 72-73, 77.

[3] International Law Commission, Peremptory norms of general international law (jus cogens), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, doc. A/CN/L.936, 29 May 2019, Draft Conclusion 23 [24] and Annex.

[4] Yearbook of the International Law Commission, vol. I, 1963, topic „Law of treaties", p. 155, para. 56.

[5] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, Separate Opinion of Judge Cançado Trinidade, para. 119, 120-128; Separate Opinion of Judge Sebutinde, para. 13, Separate Opinion of Judge Robinson, para. 48-89, Joint Declaration of Judges Cançado Trinidade and Robinson, para. 8.

the procedure that the right to self-determination is *jus cogens* and recalled that, in 1975, Spain issued a similar statement in the oral procedures concerning the *Western Sahara* advisory opinion.[1]

The above preliminary considerations are important in order to assess the wider consequences of the General Court judgments. As Enzo Cannizzaro pointed out with respect to the judgment of the Court of Justice in case 104/16P, "the interpretative decision enacted by the ECJ presents striking analogies with a declaration of invalidity".[2] What the General Court did was exactly to put in practice the judgment in case 104/16P in order to "declare the invalidity". Even if formally, invalidity touched the decisions on the conclusion of the agreements, substantially it touched the agreements themselves.[3] Moreover, as emphasized by Enzo Cannizzaro, a declaration of invalidity, for reasons of inconsistency with a norm, which is generally accepted to represent *jus cogens*, cannot avoid touching the entire agreement. The "separability" rules of article 44 (5) of the 1969 Vienna Convention on the Law of Treaties do not apply in such case.[4]

It is true, the General Court addressed the issue of "separability" of treaty provisions only in the context of the 2019 fisheries agreement. In course of the hearing, the Front Polisario indicated that, principally, it sought the annulment of the decision on the conclusion of the agreement in what concerns its application to Western Sahara and its adjacent waters and, in a subsidiary manner, the annulment of the whole decision.[5] The General Court analysed whether the "elements for which the annulment is sought" are "detachable from the rest of the act"[6] and concluded that the consent expressed by the Union for the 2019 fisheries agreement to apply to the territory of Western Sahara and its adjacent waters "could not be detached" from the consent expressed to the entire agreement.[7] The result was the same: the treaty provisions were not separable. Nevertheless, the General Court did not refer to *jus cogens*. The analysis was centred on the EU act, the decision for the conclusion of the agreement.

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[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, Separate Opinion of Judge Cançado Trinidade, para. 165; Western Sahara, Advisory Opinion,I.C.J. Reports 1975, p. 12, Oral Statement of Spain, 26 March 1975, Pleadings, vol. I., pp. 206-207.

[2] Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker, loc. cit.*, p. 583.

[3] *Ibid.*, p. 585.

[4] *Ibid.*, p. 584.

[5] T-344/19, T-356/19, para. 126.

[6] *Ibid.*, para. 127; the General Court quoted the judgment of 9 November 2017, *SolarWorld/Council*, C-204/16 P, EU:C:2017:838, para. 36, 37.

[7] *Ibid.*, para. 129.

Another element which can be derived from the analysis conducted by Enzo Cannizzaro on the case C-104/16P is ”the conflict between two international rules”.[1] Formally, the General Court analysed the conformity of the decisions on the conclusion of the contested agreements by reference to the ”clear, precise and unconditional obligations” imposed by the principles of self-determination and relative effect of treaties, as interpreted by the Court of Justice.[2] The words ”clear, precise and unconditional” merely supported the direct effect.[3] Substantially, the analysis was between two norms of international law: on one side, the contested agreements and, on the other side, the two principles of international law, self-determination and the relative effect of treaties. Such analysis could rely only on the “superior” character of the latter principles. As international law contains no “hierarchy”, the valid argument for the „superior” character is their nature of *jus cogens*. Indeed, the international community as a whole widely confirmed such character for the right to self-determination.

Thus, without saying it, the General Court applied, in substance, *jus cogens*.[4] It is true, the judgment is not binding on the other party to the agreement, the Kingdom of Morocco. Moreover, the General Court itself admitted (when it applied article 264 TFEU in order to maintain the effects of the contested decision) that the annulment of these decisions would have ”*serious consequences for the European Union’s external action and call into question the legal certainty of the international commitments to which it has consented and which are binding on the institutions and the Member States*”.[5] Despite these elements, the judgments of 29 September 2021, if confirmed by the Court of Justice, would remain a (rare) example of international practice, when the court of one of the parties finds that an agreement concluded by that party violates a principle of international law, the self determination. In other circumstances, international practice was

[1] Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker, loc. cit.*, p. 585; Carmen Achimescu, *Le contrôle des actes des organisations internationales devant le juge de Strasbourg*, NRDO 2/2014.
[2] T-279/19, para. 281, T-344/19, T-356/19, para. 289.
[3] See also to this end Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker, loc. cit.*, p. 585.
[4] It would have not been the first time when General Court would refer to *jus cogens* – see judgment of 21 September 2005, T-315/01, *Yassin Abdullah Kadi/Council*, ECLI:EU:T:2005:332, para. 226, 227; it is true, the judgment was annulled under appeal, and the *jus cogens* issue was not retained by the Court of Justice – judgment of 3 September 2008, C-402/05P, C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation/Council and Commission, ECLI:EU:C:2008:461.
[5] T-279/19, para. 395, T-344/19, T-356/19, para. 368.

more „tolerant" and attempted to reconcile different interests. Thus, even if, throughout the recent history, certain agreements „might" have been regarded as affecting the right to self-determination, no formal declaration of "invalidity" has been issued.[1]

5. Conclusion

The two judgments rendered on 29 September 2021 appear to be courageous and far-reaching, but one should not regard these judgments „alone" or in an independent manner". From the substantial point of view, they represent the continuation of the jurisprudence of the Court of Justice in the cases 104/16P and 226/16. It was the Court of Justice who has set the interpretation to be given to the principles of self-determination and relative effect of the treaties, in the sense that these principles required the "consent" of the people of Western Sahara for the implementation of the contested agreements on that territory or its adjacent waters.

Indeed, it appears also that in its judgments of 29 September 2021 the General Court has manifested greater "availability" to apply international law, in comparison with the „first" Front Polisario case, T-

[1] The first example relates merely to Western Sahara: the "Madrid Agreement" signed on 14 November 1975 ("Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania"), by which, practically, Morocco and Mauritania agreed the partition of Western Sahara. As recalled above *Supra, subsection III.1., point c),* the Letter dated 2002/01/29 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council underlined that the Madrid Agreement does not affect the status of Western Sahara - S/2002/161, para 6. The second example is represented by the Camp David Agreements of 1978, concluded between Israel, Egypt and the United States. Even if UN General Assembly Resolution no. A/RES/34/65/B of 29 November 1979 "rejected" those provisions which, *inter alia,* violate the right to self-determination of the Palestinian people, the Camp David Agreements were confirmed by the later peace agreement between Israel and Egypt, signed on 26 March 1979. The third example is represented by the delimitation agreement concluded between Australia and Indonesia in 1989, covering also the waters adjacent to East Timor. This agreement was the purported object of the *East Timor* case before the International Court of Justice – *East Timor (Portugal v. Australia), Judgment,* I.C.J. Reports, 1995, p. 90. Although one of the arguments of Portugal was the breach of the right to self-determination (p. 92, para. 1), the Court decided it is not competent to rule on the case. In practice after Timor Leste became independent in 2002, it concluded "Comprehensive Package Agreement" on 30 August 2017, in parallel with a conciliation procedure under UNCLOS – PCA Case no. 2016/19, *In the Matter of the Maritime Boundary between Timor Leste and Australia (the „Timor Sea Conciliation"),* Report and Recommendations of the Compulsory Conciliation Commission between Timor Leste and Australia on the Timor Sea, Registry PCA, 9 May 2018. See, for the first two examples, see, in this sense, pp. 135-136.

512/12.[1] Again, the same statement is valid: the General Court relied on the interpretation already given by the Court of Justice to the principles of self-determination and relative effect of treaties.

The novelty of the judgment stems from the mere facts with which the General Court was confronted. After the two judgments of Court of Justice in the cases 104/16P and 226/16P, the Council and the Commission took concrete steps in order to extend in an explicit manner the territorial scope of the liberalisation agreement and of the fisheries agreement, in order to apply to Western Sahara. At first glance, this might seem surprising, but we might "suspect" that the political relations with the Kingdom of Morocco, in the wider sense, and the demarches of this State, played an important role.

As a first element of conclusion, the judgments of 29 September 2021 raised multiple and interesting issues of international law and EU law. It is true, some were not new: the elements related to subjects of international law appeared in the previous cases T-512/12 and C-104/16P. Nevertheless, the General Court developed several elements. The concept of "people", as a subject of international law, was detailed, especially with respect to its „composition" and with respect to the way in which its consent can be expressed. Even if the Front Polisario was not labelled expressly as a „national liberation movement" (the General Court quoted only how the appellant qualified itself), the reasoning that led to the acceptance of *locus standi* for the Front Polisario relies on the elements of its personality derived from international law. Moreover, the General Court developed the reasoning on *locus standi* it adopted in the earlier case T-512/12, including the concepts of "direct and individual concern". Other important developments include: the interpretation of the customary rules contained in articles 35 and 36 (1) of the Vienna Convention on the Law of Treaties and the application of the principle „land dominates the sea" with respect to the rights over the waters adjacent to a non-self-governing territory. In the latter sense, the General Court relied on international case law, including the case concerning *Maritime delimitation in the Black Sea.*

The second element of conclusion is linked to the substantial analysis made by the General Court that led to the solution of annulment. Even if the judgments targeted the decisions of the Council on the conclusion of the contested agreements, these decisions are inseparable from the text of the agreements themselves. Thus, even if formally, the General

[1] See, with respect to T-512/12, Sandra Hummelbrunner, Anne-Carlijin Pickartz, A, *It's Not the Fish That Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, *loc. cit.*, p. 35.

Court found that the decisions did not comply with the requirement of „consent" of the people of Western Sahara inferred by the Court of Justice from the principles of self-determination and relative effect of treaties, in substance, it was the agreements that breached this requirement. Moreover, in essence, the requirement of "consent" of the people is a consequence of its right to self-determination. In short, the essential part of the reasoning lead to the conclusion that the contested agreements breached the right to self-determination. The General Court did not refer to the *jus cogens* nature of this right (or principle), but doctrine (including the International Law Commission) and opinion of States is rather convergent that the right to self-determination enjoys this status. The qualification of an international rule as *jus cogens* is not necessary in order to rely upon it in order to contest an EU law act. The criteria for direct effect ("clear, precise and unconditional") are sufficient in this sense. Nevertheless, if one regards the larger picture of the relation between the contested agreements and other international law principles, *jus cogens* is a necessary element to rely upon.

It remains to be seen if the Court of Justice confirms the judgments, following the appeal. In our view, the most important challenge will not necessarily be the "substantial part" of the reasoning, but the questions regarding the admissibility. In particular, it is known that, along the time, the approach of the Court of Justice towards the criteria of „direct concern" or „individual concern" has been restrictive.[1] Thus, it remains to be seen whether, for example, the individual concern derived from the fact that the UN bodies did not recognize any other subject as "representative" of the people of Western Sahara is sufficient to uphold the reasoning of the General Court on individual concern.

Thus, if the judgments of the General Court are be confirmed by the Court of Justice under appeal, they might represent, together with the previous case law on which they rely, useful international practice related to the effects of the right to self-determination (which is widely accepted as representing a *jus cogens* norm). It is true that the judgments have effect only within the EU legal order and are not binding on the other party to the agreement. Nevertheless, the relevance of the reasoning as "international practice" may not be ignored.

[1] Concerning the „direct concern", a recent example is the Judgment of 13 January 2022 *Federal Republic of Germany and Others v Ville de Paris and Others*, C-177/19P, C-179/19P, ECLI:EU:C:2022:10; however, an example where the Court of Justice found that direct concern existed in a situation where the General Court ruled to the opposite is the Judgment of 22 June 2021, *Venezuela v. Council,* C-872/19P, ECLI:EU:C:2021:507.

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

The International Law Applicable to the Secession of a Territory. Territorial Integrity versus "Neutrality" of International Law and the Role of Self-Determination

Bianca-Gabriela NEACŞA [*],
Faculty of Law, University of Bucharest

Abstract: *This article aims at addressing the legality of secession in public international law, building on the two opposing theories proposed regarding the international law applicable to secession. The principles of self-determination and territorial integrity are examined in order to determine their applicability in the context of each theory.*

Keywords: *unilateral secession, territorial integrity, self-determination, prohibition of secession.*

1. Introduction

After the end of the Second World War the international community has experienced the proliferation of sovereign States from 73 to 195 States today,[1] representing an almost threefold increase in the last 77 years. This has been attributed mostly to the exercise of external self-determination endorsed by the United Nations (hereinafter referred to as UN) in the second half of the 20th century, during the decolonization process. However, secessionist attempts have continued to emerge beyond the colonial context, so much so that by the year 2000 over three-quarters of violent conflicts

[*] *PhD candidate, Faculty of Law, University of Bucharest, e-mail: neacsa.bianca@drept.unibuc.ro.* The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

[1] This total comprises 193 countries that are member states of the United Nations and 2 countries that are non-member observer states: the Holy See and the State of Palestine.

were fought either by groups seeking to establish a separate State or to change the ethnic balance within an existing State.[1]

From the international law point of view, unilateral secession is defined as the creation of a new independent entity through the separation of a part of the territory and population of an existing State, without the consent of the latter; or the separation of a part of the territory in order to be incorporated in another State, without the consent of the former.[2] Most of the time, the act of separation of a part of the territory without the approval of the sovereign State comes with collateral social and economic upset and an overall risk of escalating violence that disrupts the international order.[3] But while international instability arising from such cases is strongly impacted by the lack of an established legal framework regulating secession, the responses of States as well as international organisations and courts regarding the international law applicable to secession have been heterogenous. While some States have maintained a constant view upon the legality of secession, others, along with the International Court of Justice, have avoided clarifying the issue. In addition, a number of States have preferred to address each secessionist attempt as a *sui generis* case.

Nevertheless, the international law applicable to the secession of a territory beyond the colonial context has been a central topic of discussion in numerous scholarly debates, determining the outline of two opposite theories. One theory claims that an implied prohibition of secession is suggested by the extensive interpretation of the principle of territorial integrity. On the other hand, the "neutrality" of international law towards secession has been supported due to the lack of rules expressly prohibiting secession in the international legal system. The purpose of this article is to address the main legal theories applicable to the unilateral secession of a territory, trying to draw a conclusion on the international law applicable to secession. In addition, the dynamics between self-determination and secession will be looked upon in relation to each theory.

2. A territorial view on secession

The principle of territorial integrity has been the main counterargument against secessionist attempts, establishing a duty to refrain from any action that would disrupt or dismember the integrity of a State. In general, the

[1] Diego Muro, Eckart. Woertz, *Secession and Counter-secession. An International Relations Perspective.*, Barcelona Centre for International Affairs, 2018, p. 14.
[2] Marcelo G. Kohen, *Secession. International Law Perspectives, Cambridge University Press*, 2006, p. 3.
[3] Diego Muro, Eckart. Woertz, *Secession and Counter-secession. An International Relations Perspective.*, Barcelona Centre for International Affairs, 2018, p. 22.

dismemberment or loss of a part of a State's territory is seen as a violation of the principle of territorial integrity and in total contradiction with the provisions of several fundamental international documents.[1] Therefore, the crippling effects of secession can be associated with a breach of the unity and integrity of sovereign States and consequently be considered a potential violation of international rules. It is necessary however to distinguish between particular situations where the illegal character of secession emerges from the manner in which it has been conducted and the extensive interpretation of the principle of territorial integrity which may suggest a general prohibition of unilateral secession in all cases.

2.1. Unilateral secession addressed in Security Council resolutions

Secessionist attempts such as Katanga[2], South Rhodesia[3] or Northern Cyprus[4] have witnessed the UN Security Council's firm denial of secession and all its legal consequences, in the respective particular cases. It can be assumed that such denial was lined to peremptory norms of international law being violated.[5] In addition to considering the declarations of secession invalid, the Security Council's resolutions have called upon all Member States not to recognize the secessionist entities which conducted their separatist actions in violation of international law, thus deterring them from achieving viable statehood. Therefore, even if it would meet the statehood criteria, the Security Council resolutions have prevented States from

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[1] Christian Marxen, *Territorial Integrity in International Law – Its Concept and Implications for Crimea*, ZaöRV 75 (2015), Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht.

[2] In the case of Katanga, the Security Council resolution has *"[d]eclare[d] all secessionist activities against the Republic of Congo contrary to the Loi fondamentale and Security Council decisions and specifically demand[ed] such activities ... taking place in Katanga ... cease forthwith"*, UN Security Council, *Security Council resolution 169 (1961) [The Congo Question]*, 24 November 1961, S/RES/169 (1961), par. 8.

[3] In its resolution, the Security Council condemned the unilateral declaration of independence and called upon all States not to recognize the "*illegal racist minority regime in Southern Rhodesia*", UN Security Council, *Security Council resolution 216 (1965) [Southern Rhodesia]*, 12 November 1965, S/RES/216 (1965).

[4] Through resolution 541 of 18 November 1983, the Security Council has deplored the declaration of secession and declared it invalid, UN Security Council, *Security Council resolution 541 (1983) [Cyprus]*, 18 November 1983, S/RES/541 (1983).

[5] Referring to the practice of the Security Council in cases of secessionist attempts, Professor Malcom Shaw has highlighted the observations made by the ICJ in the *Kosovo* advisory opinion, noting that "*Security Council resolutions criticizing declarations of independence (...) were so acting (...) because they were or would have been associated with the unlawful use of force or some other egregious violations of the rules of international law.*", Malcom N. Shaw, *International Law*, Eighth Edition, Cambridge University Press, 2017, p. 389.

recognizing the secessionist entity. Furthermore, even in the absence of these provisions, states have an obligation not to recognize, based on the principle *ex injuria jus non oritur.*[1]

According to Malcolm N. Shaw, the Security Council's resolutions "*calling upon a particular group seeking to secede from a specific independent state to respect the national unity and territorial integrity of that state*" involved "*an international legal duty not to secede*" incumbent upon that particular group.[2] But when mentioning the "duty not to secede", translating into a prohibition to do so, Professor Shaw is referring to those situations sanctioned by the Security Council whose illegal character originates in the violation of peremptory norms. The question that arises however is whether outside these specific situations the principle of territorial integrity can be interpreted as imposing a general implicit prohibition to secede.

2.2. Territorial integrity – an interstate principle?

In the *Kosovo* advisory opinion, the International Court of Justice held that the principle of territorial integrity represents "*an important part of the international legal order*", being enshrined in Article 2(4) of the UN Charter,[3] which proclaims that*"[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*" [4]. The term "Members" or "States", as provided in the 1970 Friendly Relations Declaration and the 1975 Helsinki Final Act, referring to the beneficiaries of the principle, suggests that the applicability of territorial integrity might be limited to interstate relations. However, an extensive interpretation of the principle has been supported by several States in their written proceedings before the International Court of Justice in the *Kosovo* case, indicating that the protection of territorial integrity exceeds the interstate character. In this

[1] According to the United Nations Terminology Database, *ex injuria jus non oritur* is a principle of international law which sanctions acts contrary to international law deeming them unable to become a source of legal rights for a wrongdoer. It was applied in the US Government's Stimson doctrine, stating non-recognition of international territorial changes that were executed by use of force.

[2] Malcolm Shaw, *International Law*, Cambridge University Press, Cambridge 2014, p. 832, as cited in Simone F. van den Driest, *From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law*, International Journal on Minority and Group Rights, vol. 22, no. 4, Brill, 2015, pp. 467–85.

[3] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, I.C.J. Reports 2010, p. 437

[4] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

regard, it was argued that the stance taken by the Security Council in cases where the unity of a sovereign State was threatened, be it by an internal separatist movement, suggests that the principle of territorial integrity is opposable to States as well as non-state entities, prohibiting actions that would affect the territory of another State.[1] Therefore, the endorsement of a broader approach of the principle of territorial integrity has been advocated, protecting State unity and sovereignty not only from the actions of another State, but from any action that would determine a territorial impairment.

Despite the arguments being presented before the Court, its findings in the *Kosovo* Advisory Opinion have not been the breakthrough anticipated by most. The ICJ has maintained the traditional view of its previous rulings, reaffirming that "*the scope of the principle of territorial integrity is confined to the sphere of relations between States*",[2] therefore, in the view of the Court, the applicability of territorial integrity does not extend to non-state actors. However, in the 2019 Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, the International Court of Justice has reviewed its opinion over the scope of the principle of territorial integrity, extending its applicability to non-self-governing territories (a non-state actor), holding that *"[b]oth State practice and opinio juris at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self- determination. (...) The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.*"[3]

The Chagos case represents a step forward towards the legal recognition of a broader protection offered by the principle of territorial integrity against any action that endangers the unity and sovereignty of a State, regardless of its author. As Professor Crawford wrote, "*[i]nternational law has always*

[1] See the Written Statements of Serbia, Argentina, Iran, Cyprus and Spain, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*.

[2] *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 437.

[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, par. 160.

favoured the territorial integrity of states"[1]. An aspect that highlights this practice is the fact that no State created through non-consensual separation from its parent State has been granted membership into the United Nations.[2] Thus, an extensive application of the principle comes as an expected confirmation of the reluctance of the international community towards unilateral secession.

3. The neutrality of international law towards secession

The theory of neutrality[3] supports the idea that international law does not permit, nor prohibit unilateral secession; in its view, secession is simply a matter that does not fall under the regulations of international law. While it is undeniable that there is no positive right to secede outside the colonial context and while State practice has shown a generally cautious approach regarding secession, in lack of explicit rules, the legality of secession is open to opposable interpretations. Moreover, scholars have argued that international rules should not be applicable to secession because the formation or disappearance of a State is a pure fact, a political matter[4] that cannot be explained by legal rules.[5] However, if secession is not a question of international law, but a mere fact, it means that international regulations are not opposable to secessionist movements. They are simply a group of people fighting against their government in hopes of achieving external recognition and, if they succeed, a new entity will be created without breaching any rules because, as Hersch Lauterpacht affirmed, "*international law does not condemn rebellion or secession aiming at the acquisition of independence*".[6]

3.1. The Lotus principle

One of the main arguments invoked in support of the neutrality of international law is the Lotus principle, considered to be a foundation of international law established by the Permanent Court of International Justice. According to the judgement of the Court, "*[i]nternational law governs relations between independent States. The rules of law binding*

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[1] James Crawford, *State Practice and International Law in Relation to Unilateral Secession - Report to the Government of Canada concerning unilateral secession by Quebec*, para. 8.
[2] James Crawford, *The Creation of States in International Law*, Second Edition, Oxford University Press, 2006, p. 390.
[3] Marcelo G. Kohen, *Secession. International Law Perspectives, Cambridge University Press*, Cambridge University Press, 2006, p. 103.
[4] *Ibidem*, pp. 171-172.
[5] *Ibidem*, p. 138.
[6] Hersch Lauterpacht, *Recognition of States in International Law,* The American Journal of International Law, vol. 35, no. 4, American Society of International Law, 1941, pp. 605–17.

upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[1] In other words, whenever an express prohibition does not exist in international law, States are free to adopt any conduct they may consider appropriate. As such, whatever is not expressly prohibited is implicitly permitted.

Commuting the application of this rule to secession reveals that since there are no explicit rules prohibiting secession, the assumption that secession is permitted in international law would be correct. Not having a proper legal framework governing secession works to the advantage of applying the Lotus principle rather than to its detriment. The State practice on the matter is inconsistent proving that a lack of express rules might allow States to adopt any attitude they deem appropriate, which is exactly the scope of the Lotus principle.

Referring to the alleged prohibition of "declarations of independence" (not necessarily "secession") Judge Simma considered, in his declaration to the ICJ Advisory Opinion on *Kosovo*, that it was not the *Lotus* case that made international law not applicable to the declaration of independence, but the fact that "*international law can be neutral or deliberately silent' on the lawfulness of certain acts and whether the toleration of certain concepts could possibly break away from the traditional permission/prohibition duality"*.[2]

3.2. Relevance of domestic law

In *Reference re Secession of Quebec*, the Supreme Court of Canada held that "*international law contains neither a right of unilateral secession nor the explicit denial of such a right"*. Instead, it "*leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part". [3]* In other words, the ruling of the Court might suggest that international law gives effect to internal law: if

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[1] *Lotus (France v. Turkey)*, Permanent Court of International Justice, P.C.I.J. (ser. A) No. 10 (1927), para. 44.

[2] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Declaration of Judge Simma, General List No. 141, International Court of Justice (ICJ), 22 July 2010 par. 4-9; Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Ed. Hamangiu 2018, p. 77.

[3] Reference re *Secession of Quebec*, [1998] 2 S.C.R. 217, par. 112.

secession is prohibited or accepted by domestic law, international law will incorporate that result.

The above mentioned idea has also been supported by the Venice Commission in its assessment of the compatibility with international law of the Russian Draft Federal Constitutional Law that brought amendments to the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation. The Commission shared the opinion of the Canadian Supreme Court and underlined that the annexation or unification of a State with a secessionist entity "*would however act in violation of several fundamental principles of international law, most notably the principle of non-intervention in internal affairs*"[1]. It highlighted that in order for a State to incorporate a part of the territory of another State it would require valid consent, as non-consensual annexation determines a violation of the principle of non-intervention in internal affairs.[2]

In its Report on Self-determination and Secession, the Venice Commission has analysed whether constitutional provisions of the States are expressly prohibiting secession. Referring to the importance of the principle of territorial integrity for State unity, the report suggests that secession is "*inimical to national constitutional law*", "*for it would result in the dismemberment if not the destruction of the state's very foundation*". The report went further arguing that although constitutions of States do not have express provisions regulating secession, "*keeping silence (...) may indeed suffice to outlaw it*".[3] In the Commission's view, constitutional provisions referring to values challenged by secession such as indivisibility, national unity or territorial integrity implicitly suggest that an attempt at separating a part of the territory from the State is prohibited by its domestic law.[4]

Therefore, an implicit prohibition of secession is suggested to emerge from the legal effect that international law is providing to the constitutional framework of States. In addition, the application of the principle of non-intervention in internal affairs has been suggested by a part of the doctrine,[5] underlining that secession might be a matter of domestic law.

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[1] Opinion no. 763/2014 on "Whether Draft Federal Constitutional Law No. 462741-6 on amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation is Compatible with International Law", CDL-AD(2014)004, Venice Commission, 2014, par. 28.

[2] *Ibidem,* par. 29.

[3] *Self-determination and Secession in Constitutional Law,* Report, CDL-INF(2000)002-e, Venice Commission, 1999, p. 3.

[4] *Idem.*

[5] Marcelo G. Kohen, *Secession. International Law Perspectives,* Cambridge University Press, 2006, p. 7.

4. Self-determination – a supplementary argument

Secession constitutes a concept situated at the crossroads of two cornerstones of international law, respectively territorial integrity and self-determination, bringing the two principles into collision, as territorial integrity safeguards the status quo of a State while any people attempting to secede seeks to change the situation that it currently finds itself in.[1] Self-determination has an impact in both theories exposed above, therefore, an analysis of the international law applicable to secession without taking it into consideration is not possible.

4.1. The role of self-determination in the theory of neutrality

In relation to the theory of neutrality, self-determination represents an additional argument in support of the possibility of certain groups of people to secede from their parent State. However, there is a different relation between self-determination and recognition from the one between secession (in the absence of the exercise of the right to self-determination) and recognition. In the case of secession (without the exercise of self-determination), the recognition of the newly formed entity depends on the discretionary power of each State.

However, in cases where self-determination is involved, recognition loses some of its discretionary power. There are situations where other States are simply called to acknowledge and legitimize the effective situation of exercising self-determination. While there is no right that entitles a group to secede, there is a positive right to self-determination. If a certain group of people could meet the requirements needed to become a holder of the right to external self-determination, the other States might be more eager, or even under a positive duty, to recognize the new entity.

Therefore, it is suggested that for the "neutrality theory" self-determination represents a supplementary argument in favour of achieving successful secession. Self-determination fights the opposing presumption of non-recognition that was established by the practice of States in case of unilateral secession, giving a people the best odds at achieving independence. However, this "empowering" effect of a separatist attempt is applicable only if the seceding group qualifies as a people under the international law entitled to exercise external self-determination.

4.2. The role of self-determination in the prohibition of unilateral secession

[1] Antonio Cassese, *Self-determination of peoples: a legal reappraisal,* Cambridge University Press, 1995, pp. 333-334.

In relation to the theory of prohibition, self-determination comes as an exception from the implicit obligation not to secede. In other words, international law does not allow a group of people to attempt the separation of a part of the territory from a State, unless that group of people holds, in certain conditions, a right to external self-determination. There are several differences between a group seeking independence by unilateral secession from their parent State based on the will of the group and its secession on the grounds of exercising external self-determination. Therefore, a distinction should be made between the holder of the right to self-determination and the groups of people who might claim secession.

In order for a group to be entitled to exercise self-determination, it needs to qualify as "a people"[1]. It is uncontested that minorities of a State do not fit into the category of holders of the right to self-determination. The beneficiaries of self-determination are peoples in the sense of "*all peoples of a given territory*".[2] The Venice Commission had a similar remark in this regard, stating that it is peoples who have the right to self-determination, not a minority or another group within the State, whereas secession is the instrument of a group of people looking to separate.[3]

[1] International law does not provide a legal definition of a "people", but a number of criteria have been in doctrine. In 1989 the International Meeting of Experts on Further Study of the Concept of the Rights of Peoples has established in its Final Report and Recommendations that in order to be acknowledged as a people, a group must have the will to be identified as such and fulfil some or all of the following features:

a. a common historical tradition;
b. racial or ethnic identity;
c. cultural homogeneity;
d. linguistic unity;
e. religious or ideological affinity;
f. territorial connection;
g. common economic life.

International Meeting of Experts on Further Study of the Concept of Rights of Peoples, *Final report and recommendations* (SHS.89/CONF.602/7), Paris, 1989.

[2] Rosalyn Higgin, *Problems and Process: International Law and How We Use It*, Oxford University Press, p. 124, as cited in John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo,* Recueil des cours, Vol 357, Hague Academy of International Law, 2013.

[3] *Self-determination and Secession in Constitutional Law,* Report, CDL-INF(2000)002-e, Venice Commission, 1999, p. 10.

The theory regarding the exceptional character of self-determination was pursued based on the "safeguarding clause"[1] which recognizes external self-determination only in cases when internal self-determination is not applicable. In light of the "safeguarding clause", international law seems to allow external self-determination in the case of a State that does not conduct itself in compliance with the principle of equal rights and self-determination of peoples.[2]

Going back to the case of *Quebec*, this view has been referred to by the Canadian Supreme Court, stating that while international law does not expressly prohibit secession, "*such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination."*[3] It then continued by emphasizing that *"[a] right to external self-determination (...) arises in only the most extreme cases and, even then, under carefully defined circumstances*".[4]

Therefore, a State is protected from any internal or external disruption that could threaten the integrity of its territory as long as it respects the rights and freedoms of its peoples, prohibiting secession and any other action that could threaten the unity and sovereignty of the State. But if the State does not respect the internal self-determination of its citizens, the territorial protection yields in the face of external self-determination. In this case, external self-determination may have the character of a last resort measure. This extraordinary character strengthens the theory of the implicit prohibition of secession, as only an exceptional situation would prevail over the protection conferred by the territorial integrity. The argument would go that if self-determination, which is a positive right and a peremptory norm in international law,[5] requires

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[1] The "safeguarding clause" provides that: "*nothing (...) shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples (...) and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*", UN Commission on Human Rights, *World Conference on Human Rights.*, 9 March 1994, E/CN.4/RES/1994/95.

[2] James Crawford, *The Creation of States in International Law*, Second Edition, Oxford University Press, 2006, p. 118 -119.

[3] Reference re *Secession of Quebec*, [1998] 2 S.C.R. 217, par. 112.

[4] *Ibidem*, par. 126.

[5] Regarding the status of the right to self-determination as a peremptory norm, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Separate Opinion of Judge Cançado Trindade, Sep. Op. of Judge Sebutinde, and Sep. Op. of Judge Robinson, *I.C.J. Reports 2019*. See also *Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading* on *Peremptory norms of general international law (jus cogens)*, A/CN.4/L.936, 2019.

extraordinary conditions in order to allow external self-determination, secession outside this context is prohibited.

The paradox of the self-determination argument in the case of the "implied prohibition theory" is that the interpretation of external self-determination as having the character of a last resort and only in exceptional situations creates the premises for a potential establishment of a qualified right to secession, as an instrument of exercising self-determination in order to combat oppression and grave violations of a people's rights and freedoms.

Although in the case of *Kosovo* the International Court of Justice repudiated the call to analyse the issue of secession as a remedy for violations of peoples' rights committed by the government, a number of States have supported remedial secession in their written statements[1] submitted before the Court. In addition, this concept has gathered considerable support among scholars, so much so that a set of requirements for a people to resort to remedial secession have crystallized:

i. A "people" qualifying as the holder of the right to self-determination;
ii. The people must occupy a distinct part of the territory and constitute a majority in that territory;
iii. There must be a prior denial of the right to internal self-determination;
iv. The people must have been priorly subjected to widespread and gross violations of their fundamental human rights;
v. The remedial secession must come as a last resort, after the people have exhausted all peaceful means of securing the respect of their rights while respecting the integrity of the State.[2]

However, remedial secession is yet to be acknowledged as an established concept of international law outside the scholarly realm. The findings of the Independent Fact-Finding Mission on the Conflict in Georgia come to reinforce this statement. As one of the more recent cases where the matter of secession was addressed, the Mission's report argued that "*a limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in IL scholarship*". However, "*such a remedial*

[1] See the Writing Statements of the Republic of Germany, Netherlands, Slovenia, Ireland, Poland, Finland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, I.C.J. Reports 2010*.
[2] John Dugard, *The Secession of States and Their Recognition in the wake of Kosovo*, p. 146-147.

right or allowance does not form part of IL as it stands. The case of Kosovo has not changed the rules".[1]

5. Conclusion

In trying to determine the international law applicable to the secession of a territory, one would feel compelled to solve a complex legal puzzle. The emergence of the two antagonist theories has made the task of determining the legality of secession very difficult. There are however circumstances in which both State practice and doctrine have been in mutual assent about the rules applicable.

In specific situations, the illegal character of unilateral secession has been uncontested. These are the cases where secession and all its legal consequences have been expressly prohibited by the Security Council resolutions. It may be argued that the Security Council acted in particular due to the manner in which secession has been conducted, by breaching the peremptory norms of international law. In this case, either the Security Council resolutions, or the principle *ex injuria jus non oritur,* prevent any State from recognizing the secessionist movement, determining the inability of that entity to become a viable State.

In other cases, however, establishing the legality of secession has been dictated by the arguments brought in support of the two antagonist theories, respectively the theory of neutrality and the theory of prohibition. Although no express prohibition of secession is provided by the international law, the practice of States as well as other relevant actors have showed that an implicit prohibition of secession might be deduced from the provisions of the principle of territorial integrity. In addition, the extensive interpretation of the scope of the principle of territorial integrity established by the ICJ in the 2019 *Chagos* case represents a step forward towards the legal recognition of a broader protection offered against any action that endangers the unity and sovereignty of a State, regardless of its author.

With reference to the application of the two fundamental principles of the international legal system, respectively territorial integrity and self-determination, the provisions of the "safeguarding clause" indicate that territorial integrity prevails over external self-determination in all cases where the State governs itself in respect to internal self-determination and provides all its people equal access to the political decision-making process and political institutions, along with the protection of their fundamental rights and liberties. However, a State which is not conducting itself in compliance with the principle of equal rights and self-determination of

[1] Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, September 2009, p. 141.

peoples could lose the protection of its territorial integrity and political unity. Taking into consideration the extraordinary situations under which unilateral secession can be lawfully exercised enforces the conclusion that in any other situation unilateral secession is prohibited by the principle of territorial integrity

Concluding, international law has always recognized the fundamental importance of the unity and territorial integrity of States. 61 years ago, the former Secretary General, U Thant, addressed the legality of secession in international law, stating that "*as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept, and I do not believe it will ever accept the principle of secession of a part of its Member State*." [1] This statement reflected the opinion of the international community at the time and remains until today one of the firmest positions taken regarding the matter of secession. Furthermore, observing the more recent reactions of States and international courts, as well as the overall outcome of secessionist attempts, it appears that the international community has remained consistent in this view.

[1] Transcript of Press Conference by Secretary-General at Dakar, Senegal, on 4 January 1970, Press Release SG/SM/1204, 26 January 1970.

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The Concept of "Crime of Terrorism": the Relevant Case Law of the Special Tribunal for Lebanon

Raluca-Andreea ȘOLEA [*]
PhD Student, University of Bucharest

Abstract: *The aim of this research is to analyse the elements of the crime of terrorism encompassed within the relevant case law of the Special Tribunal for Lebanon, in comparison with other definitions of terrorism, developed by international bodies. The study also aims at explaining what their relevance for the further development of a common agreed concept of the crime of terrorism is.. As it is well-known, so far, the crime of terrorism, despite its gravity and the threat that it poses to the international peace and security, is not regulated within the international law since the international community could not agree on a common notion of the terrorism offence. Thus, analysing the concepts of terrorism developed is of high importance. Because the Special Tribunal for Lebanon is competent in particular on the crime of terrorism, its case law appears of significant relevance.*

Key-words: *Lebanese criminal law, mens rea, customary international law, peace-time concepts of terrorism, distinct crime.*

1. Introduction

The Special Tribunal for Lebanon ("STL") has been established by an Agreement between the Lebanese Republic and the United Nations in accordance with the Security Council Resolution 1664,[1] at the request of the Government of Lebanon. It is competent to prosecute the crime of terrorism, committed in times of peace, namely the terrorist bombings that occurred in Lebanon in 2005 and killed the former Lebanese Prime Minister Rafik Hariri and others.[2]

The applicable law is the national criminal law of Lebanon for the prosecution of the crime of terrorism.[3] Nevertheless, the Appeals Chamber

[*] *PhD candidate, Faculty of Law, University of Bucharest, e-mail: solea.ralucaandreea@yahoo.ro.* The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

[1] United Nations Security Council, *Resolution 1664*, 29 March 2006, S/RES/1664.

[2] UNSC, *Statute of the Special Tribunal for Lebanon (Preamble)*, 30 May 2007.

[3] UNSC, *Statute of the Special Tribunal for Lebanon,* 30 May 2007, Art. 2.

of the STL considered appropriate to take into account the international standards as well since it is a tribunal of international character.[1]

This article will analyse the case Ayyash et al.,[2] since it is the most complex one. The Trial Chamber of the STL has already pronounced its Judgment,[3] and also the Sentencing Judgement[4] for Mr. Salim Ayyash.

Analyzing the case law of this Tribunal is important since it is the first jurisdiction of international relevance to consider terrorism as a distinct crime. This element differentiates it from the international criminal tribunals and courts such as the International Criminal Tribunal for the Former Yugoslavia (ICTY),[5] International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL), which prosecuted war crimes and crimes against humanity.

This paper will focus on the elements of terrorism from both the definition of terrorism stipulated within the Lebanese law and the definition of terrorism developed by the Appeals Chamber as being part of the international customary law. As it will be emphasized, the latter element – represents a judicial innovation developed by the Tribunal. Built on the analysis, a comparison between the two concepts of terrorism will be drawn. The relevance of the STL case law for the further development of international law will be emphasized before presenting the concluding remarks.

The study analyses and brings into light the developments resulting from the case law of the Special Tribunal for Lebanon, which was especially designed to judge the terrorism crime. It also analyses the elements of the crime terrorism, which derives from the jurisprudence, and makes also reference to other notions of terrorism developed by international bodies. Thus, the research might represent another step in the development of the notion of terrorism to be acknowledged by the international community.

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[1] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon (Appeals Chamber), Case No. STL–11–01/1, 2011, pp. 14-15, para 15.

[2] See *The Prosecutor v. Ayyash et al.*, STL, 16 February 2011.

[3] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020.

[4] See *The Prosecutor v. Salim Jamil Ayyash*, STL, Sentencing Judgement, STL-11-01/S/TC, 11 December 2020.

[5] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Ed. Hamangiu 2018, p. 213

2. The concept and elements of the terrorism crime as encompassed in the *Ayyash el al. Trial Chamber Judgement*[1]

2.1 An overview of the case

The accused in this case are four members of a Lebanese armed group, Hezbolah - Mr. Jamil Ayyash, Mr. Merhi, Mr. Oneissi and Mr. Sabra - because of their involvement in the bombing that killed the Lebanese politician Hariri and 21 others in Beirut on February 14, 2005. All four were tried *in absentia*, and Prosecutors have based their case on the evidence resulting from a phone network that monitored the prime minister Hariri months before his death.

Mr. Jamil Ayyash has been accused of five offences: conspiracy aimed at committing a terrorist act, committing a terrorist act by means of an explosive device, intentional homicide, the intentional attempted homicide, while the others have been accused only for conspiracy.[2] In the cases of Mr. Merhi, Mr. Oneissi and Mr. Sabra, when analysing the conspiracy offence, the Trial Chamber concluded that the Prosecution did not prove their guiltiness of conspiracy. Mr. Ayyash has been found guilty for committing a terrorist act by assassinating Mr. Hariri with the explosive device. The evidence was represented by the mobile activity of some users of Blue, Red and Green networkson the day of the attack.[3] This article will focus mainly on ”count two” - committing a terrorist act by means of an explosive device.

The Trial Chamber sentenced unanimously Mr. Ayyash to life imprisonment for each of the five counts he was found guilty of, since each of them had the sufficient gravity for the maximum sentence, the imprisonment for life.[4]

Currently, s, the case is in the appeal phase after the the Defence Counsel for Mr. Salim Jamil Ayyash and the Prosecution of the Tribunal have filed notices of Appeal against the Trial Chamber’s Judgment.[5] Furthermore, the Defence has also filed notices of Appeal against the Sentencing Judgment.[6] The Appeals Chamber is also seized of an appeal by the Prosecution against

[1] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020.
[2] *Ibid*., p. 2162.
[3] *Ibid.*, p. 2163.
[4] STL Bulletin, September - December 2020.
[5] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020.
[6] *Ibid.*

the Judgment in the case of *Prosecutor v. Merhi and Oneissi.*[1] At the moment at which this article is written, the latest development is represented by the fact that the pronouncement of the Appeal Judgment was scheduled for the 10th of March 2022.[2]

2.2 The elements of the terrorism offence according to the Trial Chamber Judgement

The Trial Chamber has made its judgement based on the national criminal law of Lebanon for the prosecution of the crime of terrorism. The Lebanese Criminal Code[3] incorporates a definition for the crime of terrorism. The elements of this crime will be further discussed.

The first element included in the definition of terrorism within Article 314 of the Lebanese Criminal Code[4] is the subjective element (*mens rea*) - the intended aim - to cause a state of terror. On the basis of elements of the terrorism offence from all the international and regional instruments against terrorism that contain a definition of terrorism, it can be argued that this element is the most common one. , It can be found in all the definitions of terrorism developed so far. This can be observed in the tables below, together with some other elements of the terrorism crime that will be emphasized within the article. The first table (Table 1) contains the elements of terrorism developed within the regional instruments against terrorism, while the second (Table 2) contains the elements of terrorism from other international conventions, UN Resolutions and last, but not least, the elements of terrorism found by the Appeals Chamber of the Special Tribunal for Lebanon, as belonging to the definition of terrorism within customary international law.

Table 1 – The elements of terrorism within regional counter-terrorism instruments

[1] See *Prosecutor v. Merhi and Oneissi,* STL-11-01, (formerly, *Prosecutor v. Ayyash et al.*).
[2] https://www.stl-tsl.org/en/media/press-releases/stl-appeals-chamber-schedules-pronouncement-of-the-appeal-judgment-in-the-case-of-prosecutor-v-merhi-and-oneissi-stl-11-01-for-thursday-10-march-2022.
[3] Lebanese Criminal Code, 1943, Art. 314.
[4] *Ibid.*

	Intended aim	Motive	Means used	Scope
1998 League of Arab States Convention[1]	**yes**	**no**	**yes**	**no**
1999 African Unity Convention[2]	**yes**	**no**	**no**	**yes**
2001 Shanhai Cooperation Convention[3]	**yes**	**yes**	**yes**	**yes**
2002 EU Framework Decision[4]	**yes**	**yes**	**yes**	**yes**

Table 2 - The elements of terrorism from international instruments and the jurisprudence of the Special Tribunal for Lebanon.

	Intended aim	Motive	Means Used	Scope
1937 League of Nation's Convention[5]	**yes**	**no**	**Yes**	**no**
1954 ILC Draft Code[6]	**yes**	**no**	**Yes**	**no**

[1] League of Arab States, *Arab Convention on the Suppression of Terrorism*, 1998.
[2] African Unity, *Convention on the Prevention and Combating of Terrorism*, 1999.
[3] Shanghai Cooperation Organization, *Convention on Combating Terrorism, Separatism and Extremism*, 2001.
[4] European Union, *EU Framework Decision on Combating Terrorism*, 2002.
[5] League of Nations, *Convention for the Creation of an International Criminal Court*, 1937.
[6] United Nations, *Draft Code of Offences against the Peace and Security of Mankind*, ILC, 1954.

1991 ILC Draft Code[1]	**yes**	**no**	**No**	**no**
1995 ILC Draft Code[2]	**yes**	**no**	**No**	**yes**
1972 US Draft Convention[3]	**yes**	**no**	**No**	**no**
1998 Draft Rome Statute[4]	**yes**	**yes**	**Yes**	**no**
2000 UN DCC[5]	**yes**	**yes**	**Yes**	**no**
2004 UN SC Res. 1566[6]	**yes**	**yes**	**No**	**yes**
Lebanese Criminal Code[7]	**yes**	**no**	**Yes**	**Yes**
STL Appeals Chamber Definition[8]	**yes**	**yes**	**Yes**	**Yes**

Both tables, which represent the result of our previous research concerning the elements of the concept of terrorism developed so far within the international law, emphasize the fact that the 'intended aim' element is of utmost importance for the notion of terrorism since it is encompassed in many regional and international counter-terrorism instruments. The 'intended aim' element is also included in the definition of the crime of

[1] United Nations, *Draft Code of Crimes against the Peace and Security of Mankind*, ILC, 1991.
[2] United Nations, *Draft Code of Crimes against the Peace and Security of Mankind*, ILC, 1995.
[3] *US Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, 1972.
[4] United Nations, *Draft Rome Statute*, 1998.
[5] United Nations, *Draft Comprehensive Convention*, 2000.
[6] United Nations, *Resolution 1566*, Security Council, 2004.
[7] Lebanese Criminal Code, 1943, Art. 314.
[8] See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon (Appeals Chamber), Case No. STL–11–01/1, 2011.

terrorism in the Lebanese Criminal Code[1] and in the customary definition of the crime of terrorism, as identified by the Appeals Chamber of the Special Tribunal for Lebanon.[2]

The Appeals Chamber of the STL found that the subjective element is one's deliberate action with the intent to cause a state of terror.[3] From the meaning that the Appeals Chamber gave to the stipulation of the Article 314 of the Lebanese Criminal Code,[4] one can understand that terrorism should be perceived as a crime of a special intent (*dolus specialis*). In addition, the means used, the detonating of a bomb, - shows the intention to cause a state of terror, especially as the conduct has occurred in a crowded market place. Consequently, the terrorism offence committed by the perpetrators, Mr. Ayyash and his accomplices, satisfies the special intent requirement for a terrorist act as stipulated within Art. 314.[5]

If one analyses the case law of the Lebanese domestic courts, even if the prime intent of the perpetrator was not to cause a state of terror among the general public, but among a particular group, the intent is still sufficient for the person responsible to be held accountable.[6] The main reason is that even if the public might not have been the principal target, the action has created "danger" within the general public. The precedent of Balamand Monastery Case[7] can be mentioned, where the Lebanese Judicial Council has found that the men, who placed an explosive device near a monastery in the Balamand region in northern Lebanon with the intent to attack a bus, where Christian religious leaders were found, aimed to cause a state of terror in the respective area. The Council found that such act violated the security of Lebanon. The Trial Chamber of the STL agreed with the interpretation of Article 314 made by the Lebanese Judicial Council in this case,[8] "given that it simply required the acts be intended to cause a state of terror".[9] A

[1] Lebanese Criminal Code, 1943, Art. 314.
[2] See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon (Appeals Chamber), Case No. STL–11–01/1, 2011, para. 85.
[3] See Ayyash et el., STL, *First interlocutory decision on applicable law*, paras 49, 57, 147 (c), disposition: 3 (c).
[4] Lebanese Criminal Code, 1943, Art. 314.
[5] *Ibid.*
[6] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2023.
[7] *Balamand Monastery Attempted Bombing Case*, Lebanese Judicial Council, Judgment No. 3, 26 October 1994.
[8] *Ibid.*
[9] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2024.

different solution occurred in the Fatieh Case.[1] A man was accused of throwing explosives at a house twice in order to convince the daughter of the of the family the house belonged to, to marry him. In this case,[2] the Decision of the Lebanese Court of Cassation of 16 November 1953[3] found the man guilty for committing a terrorist act - throwing explosives at a house. It considered that the intent of the perpetrator was to scare the father of the daughter in order to coerce him to allow his daughter to marry him. With this aim, he used explosive devices, which are means of committing a terrorist act included in the Lebanese Criminal Code definition[4] of the crime of terrorism. Unlike the Decision of the Lebanese Court of Cassation of 16 November 1953,[5] the Trial Chamber of the Special Tribunal for Lebanon considered that the act committed by the man did not represent terrorism since the intention was to influence someone for personal reasons, the wish for a marriage.[6] Consequently, the ruling of the Trial Chamber of the Special Tribunal of Lebanon was in contradiction with the Lebanese Court of Cassation Decision of 16 November 1953,[7] which found the man guilty for committing a terrorist act under the Article 314 of the Lebanese Criminal Code.[8]

In this regard, we tend to agree more with the Decision[9] of the Lebanese Court of Cassation, mainly for the reason that the means that have been used by the perpetrator, , namely explosives, represent an important element of terrorism. The result of an action using explosives might be to create a state of terror in the area where the house was located. It may appear that the Lebanese case law is not uniform with respect to the special intent elements of the crime of terrorism under Article 314.[10] In this sense, it can be noted that in the *Al Jaran, Al Marout and Magharet el Leimoune Case*,[11] the perpetrators who used explosives had not been found guilty of a terrorism

[1] See *Fatieh Case*, Lebanese Court of Cassation, Cassation Decision No. 334, 1953.
[2] *Ibid.*
[3] *Ibid.*
[4] Lebanese Criminal Code, 1943, Art. 314.
[5] See *Fatieh Case*, Lebanese Court of Cassation, Cassation Decision No. 334, 1953.
[6] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2024.
[7] *Ibid.*
[8] Lebanese Criminal Code, 1943, Art. 314.
[9] See *Fatieh Case*, Lebanese Court of Cassation, Cassation Decision No. 334, 1953.
[10] Lebanese Criminal Code, 1943, Art. 314.
[11] See *Al Jaran, Al Marout and Magharet el Leimoune Case*, Lebanese Court of Cassation, Cassation Decision, No. 85, 1998.

act since they only intended to achieve personal objectives or to test the explosives.[1]

Taking into consideration the inconsistency of Lebanese case law, the Appeals Chamber concluded that the 'special intent' as to causing a state of terror must be established on a case-by-case basis.[2] Establishing that special intent on a case-by-case basis might be a solution, since it is the most efficient way to exactly determine if the "special intent" element of the terrorism offence is met.

Another interesting element found by the Trial Chamber in its Judgement[3] is the requirement for the perpetrator to be aware that the act was to be committed by means of an explosive device that can create public danger. The Trial Chamber makes an interesting statement: the proof whether the perpetrator is to be made responsible for his actions depends on his knowledge of its actions and his intention.[4] According to the Trial Chamber of the STL, this element includes two parts: firstly, the knowledge that the act has been perpetrated by using an explosive device likely to create a public danger and, secondly, the intent to create a state of terror.[5]

The Chamber argued that Mr. Ayyash must have known that and how Mr. Hariri was going to be murdered, namely by an explosion. It has also been alleged that he had been most likely aware of the place where it was to occur, namely that it was a public place, and about the time, in the middle of a weekday.[6] Consequently, the knowledge part of the *mens rea* element – the intended aim – was met. Considering the time and place where the detonation occurred, on a public street, in the middle of a weekday, it was clear that the attack would create a state of terror among the population. Consequently, the Trial Chamber concluded beyond reasonable doubt that Mr. Ayyash knew that the means used would create a public danger.[7]

Another element found by the Trial Chamber within its Judgment is represented by the means used when committing a terrorism offence. In the case of Lebanese Criminal Code definition of terrorism, the means used are deemed to create a public danger if the act is committed by using „explosive

[1] See *Al Jaran, Al Marout and Magharet el Leimoune Case*, Lebanese Court of Cassation, Cassation Decision, No. 85, 1998, p.5.
[2] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2025.
[3] *Ibid.*
[4] *Ibid*., p. 2190.
[5] *Ibid.*
[6] *Ibid.*, p. 2192.
[7] *Ibid.*, p. 2193.

devices, inflammable materials, toxic or corrosive products and infectious or microbial agents".[1] The Trial Chamber has found that this element is met in the Ayyash et al. case,[2] taking into consideration the detonation of an explosive device of „2.500 to 3,000 kilograms of TNT equivalent high explosives".[3]

Regardless the fact that the target was Mr. Rafik Hariri, numerous other persons, including the ones from the Mr. Hariri's convoy, have been killed since the device exploded in a very busy street on a weekday. Since detonating the device has occurred in such circumstances, it was clear that the attack caused fear, in particular to the members of the public in the area, but also to other inhabitants who afterwards were informed about the event.

Furthermore, regarding the 'motive element', which also can be found in the concepts of terrorism developed by other regional[4] and international[5] instruments, the Trial Chamber concluded that the proof of a motive is not required for the indictment. This decision contradicts some of the previous definitions that have been developed in international practice, as mentioned in the Tables 1 and 2.

2.3 The differences between the concept of terrorism in the Lebanese law and international customary law

This part will encompass a comparison between the concepts of terrorism from Lebanese law and from international customary law, as identified by the Appeals Chamber.

First of all, the definition of terrorism in the Lebanese law does not stipulate the requirement of specific motive. The Prosecution and the Trial Chamber in the *Case Ayashh et al.*[6] rejected the Sabra Defence argument that the motive must be proven in order to establish a terrorist act under

[1] Lebanese Criminal Code, 1943.
[2] See *The Prosecutor v. Ayyash et al.*, STL, 16 February 2011.
[3] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2074.
[4] Shanghai Cooperation Organization, *Convention on Combating Terrorism, Separatism and Extremism*, 2001.
European Union, *EU Framework Decision on Combating Terrorism*, 2002.
[5] United Nations, *Draft Rome Statute*, 1998;
United Nations, *Draft Comprehensive Convention*, 2000;
United Nations, *Resolution 1566*, Security Council, 2004.
[6] See *The Prosecutor v. Ayyash et al.*, STL, 16 February 2011.

Article 314.[1] An important aspect regarding the motive requirement is that the Appeals Chamber of the Special Tribunal of Lebanon stated that the international customary law does not require a political, religious or ideological motive.[2]

Even if the motive requirement might give clarification about the purpose of the offence that is to be prosecuted as a crime of terrorism under the international law, we consider that the concept of the crime of terrorism should not necessarily include a political, religious or ideological motive. For example, the political motive might trigger various interpretations, from different groups of States. Thus, it is not excluded that the motive requirement might hinder the process of the development of a common concept of the crime of terrorism within the international law.

Furthermore, the definition contained within the Disposition of the First Interlocutory Decision[3] of the Appeals Chamber includes an additional element, incriminating, besides the perpetration of an act, the "credible threat of an act"[4] - the *actus reus* element. Consequently, the Appeals Chamber's concept of terrorism incriminates both acts and threats. Thus, it is broader that in the concept defined by the Lebanese Criminal Code,[5] according to which the threat itself does not represent an offence.

In addition, the definition provided by the Appeals Chamber in the Disposition[6] does not enumerate the means used, stipulating just that they are means "that are likely to pose a public danger".[7] By not specifying exactly what the means are, it can be interpretated that both physical and other methods of accomplishing a terrorist act are to be incriminated as long as they pose a public danger.

The Appeals Chamber has taken into account the relevant applicable international law besides the Lebanese Criminal Code.[8] In order to identify the applicable international law, the Appeals Chamber examined the Arab

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[1] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2027.
[2] *See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon (Appeals Chamber),* STL-11-O1/I, 16 February 2011, paras 98, 100, 106.
[3] *Disposition of the First Interlocutory Decision*, STL, p. 2375, para. 3.
[4] *Ibid.*
[5] Lebanese Criminal Code, 1943.
[6] *Disposition of the First Interlocutory Decision*, STL, p. 2375, para. 3.
[7] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2027.
[8] Lebanese Criminal Code, 1943.

Convention for the Suppression of Terrorism of 22 April 1998,[1] and customary international law. The Arab Convention[2] was the only treaty ratified by the State of Lebanon that contained a definition of the crime of terrorism. The definition is broader and includes the threat of violence, besides the act itself. Furthermore, it incriminates acts that damage the environment and public or private properties, also jeopardizing national resources.

Even if the Appeals Chamber did not directly apply that definition, since the Arab Convention[3] stipulates that its aim is not to substitute its own definition of terrorism for those contained in the national law of the contracting parties, it has however used this definition in order to interpret the Lebanese Criminal Code.[4] Accordingly, the Appeals Chamber of the STL has given a much broader interpretation than the Trials Chamber.

With respect to customary international law, the Appeals Chamber emphasised that a definition of crime of terrorism exists within the body of international customary law, applicable in time of peace, based on different sources at national and international level, such as treaties, UNSC resolutions and national legislation of different states.

By analysing these sources, the Appeals Chamber emphasized that there is a motive requirement for a political, religious, racial or ideological purpose, but it concluded that this element does not yet form part of the customary definition of the crime.[5] The Appeals Chamber intended to ensure consistent interpretation of national legislation with binding relevant international law. The Appeals Chamber stipulated in the definition of the crime of terrorism under customary international law,that the threat of an act should also be a crime.. Furthermore, the Appeals Chamber considers the transnational element part of the customary concept of the crime of terrorism.[6]

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[1] League of Arab States, *Arab Convention on the Suppression of Terrorism*, 22 April 1998.
[2] *Ibid.*
[3] *Ibid.*
[4] Lebanese Criminal Code, 1943.
[5] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2379.
[6] *See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon (Appeals Chamber),* STL-11-O1/I, 16 February 2011, paras 91, 111, 124.

Even if the Trial Chamber did not contend that there is an international agreed notion of terrorism, it has made it clear in its judgement that terrorism is one of the most serious and heinous crimes.[1]

3. The judicial of the STL and the separate opinion of judge David Re about the shaping of a definition of terrorism within the international customary law

3.1 The innovation of the STL and its relevance for the development of international criminal law

The Appeals Chamber stated that since the Special Tribunal for Lebanon is also a tribunal of an international character, it is obliged to take into account the international law and it did so even if its Interlocutory Decision on the Applicable Law[2] stipulated that the Tribunal shall primarily apply national Lebanese law.

By analyzing the international criminal law such as the UN Security Council and General Assembly Resolutions, but also the national laws of States and domestic case law, the Appeals Chamber of the STL offered a judicial innovation: it recognized terrorism as being part of the international customary law and is the first court of an international character, which did so. The crime of terrorism, under customary international law, as identified by the Appeals Chamber contains three elements:

"(i) the perpetration of the criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;

(ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;

(iii) when the act involves a transnational element".[3]

The concept of terrorism developed by the Appeals Chamber of Tribunal for Lebanon emphasizes the special intent of the perpetrators to spread fear

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[1] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 284.

[2] See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon (Appeals Chamber), STL-11-O1/I, 16 February 2011, para. 33.

[3] See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon (Appeals Chamber), Case No. STL–11–01/1, 2011, para. 85.

among the population, but also the intent to compel a national or international authority to do a specific act or abstain from doing it. Furthermore, the terrorist act requires a transnational element.

An important aspect regarding the Appeals Chamber of the Special Tribunal for Lebanon is the fact that it analyzed many national laws on combating terrorism. It concluded that the common elements of the domestic definitions are: the intent to terrorize the population, to compel a government to do an act or refrain from doing it and the disruption or destabilization of social or political structures.[1] For example, Jordan, the United Arab Emirates, Iraq, Tunisia and Egypt prosecute in their national laws criminal offences that endanger social order and spread fear among the population or damage property or infrastructure.[2] In addition, many European countries such as Austria, Belgium, France, Sweden, and UK criminalize in their domestic laws acts that intimidate and spread fear among the population and endanger the social order.[3] The national laws of Latin American countries such as Chile,[4] Colombia,[5] Panama[6] and Peru[7] also incriminate the spread of fear among the population. Furthermore, the element of spreading fear is also encompassed in the national law of the United States.[8]

The conclusion of the Appeals Chamber regarding the common elements of the domestic definitions of the crime of terrorism reveals that State practice supports the outcome that the crime of terrorism is already regarded as a distinct crime under international customary law.

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[1] See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon (Appeals Chamber), Case No. STL–11–01/1, 2011, para. 93.

[2] See the Penal Code of Jordan, 1960, Art. 147(1);
See United Arab Emirates Decree by Federal Law No. I of 2004 on Combating Terrorist Offences, 2004, Art. 2.
See Iraq: Anti-Terrorism Law (Law No. 13 of 2005), 7 November 2005, Art. 1 and 2;
See Tunisian Law 2003-75 against Terrorism and Money-Laundering, 10 December 2003, Art. 4;
See Penal Code [Egypt], No. 58 of 1937, August 1937, Art. 86.

[3] See Austrian Criminal Code, 1974, Section 278c; Belgian Criminal Code, 1867, Art. 137 para I; French Criminal Code, 1810, Art. 421-I; Swedish Law (2003:148) on the crime of terrorism, 2003, Section 2; UK Terrorism Act 2000; as amended by the Terrorism Act 2006 and Counter-Terrorism Act 2008, Section 1.

[4] Chile's anti-terrorism law (Law No.18,314), 1984, Art. 1 and 2.

[5] Colombian Penal Code, 1936, Art. 343.

[6] Criminal Code of the Republic of Panama, 2007, Art. 287.

[7] Peru's Decree Law No. 25475, 1992, Art. 2.

[8] US Code, 1988, Title 18, Part I, Chapter 113B § 2331.

In addition, the concept of the crime of terrorism developed by the Special Tribunal for Lebanon might represent a source of inspiration for other tribunals that include the crime of terrorism within their competence. In this sense, it has been a proposal to take into consideration this concept when developing a proposal for an International Court against Terrorism, presented in 2015 by Romania and Spain.[1]

3.2 Arguments against an international customary law definition of terrorism – the separate opinion of the judge David Re

In his separate opinion, judge David Re affirms that a customary definition of an international crime of terrorism for the peacetime was in the making, or nascent, but it is not already contoured within the international customary law.[2] He emphasizes that there is commonality and convergence between definitions encompassed in UN treaties,[3] UN General Assembly

[1] Bogdan Aurescu and Ion Gâlea, *Establishing an International Court against Terrorism*, Constitutional Law Review, 2015.

[2] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2383.

[3] United Nations, Treaty Series, vol. 704, p. 219, *Convention on Offences and Certain other Acts Committed on Board Aircraft*, Tokyo, 4 September 1963;
United Nations, Treaty Series, vol. 1670, p. 343, *Convention for the Suppression of Unlawful Seizure of Aircraft*, Hague, 16 December 1970.
United Nations, Treaty Series, vol. 1035, p. 167, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, New York, 14 December 1973.
United Nations, Treaty Series, vol. 1316, p. 205, *International Convention Against the Taking of Hostages*, New York, 17 December 1979;
United Nations, Treaty Series, vol. 1456, p. 101, *Convention on the Physical Protection of Nuclear Material*, New York, 8 February 1980.
United Nations, Treaty Series, vol. 1589, p. 474, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Montreal, 24 February 1988.
United Nations, Treaty Series, vol. 1678, p. 222, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, Rome, 10 March 1988.
United Nations, Treaty Series, vol. 1678, p. 304, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988.
United Nations, Treaty Series, vol. 134, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991.
United Nations, Treaty Series, vol. 2149, p. 256, *International Convention for the Suppression of Terrorist Bombings*, New York, 15 December 1997.
United Nations, Treaty Series, vol. 2178, p. 197, *International Convention for the Suppression of the Financing of Terrorism*, New York, 9 December 1999.

(hereinafter referred to as UN GA) and Security Council Resolutions (hereinafter referred to as SC)[1] and the draft of an UN Comprehensive Convention on International Terrorism.[2] Regarding the elements of the crime of terrorism, judge David Re states that at a trend exists at the international level, in the sense that the definitions of terrorism should not limit the means used for to physical means. Furthermore, he argues that he is not convinced about the full crystallization and maturity of a definition of terrorism at the international level because State practice might not be sufficiently consistent.[3]

His contention proves the difficulty of assessing the the current status on the international level - if a definition of terrorism has been shaped yet within the customary international law. An argument raised by judge Re is that the 'motive element' is not uniform in all the international and national instruments on terrorism. While the Appeals Chamber considers that the 'motive element' or its absence is a minor discrepancy between the concepts of the crime of terrorism in international and national instruments and the complete uniformity of practice is unnecessary, judge Re claims that this element shows the opposite: that there is no international consensus regarding the concept of terrorism. Even if it represents just a particular element of the whole concept of terrorism, it makes the overall agreement of

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United Nations, Treaty Series, vol. 2445, p. 89, *International Convention for the Suppression of Acts of Nuclear Terrorism*, New York, 13 April 2005.
United Nations, Treaty Series, vol. 3132, *Amendments to the Convention on the Physical Protection of Nuclear Material*, Vienna, 8 July 2005.
United Nations, Treaty Series, vol. 1678, p. 222, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005;
United Nations, Treaty Series, vol. 1678, *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, Rome, 14 October 2005.
United Nations, Treaty Series, *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, Beijing, 10 September 2010.
United Nations, Treaty Series*, Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft,* Beijing, 10 September 2010;
United Nations, Treaty Series, *Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft*, Montréal, 4 April 2014.

[1]UNSC Resolution 1373, 2001. Resolution 1377 (2001); Resolution 1368 (2001); Resolution 1438 (2002); resolution 1440 (2002); Resolution 1450 (2002); Resolution 1456, 2003; resolution 1516 (2003); resolution 1530 (2004); resolution 1611 (2005); resolution 1618 (2005); Resolution 1390 (2002); Resolution 1452 (2002); Resolution 1455 (2003); Resolution 1456 (2003); Resolution 1526 (2004); Resolution 1535 (2004); Resolution 1540 (2004); Resolution 1617 (2005);47 Resolution 1624 (2005);48 Resolution 1735 (2006).

[2] UN Draft Comprehensive Convention, 2000.

[3] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, p. 2385.

a common international concept of terrorism questionable.[1] On this issue, we are inclined to agree with the opinion of the Appeals Chamber since it is hard to have a totally agreed uniform definition at the international level, taking into consideration the differences and variety of states on the globe.

Another argument and difference in the terrorism concepts around the globe revealed by the judge David Re is related to the *actus reus* element, stating that in some national criminal laws an act might be directed towards individuals or other targets, non-human ones, such as the property or environment, while other concepts of terrorism are limited to the individuals. Furthermore, he finds another discrepancy: the proof that people have been injured or that a property has been damaged is necessary for a crime to be committed according to certain definitions of terrorism, while other definitions do not require this element, such as the one encompassed within Article 314 of the Lebanese Criminal Code. In addition, he argues that, while some national definitions of terrorism incriminate both the act and the threat of a terrorism offence, others just stipulate the act itself, such as the Article 314.[2]

Consequently, the judge disagrees with the Appeals Chamber that there is a definition of terrorism within the body of international customary law. Moreover, he agrees with the Trial Chamber that a common notion of terrorism has not yet been contoured within the international customary law, but affirms that the international and domestic sources could be used by the TSL as guidance when interpreting the provisions within the Lebanese law.

We firmly believe that the Trial Chamber should have accepted a broader interpretation of the definition of terrorism encompassed within the Lebanese Criminal Code. For example, with respect to the 'means element', the Trial Chamber of the Tribunal should have interpreted the disposition regarding the means used in a broader way. An illustrative list rather than a closed list[3] would have been more appropriate in order to encompass a larger spectrum of acts of terrorism, committed by other means than the ones enumerated in the definition. Nevertheless, if one looks strictly at the Ayyash et al. Case,[4] the Trial Chamber did not necessarily need to give a broader interpretation of the provision and the means used, since the definition of terrorism within the Lebanese Criminal Code[5] has already

[1] See *The Prosecutor v. Ayyash et al.,* STL, Judgement STL-11-01/T/TC, 18 August 2020, 2386.
[2] *Ibid.*
[3] Lebanese Criminal Code, 1943, Art. 314.
[4] See *The Prosecutor v. Ayyash et al.*, STL, 16 February 2011.
[5] Lebanese Criminal Code, 1943, Art. 314.

incorporated the means used in the terrorist attack against Mr. Hariri. In the same vein as the separate opinion of the judge David Re, our position is that that a broader reading of the 'means element' would facilitate the application of the definition to contemporary forms of terrorism. Even if for the purpose of cases before the Tribunal this interpretation was not necessarily, the broader reading is more useful for the development of international law.

4. Conclusion

The case law of the Special Tribunal for Lebanon is very relevant for the development of the notion of the crime of terrorism and the development of the international criminal law. The findings of the Appeals Chamber of the STL in the Ayyash et el. Case[1] are of high importance for the further development of international criminal law because they might represent a source of inspiration, in the future, for other tribunals and for the development of a common agreed notion of terrorism within the public international law. Furthermore, the definition of the crime of terrorism proposed by the Appeals Chamber of the Special Tribunal for Lebanon is very relevant because it brings into light that the State practice supports the outcome that the crime of terrorism is already regarded as a distinct crime within the customary international law.

The elements of the crime of terrorism identified by the Appeals Chamber, as well as the comparison with elements contained in the the relevant case law of the Special Tribunal for Lebanon, might prove important for the further development of a uniform commonly agreed notion of the crime of terrorism within the international criminal law.

[1] See *The Prosecutor v. Ayyash et al.*, STL, 16 February 2011.

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