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CUPRINS

TABLE OF CONTENTS

Cuvânt înainte / Foreword

It is with great pleasure that we present the latest issue of the Romanian Journal of International Law, comprising an array of insightful contributions from scholars and experts, shedding light on multifaceted aspects of contemporary international law. The featured articles and studies traverse various domains, offering profound analyses and assessments.

The first article, authored by Carmen-Gina Achimescu and Ioana-Roxana Oltean, scrutinizes the pivotal role played by the International Maritime Organization amidst the challenges arising from the Russo-Ukrainian conflict. Their investigation delves into the efforts aimed at ensuring maritime safety in the Black Sea. Following this, Daniela-Anca Deteșeanu and Viorel Chiricioiu explore the intricate realm of cultural heritage within the maritime environment and the legal complexities surrounding underwater cultural heritage. Simultaneously, Mihaela-Augustina Niță provides an incisive overview of the European Union's involvement in sea-related policies, delineating its historical evolution and highlighting its significance in shaping responsible marine activities. Furthermore, Oana-Mihaela Salomia examines the pertinent question of the European Union's potential accession to the Bucharest Convention in light of the ongoing conflict in Ukraine.

The issue also features Filip A. Lariu's comprehensive study, concluding a trilogy on the interaction between immunities of state officials and the obligation to extradite or prosecute. This work critically assesses the impact of immunities on this obligation, unravelling complex doctrinal questions and proposing potential solutions. Finally, Sabin G. Solomon's article probes into the impending Advisory Opinion of the International Court of Justice and its ramifications on small island States grappling with the challenges posed by sea-level rise and climate change.

We trust that this compilation of scholarly contributions will captivate our esteemed readers, providing invaluable insights and contributing significantly to the discourse on international law.

Professor Dr. Bogdan Aurescu

Member of the UN International Law Commission
Judge-elect of the International Court of Justice

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

The Role of the International Maritime Organization in Securing the Black Sea in the Context of the Russo-Ukrainian War[*]

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Abstract: *After the annexation of Crimea by the Russian Federation in 2014, maritime safety in the Black Sea and the Sea of Azov became a major international challenge. After February 2022, the Russo-Ukrainian conflict disrupted maritime trade in the region, impairing shipping routes and port operations. The United Nations and International Maritime Organiation provided technical support to reduce the impact of the armed conflict, especially to allow the establishment of a humanitarian corridor and a safe corridor for the transportation of grain, related foodstuff, and fertilizer from Ukraine and Russia to international markets.*

Key-words*: International Maritime Organization, Black Sea Grain Initiative, Russia-United Nations Memorandum of Understanding.*

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[*] This study was carried out within the *Project Challenges to Ocean Governance: Regional Disputes, Global Consequences? (OCEANGOV)*, Research Council of Norway, No 315163.

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1. Introduction

The Russian-Ukrainian conflict that started in 2014, when Russia annexed Crimea and then continued with tensions and fighting in Eastern Ukraine,[1] has several implications for the safety of the oceans, particularly in the Black Sea and the Sea of Azov. While the conflict itself is primarily a land-based issue, it has indirectly impacted maritime safety in several ways.

The situation has resulted in increased naval and military activity in the Black Sea and the Sea of Azov.[2] This intensifiedsecurity presence could highten the risks of maritime incidents, such as collisions of naval vessels or confrontations, thus endangering safety. The increased naval and military activity in the Black Sea has raised concerns about a possible escalation of the conflict between Russia and NATO. In recent months, there have been several close encounters between Russian and NATO warships in the Black Sea, which have accentuated the risk of accidental friction: A few of the most important moments in this regard include the following: the launching of a missile strike from the Black Sea, by Russia, in June 2022, on a Ukrainian shopping mall in Kremenchuk from the Black Sea, which killed at least 18 people and injured dozens more, the holding, in August 2022, by Russia of a large-scale military exercise in the Black Sea, involving over 150 warships and aircraft, whilst in September 2022, Turkey closed the Bosphorus and Dardanelles straits to Russian warships, citing the Montreux Convention.[3] This prevented Russia from reinforcing its Black Sea Fleet from the Mediterranean Sea.

The war has disrupted maritime trade in the region, compromising shipping routes and port operations. The trade through Ukrainian ports, including Mariupol and Berdiansk in the Sea of Azov, had been severely disrupted as a result of blockades,[4] hostilities, and measures imposed by both parties. This

[1] Jeffrey Mankof, "Russia's War in Ukraine, Identity, History, and Conflict", *Center for Strategic and International Studies*, April 2022, available at: https://www.csis.org/analysis/russias-war-ukraine-identity-history-and-conflict

[2] Luke Coffey, "Russian dominance in the Black Sea: The Sea of Azov", *Middle East Institute*, September 2020, available at: https://www.mei.edu/publications/russian-dominance-black-sea-sea-azov

[3] Heather Mongilio, "Turkey Closes Bosphorus, Dardanelles Straits to Warships", *USNI News*, February 2022, available at: https://news.usni.org/2022/02/28/turkey-closes-bosphorus-dardanelles-straits-to-warships

[4] Alexander Lott, "Russia's Blockade in the Sea of Azov: A Call for Relief Shipments for Mariupol", *European Journal of International Law*, March 2022, available at: https://www.ejiltalk.org/russias-blockade-in-the-sea-of-azov-a-call-for-relief-shipments-for-mariupol/

disruption could potentially result in economic losses, and delays in transportation, and safety risks for the vessels. It has also caused navigation difficulty, with mines and other explosives placed in certain areas.[5] These dangers represent a direct issue for the ships in the area, therefore adapting the movement of these vessels is a constant preoccupation for both private persons and the maritime authorities that need to carry out minelayer-clearing operations.

The conflict also has a significant impact on seafarers, many of whom are Ukrainian or Russian nationals. There have been cases where they were stranded on ships in Ukrainian ports, and killed or wounded in attacks on the ships. The conflict has also made the seafarer's movement from and into the region more difficult.

The general atmosphere of tension and conflict could potentially increase the likelihood of at-sea accidents. Ships traveling through the area may be subject to enhanced surveillance and possible interference by military forces,[6] thereby posing a threat to navigation safety. The conflict has increased the risk of maritime accidents in the region due to a number of factors, including the minefields in the sea, collision risks of merchant ships vs. warships, port disruption and closure, the diminished provision of maritime safety services, and increased risk of maritime pollution.[7]

International sanctions imposed on Russia and related entities have also affected sea operations.[8] Shipping companies and other maritime traders are facing increasingly burdensome sanctions-related regulatory requirements that could undermine the safety of their businesses.

Conflict areas also often see a greater risk of environmental harm caused by incidents like oil spills resulting from damaged ships or infrastructure during

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[5] Allianz Global Corporate & Speciality, "Shipping losses hit a record low in 2022, but jump in fires, shadow tanker fleet and economic uncertainty pose new safety challenges", *Safety and Shipping Review 2023*, May 2023, available at: https://commercial.allianz.com/news-and-insights/reports/shipping-safety.html#download

[6] Mark Nevitt, "The Russia-Ukraine Conflict, the Black Sea, and the Montreux Convention", February 2022, available: https://www.justsecurity.org/80384/the-russia-ukraine-conflict-the-black-sea-and-the-montreux-convention/

[7] Jonathan Saul, "Floating mines in Black Sea endangering grain, oil trade, officials say", April 2022, available at: https://www.reuters.com/world/europe/floating-mines-black-sea-endangering-grain-oil-trade-officials-2022-04-05/

[8] Council of the European Union, "EU sanctions against Russia explained", available at: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/

the war. Such events can have lasting ecological consequences for the oceans and coastlines in the affected areas.[9] The increased risk of maritime pollution in the region is due to shipwrecks and sinking or damaged merchant ships and warships, oil and other noxious substances spilled into the water, disruption of the pollution, and response to the disruption of the maritime environment.[10]

2. The Necessity of an International Response to Regional Security Threats in the Black Sea

The international community has taken various steps to address the safety of the seas in the Black Sea and Sea of Azov region. These include both the the establishment of an Emergency Task Force to coordinate efforts to address the security and safety risks to shipping, ports, and seafarers, by the International Maritime Organisation, putting into place several measures to ensure maritime safety in the region, as well as providing maritime security and safety assistance to Ukraine, by the European Union. It can be added that NATO has upped its maritime presence in the Black Sea to prevent any potential further Russian aggression and safeguard shipping interests. While these measures are important, the safety of the Black Sea and the Sea of Azov is still a matter of great worry.

Even though the conflict is about territory and geopolitics, it also indirectly affects maritime safety in the Black Sea and the Sea of Azov. These challenges illustrate the interconnectedness of global maritime security and the importance of international cooperation in managing risks and securing the passage of ships in hotspots. In this sense, the following will analyze the role of the International Maritime Organisation in stabilising the Black Sea Area.

2.1. The Framework Standards of the International Maritime Organization

The International Maritime Organisation (IMO) is undoubtedly one of, if not the most, important institutions involved in global maritime regulation. Created by the UN in 1948 as The Inter-Governmental Maritime Consultative

[9] Sofia Sadogurskaya, "War and the Sea: How hostilities threaten the coastal and marine ecosystems of the Black and Azov Seas", September 2022, available at: https://uwecworkgroup.info/war-and-the-sea-how-hostilities-threaten-the-coastal-and-marine-ecosystems-of-the-black-and-azov-seas/

[10] Conflict and Environment Observatory, "Ukraine conflict environmental briefing" available at: https://ceobs.org/ukraine-conflict-environmental-briefing-the-coastal-and-marine-environment/

Organisation (IMCO), the organisation's name changed to its present one in 1982 as it became more important as an authority overseeing regulation and ensuring the protection of the seas.

Dedicated to safeguarding the waters of our planet with missions including safety at sea and protection of the environment under the Maritime Safety Committee and Marine Environment Protection Committee respectively, the IMO takes a lead position as the regulator for international global shipping. This opening paragraph gives only a small overview of the broad range and importance of the IMO, an organisation whose reach extends to the very heart of the interlocking network of maritime issues linking countries around the world.

The IMO develops and maintains a comprehensive regulatory framework for shipping, covering all aspects of the industry, including ship design, construction, and equipment, manning and training, operation and safety procedures, prevention of marine pollution, liabilities, and damages in case of marine incidents.[11] Therefore, the main activity of the IMO is the normative one, through the elaboration of international conventions. Out of the over 50 legal instruments concluded under the IMO, the organisation has developed three "key conventions":

a) The International Convention on the Safety of Life at Sea (SOLAS) of 1974;

b) The International Convention on Pollution from Ships (MARPOL) of 1973, modified by the Protocols of 1978 and 1997;

c) The International Convention on the Standards of Training, Certification/Certification and Charting of Seafarers (STCW), as amended by the 1995 Amendments and the 2010 Manila Amendments.

The other conventions are classified by the IMO according to their scope:

a) maritime security, ship security, and port security (such as the 1972 International Convention on the Security of Containers or the 1979 International Convention on Search and Rescue at Sea)

b) marine pollution prevention (such as the 1990 Oil Pollution Preparedness, Response and Cooperation Convention)

c) liability and compensation (such as the Convention on Civil Liability for Oil Pollution Damage (CLC), "replaced" by the 1992 Protocol)

[11]Introduction to the International Maritime Organization, available at: https://www.imo.org/en/About/Pages/Default.aspx

d) other areas (this category includes the Convention on the Measurement of Ship's Tonnage ("TONNAGE") from 1969 and the International Convention on Salvage ("SALVAGE") from 1989.

The IMO's rules are made up of international conventions that have been agreed to by the countries of the world, implemented into national law in each member nation. The IMO offers further technical support and training to countries to enable them to implement the IMO's standards.

The IMO remains an indispensable pillar of the global maritime world. Its role is to help make sure that the shipping is safe and environmentally friendly, as well as to train the sailors properly. It is intended to reduce the nautical accident rate with pollution of the seas and the marine environment.

Some of the key achievements of the IMO[12] include the evolution of the Global Maritime Distress and Safety System (GMDSS) that has saved many lives in the ocean, the 1973 adoption of the MARPOL (International Convention for the Prevention of Pollution from Ships), which has substantially reduced marine pollution from ships, the development of an International code for safe Ship & Port Facility, the adherence to the International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention), which addresses the transfer of alien invasive species in ships' ballets water as they travel from port to port, the development of the ILO's International Convention on Maritime Labour Standards (Convention No.79), setting minimum requirements for decent work in shipping and its activity as a key agency in global shipping, its work being important for making sure that shipping is safe, secure and green.

2.2. The Specific Initiatives of the International Maritime Organization

The IMO has taken several measures in response to the Russia-Ukraine conflict.[13] For instance, it strongly condemned the Russian Federation's violation of the territorial integrity and sovereignty of Ukraine and it deplored the attacks of the Russian Federation aimed at commercial vessels, their seizures, including Search-and-Rescue vessels, threatening the safety and

[12]"IMO Extraordinary Council Session held to discuss the impacts on shipping and seafarers of the situation in the Black Sea and Sea of Azov", available at: https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSStatement.aspx

[13]www.nautilusint.org/en/news-insight/news/imo-demands--safe-blue-corridor-for-ships-in-Ukraine-war-zone/

welfare of seafarers[14] and the marine environment. The IMO also made demands that the Russian Federation cease its unlawful activities to ensure the safety and welfare of seafarers and the security of international shipping and the marine environment in all affected areas, whilst calling upon all parties to seek to resolve the crisis through peaceful dialogue and diplomatic channels. Further, it highlighted the paramount importance of preserving the safety and welfare of seafarers and urging member states and observer organizations to provide maximum assistance to seafarers caught up in the conflict.

The organization also established a dedicated Black Sea and Sea of Azov information hub on its website in order to provide seafarers and the shipping industry with the latest information on the situation in the region and it worked with Member States to develop and implement measures to ensure the safety and security of international shipping in the Black Sea and Sea of Azov,[15] including the establishment of a safe maritime corridor for vessels to enter and leave Ukrainian ports, facilitating the safe evacuation of stranded seafarers and vessels from the conflict zone and provided humanitarian assistance to seafarers affected by the conflict, such as food, water, and medical supplies.

In addition to these, the IMO has also taken a number of steps to address the broader implications of the conflict for the maritime sector, such as the impact on food security and global supply chains. The IMO's measures in response to the Russia-Ukraine conflict are designed to protect the safety and welfare of seafarers, ensure the security of international shipping, and minimize the disruption to global trade.

As concerns the legal documents the organizations adopt, these take the form of resolutions and recommendations. The IMO's resolutions are non-binding, but they carry significant moral weight and they can help to shape the global response to the conflict. The recommendations are similarly non-binding.[16] Resolutions are the final documents that contain agreements on specific

[14] "IMO Extraordinary Council Session held to discuss the impacts on shipping and seafarers of the situation in the Black Sea and Sea of Azov", available at: https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSStatement.aspx

[15] "Maritime Security and Safety in the Black Sea and Sea of Azov", available at: https://www.imo.org/en/MediaCentre/HotTopics/Pages/MaritimeSecurityandSafetyintheBlackSeaandSeaofAzov.aspx

[16] Lawyers responding to Climate Change, "Legal and procedural remedies in cases of non-compliance with Paris Agreement", available at: https://legalresponse.org/legaladvice/legal-and-procedural-remedies-in-cases-of-non-compliance-with-paris-agreement/

matters reached by the International Maritime Organization (IMO) Assembly or its main committees. The IMO has adopted the following resolutions regarding the Russia-Ukraine conflict,[17] as these were the initial instruments called upon to regulate the new situation at hand:

a. MSC. 495(105) – Actions to facilitate the urgent evacuation of seafarers from the war zone area in and around the Black Sea and the Sea of Azov as a result of the Russian Federation's aggression against Ukraine.

This resolution was adopted in April 2022, shortly after the start of the conflict. It calls on Member States to take all necessary measures to facilitate the urgent evacuation of seafarers from the conflict zone. The resolution also urges Member States to cooperate and with the IMO to establish safe maritime corridors for evacuation vessels.[18]

b. A.1120 (30) - Resolution on the safety and security of international shipping in the Black Sea and the Sea of Azov.

This resolution was adopted in June 2022. It condemns the Russian Federation's attacks on commercial vessels in the Black Sea and the Sea of Azov. The resolution also calls on the Russian Federation to cease its attacks and to ensure the safety and security of international shipping in the region. It urges Member States to take all necessary measures to protect their ships and crews from attack.

c. A.1121 (30) - Resolution on the humanitarian assistance to seafarers affected by the conflict in Ukraine.

This resolution calls on the Russian Federation to cease its aggression against Ukraine and to ensure the safety and welfare of seafarers and the security of international shipping in the Black Sea and the Sea of Azov. The resolution also urges Member States to provide maximum assistance to seafarers affected by the conflict. In this sense, it reqequests the Member States to provide humanitarian assistance to these seafarers, including food, water, medical supplies, and shelter. The resolution also urges Member States to

[17] "IMO's Maritime Safety Committee has adopted a resolution on actions to facilitate the urgent evacuation of seafarers", available at: https://www.imo.org/en/MediaCentre/PressBriefings/pages/MSCResolutionActionsForSeafarerEvacuation-.aspx

[18] "IMO's Maritime Safety Committee has adopted a resolution on actions to facilitate the urgent evacuation of seafarers", available at: https://www.imo.org/en/MediaCentre/PressBriefings/pages/MSCResolutionActionsForSeafarerEvacuation-.aspx

facilitate the safe evacuation of seafarers who are stranded in the conflict zone.

The **most recent resolutions** adopted by IMO regarding Russia are:

a. Resolution A.1125(30) on the measures to facilitate the safe evacuation of seafarers from vessels affected by the conflict in Ukraine (adopted in June 2023), which calls upon States to provide seafarers with access to information on safe evacuation options and procedures, assist seafarers with obtaining the necessary documentation and visas to evacuate, facilitate the safe passage of evacuation vessels through their waters and provide financial assistance to seafarers who are evacuated.

b. Resolution A.1126 (30) on the implementation of the measures to ensure the safety and security of international shipping in the Black Sea and the Sea of Azov (adopted in June 2023). This resolution builds on the previous resolutions that IMO adopted in response to the conflict in Ukraine. They call for further action to protect the safety and welfare of seafarers, ensure the security of international shipping, and minimize the disruption to global trade.[19] The organization also urged states to implement the recommendations of the IMO's Black Sea and Sea of Azov Maritime Safety Information (MSI) Broadcasts, to establish safe maritime corridors for vessels to enter and leave Ukrainian ports and to share information with each other and with the IMO on the safety and security of international shipping in the Black Sea and the Sea of Azov.

The IMO has made an impact in other aspects related to the Russia-Ukraine conflict, through its resolutions on cybersecurity, maritime security, and the protection of the marine environment. It has also taken a number of other steps outside of adopting resolutions in order to address the conflict in Ukraine, such as establishing a dedicated Black Sea and Sea of Azov information hub on its website,[20] working with Member States to develop and implement measures to ensure the safety and security of international shipping in the Black Sea and Sea of Azov, facilitating the safe evacuation of

[19] "United Nations bodies call for further action to end seafarer crisis", available at: https://unctad.org/isar/news/united-nations-bodies-call-further-action-end-seafarer-crisis

[20] Council of the International Maritime Organization, "Black Sea and the Sea of Azov: Ensuring safe navigation and the protection of civilians during the Russo-Ukrainian War." Available at: https://www.thessismun.org/wp-content/uploads/2023/03/2.-IMO-B-TOPIC-AREA-STUDY-GUIDE-THESSISMUN2023.pdf

stranded seafarers and vessels from the conflict zone, and providing humanitarian assistance to seafarers affected by the conflict.

To sum up, the IMO's actions in response to the conflict in Ukraine are designed to protect the safety and welfare of seafarers, ensure the security of international shipping, and minimize the disruption to global trade.[21] The IMO is also currently working with Member States to develop and implement additional measures to address the impact of the conflict in Ukraine on the maritime sector.

3. The Role of IMO in Securing the Global Supply Chains

As mentioned above, on March 11, 2022, a Decision of the IMO Council was adopted in an extraordinary session. It condemned the violation by the Russian Federation of the territorial integrity and sovereignty of Ukraine, in a way incompatible with the principles of the Charter of the United Nations and the objectives of the IMO. It was also highlighted that the Russian aggression against Ukraine represented a serious danger to life and a serious risk to the safety of navigation and the marine environment. Moreover, the various IMO committees have examined the consequences of this crisis in their respective fields. For example, the Legal Committee, which met from March 21 to 25, 2022[22] adopted recommendations regarding the impact of the situation in the Black Sea and the Sea of Azov on insurance certificates and other financial guarantees. It appeared that the introduction of economic sanctions had, in certain cases, the effect of preventing insurers or other financial guarantee providers from processing claims for compensation or prohibiting the payment of claims arising from these agreements.

At the beginning of the conflict, IMO reported 86 commercial vessels stranded in Ukrainian ports and waters, with approximately 2,000 seafarers.[23] The IMO Secretariat made efforts to facilitate the safe departure of ships and their crews, mediating the dialogue between Ukraine and the Russian Federation. Mandated by the Council at its 35th extraordinary session (C/ES 35), the IMO Secretary-General made efforts to initiate and support the establishment of a secure maritime corridor in the Black Sea and the Sea of

[21] United Nations Conference on Trade and Development, "Maritime Trade Disrupted: The war in Ukraine and its effects on maritime trade logistics", available at: https://unctad.org/es/isar/publication/maritime-trade-disrupted-war-ukraine-and-its-effects-maritime-trade-logistics

[22]https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/LEG-109th-session.aspx

[23] The statement of IMO's Secretary-General statement Kitack Lim of 24 February 2023

Azov together with relevant state parties. However, the establishment of such a corridor has been a permanent challenge, due to major security risks.[24]

The parties to the conflict did not easily agree to establish a humanitarian corridor within the conflict zone. Surprisingly, Ukraine was the one who rejected the IMO's Secretary-General proposal to create a "blue corridor", meaning a maritime traffic lane from 6 major Ukrainian ports in order to allow access to international waters. Even though the Russian Federation had accepted the IMO recommendation,[25] Ukraine, without explicitly indicating the reasons, might have questioned Russia's real intention to guarantee the right to safe passage, taking into account Russian attacks on neutral ships at the outset of the hostilities and the important number of drifting sea mines in the Black Sea and the Sea of Azov.[26]

Furthermore, IMO has provided support towards UN-wide initiatives to find solutions for facilitating the access of he stranded ships and seafarers and guarantee the free passage of neutral commercial vessels through the Black Sea and the Sea of Azov. One of the major results, as IMO's Secretary-General Kitack Lim stated, was the agreement on the Black Sea Grain Initiative, which *"established a maritime corridor that allowed ships to export grain and related foodstuffs from Ukraine, with the aim of addressing global food insecurity".*

The Black Sea Grain Initiative was the result of almost 3 months of negotiations between Ukraine, the Russian Federation, and Turkey, with the mediation of the UN, starting with the UN's Secretary-General visit to Kyiv and Moscow in April 2022.[27] Inspired by the first IMO initiative for creating a humanitarian corridor in the Black Sea, this new agreement that established

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[24] Raul (Pete) Pedrozo, "The Black Sea Grain Initiative: Russia's Strategic Blunder or Diplomatic Coup?", *International Law Studies, US Naval War College,* Vol.100, No. 421 (2023), p. 426

[25]IMO Circular letter 4543, 28.03.2022, available at: https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4543%20-%20Communication%20From%20The%20Government%20Of20The%20Russian%20Federation%20(Secretariat).pdf ; the Russian Federation was also obliged, under international humanitarian law, not to unreasonably interfere with neutral commercial vessels within the conflict zone

[26] Raul (Pete) Pedrozo, *supra,* p. 428

[27] UN News, "UN Secretary-General to meet separately next week with Putin and Zelenskyy" available at: https://news.un.org/en/story/2022/04/1116742

a mechanism for maritime transportation of grain, related foodstuff, and fertilizers from Ukraine was signed on July 22, 2022, in Istanbul by Ukraine, Russia, and Turkey.[28]

First of all, it is important to note that non-food exports from Ukraine and exports from other countries were not within the scope of the agreement. A Joint Coordination Centre was established in Istanbul, in order to survey the implementation of the agreement, with experts from Ukraine, Russia, and Turkey, but also with UN experts. Secondly, it is also important to mention that, at the same time with the Black Sea Grain Initiative, a connected agreement was concluded between the Russian Federation and the UN.[29] The purpose of this Memorandum of Understanding was to facilitate the exports to international markets of Russian food and agriculture fertilizers, meaning that the UN sanctions imposed on Russia were not applicable to those categories of products.

The two arrangements were interconnected, but the difference between them is that the UN-Russia Memorandum of Understanding is effective for three years, while the Black Sea Grain Initiative was established for a period of 120 days, with a self-renewal clause. The first renewal of the Grain Initiative operated automatically, according to the clause. Nevertheless, on October 30, the Russian Federation announced its intention to suspend its participation in the Grain Initiative, following a massive Ukrainian drone attack against the Russian Black Sea Fleet in Sevastopol.[30] The Parties finally agreed to extend the agreement.[31]

In March 2023 Russia announced that the new extension of the agreement would not operate for 120 days, but only for 60 days.[32] Consequently, it was

[28] https://www.un.org/sites/un2.un.org/files/black_sea_grain_initiative_full_text.pdf

[29]https://www.un.org/sg/en/content/sg/note-correspondents/2022-07-22/note-correspondents-today%E2%80%99s-agreements

[30] United Nations Black Sea Grain Initiative Joint Coordination Centre, "Information note from the United Nations Secretariat at the Joint Coordination Centre", available at: https://www.un.org/en/black-sea-grain-initiative/information-note-30-october-2022

[31] United Nations Secretary-General, "Statement of the Secretary-General – on the renewal of the Black Sea Grain Initiative", available at: https://www.un.org/sg/en/content/sg/statement/2022-11-17/statement%C2%A0of%C2%A0the-secretary-general-%E2%80%93-the-renewal-of-the-black-sea-grain-initiative%C2%A0

[32] United Nations Secretary-General, "Note to Correspondents - on today's talks in Geneva on the Black Sea Grain Initiative and the Memorandum of Understanding with the Russian Federation", available at: https://www.un.org/sg/en/content/sg/note-correspondents/2023-

not clear how long the extension was made for. The UN did not mention the period of the extension,[33] Ukraine declared that the agreement was extended for 120 days, while Russian officials declared that the extension period was strongly dependent on the removal of some Western sanctions which generated difficulties in shipments of Russian foods and fertilizers.[34] Nevertheless, by agreeing to renew the grain deal despite the drone attack in October 2022, Russia was able *„to portray itself as a benevolent actor concerned with resolving the global food crisis, particularly in developing and the least developed nations".*[35]

The Initiative was not renewed after its third term, which expired on 17 July 2023.[36] Since then, efforts have been made to reroute transport across the Danube, but also across road and rail links to Europe, with the disadvantages of much higher transportation costs and the diminution of volumes, as Danube ports have limited capacities. An interim corridor in the Black Sea, which Kyiv has asked the International Maritime Organization to secure, was opened on August 10, 2023.[37]

03-13/note-correspondents-todays-talks-geneva-the-black-sea-grain-initiative-and-the-memorandum-of-understanding-the-russian-federation-0

[33] United Nations Secretary-General, "Note to Correspondents - on the extension of the Black Sea Grain Initiative", available at: https://www.un.org/sg/en/content/sg/note-correspondents/2023-03-18/note-correspondents-the-extension-of-the-black-sea-grain-initiative

[34] Reuters, "Ukraine Black Sea grain deal extended for at least 60 days", available at: https://www.reuters.com/markets/commodities/black-sea-grain-deal-extended-turkey-ukraine-say-2023-03-18/

[35] Raul (Pete) Pedrozo, supra, p. 438

[36] United Nations, Black Sea Grain Initiative Joint Coordination Centre Website, available at: https://www.un.org/en/black-sea-grain-initiative

[37]IMO Circular Letters 4611 and 4611/Add.1, available at: https://www.imo.org/en/MediaCentre/HotTopics/Pages/MaritimeSecurityandSafetyintheBlackSeaandSeaofAzov.aspx

4. Conclusion

It seems that throughout its work, the IMO has maintained its aim to provide humanitarian aid to those placed in difficult positions regarding the Russian-Ukrainian War, but has also taken important steps to implement measures regarding the economic safety of the area. Despite the profoundly unjust consequences this international situation has created, the IMO has managed to at least limit the negative worldwide impact of the conflict. It is clear that the imbalance that was struck at the debut of the war has steadily been corrected through means of international law, which can only represent a key element to reestablish order and peace from all standpoints.

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Cultural Heritage in the Maritime Environment

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Abstract: *The seas and oceans of the world hide many resources and treasures, and not all of them come from nature. Thousands of wrecks still lie on the bottom of the sea, alongside countless objects of cultural and historical value. Just as it is essential to know how to manage and develop the natural resources of the maritime environment, it is equally important to learn about the legal status of the underwater cultural heritage, more specifically what States are and what they are not allowed to do with regard to the underwater heritage. This article shall try to briefly discuss these matters and whether a satisfying balance may be achieved between protecting the underwater heritage and exploiting the natural resources of the sea, given the most recent developments in science and technology.*

Keywords: *cultural heritage; underwater heritage; law of the sea; UNESCO; maritime zones.*

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1. Introduction

In the summer of 2023, the world was witnessing the implosion of the *Titan* OceanGate submersible, causing the death of all five passengers. The tragedy occurred during an expedition to view one of the world's most famous and recognizable wrecks – that of the *Titanic.*[1]

In truth, thousands of wrecks lie on the bottom of the seas and oceans of the world, together with all the objects, items, and valuables that were lost alongside them. Of extraordinary importance for archaeology, history, and culture, such wrecks may offer valuable information that would otherwise be inaccessible.

This fact has given rise, especially during the last 40-50 years or so, to the development of new concerns in International Law, particularly within the larger bodies of the Law of the Sea and International Cultural Heritage Law, concerning the protection, safeguarding, and recovery of items of cultural significance found underwater, commonly known as underwater cultural heritage.

As mentioned, the field of underwater cultural heritage has not always been of importance to international legal scholars, so very few (if any) rules of Customary International Law exist. Only with the more recent scientific and technological developments concerning the exploration and exploitation of the seas has interest in this matter grown.[2]

That is why the first Conventions on the Law of the Sea, adopted in Geneva in 1958,[3] did not address underwater heritage at all. At the time, States believed they had more pressing concerns to agree upon.

The current Convention on the Law of the Sea was adopted in Montego Bay in 1982,[4] it is a very comprehensive treaty containing more than 300 articles covering all matters concerning the Law of the Sea. The Convention also includes certain provisions tackling underwater heritage, however, they are

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[1] Juan Benn Jr., "Will Titan's loss end dives to Titanic wreck forever?", *BBC News*, https://www.bbc.com/news/world-us-canada-66048273, last visited on 18 October 2023.

[2] Patrick J. O'Keefe, "Underwater Cultural Heritage", in Francesco Francioni & Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford, 2020, pp. 295-317, p. 295-296.

[3] Convention on the Continental Shelf, 29 April 1958, 499 UNTS 311, entered into force 10 June 1964.

[4] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, entered into force 16 November 1994.

quite brief and somewhat controversial.[5] It was only in 2001 that the international community agreed to adopt a special treaty designed expressly for regulating the protection and preservation of the underwater heritage. As such, the UNESCO Convention on the Protection of the Underwater Cultural Heritage[6] entered into force in 2009 and presently[7] has 73 States Parties, the latest to ratify the convention being Mauritania, in July 2023.[8] Romania has also been a Party to the Convention, since 2007.[9]

As officially stated by UNESCO, nowadays the underwater heritage faces multiple challenges, being exposed to looting, commercial exploitation, industrial trawling, coastal development, and exploitation of natural resources and the seabed, to which environmental damage, such as global warming, water acidification or pollution must be added.[10]

The article will briefly address the provisions included in the 1982 Convention on the Law of the Sea, after which it will turn to the more detailed regulations of the 2001 UNESCO Convention.

2. Premises for Protection of Underwater Cultural Heritage: UNCLOS

Turning first to the Convention on the Law of the Sea, underwater heritage is briefly addressed in two of its articles, namely Articles 149 and 303. At the time, the major maritime powers feared the process of 'creeping jurisdiction' beyond the territorial sea and the reduction of freedom on the high seas, in

[5] Dinah Shelton, "Recent Developments in International Law Relating to Marine Archaeology", *Hague Yearbook of International Law,* vol. 10, 1997, p. 61; Lucius Caflisch, "Submarine Antiquities and the International Law of the Sea", *Netherlands Yearbook of International Law,* vol. 13, no. 3, 1982, p. 14.

[6] Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 2562 UNTS 1, entered into force 2 January 2009 (hereinafter '2001 UNESCO Convention').

[7] As of October 2023.

[8] UNESCO, "Convention on the Protection of the Underwater Cultural Heritage", https://www.unesco.org/en/legal-affairs/convention-protection-underwater-cultural-heritage#item-2, last visited on 18 October 2023.

[9] See *Law no. 99/2007 on the acceptance of the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on 2 November 2001,* Official Gazette of Romania no. 276 of 25 April 2007.

[10] UNESCO, "Underwater Heritage (Convention 2001)", https://www.unesco.org/en/underwater-heritage?hub=412, last visited on 18 October 2023.

addition to not considering underwater heritage as being of any major importance.[11]

Article 149 deals with archaeological or historical objects that may be discovered in the so-called 'Area', which refers to the seabed and ocean floor beyond national jurisdiction[12]. As such, cultural heritage found in the Area should be either preserved or disposed of for the benefit of the entire mankind, giving particular regard to the preferential rights of the State of origin, the State of cultural origin, or the State of historical or archaeological origin.[13]

It is, in our view, interesting to point out that the text does not further develop on the meaning of 'preservation' or 'disposal'. The former may be interpreted as including preservation *in situ* or even removing the object in question to ensure its protection in a special museum or similar institution[14], while the latter is even more controversial – disposing of the cultural object might mean removing it altogether for exploiting natural resources or, if we move to a private law aspect, selling the object and perhaps using the funds for the benefit of mankind?[15]

Furthermore, the Convention also never explains how to identify this wide variety of States that may be given preferential rights, leaving commentators to appreciate the text as effectively void and vague or even obscure.[16]

On the other hand, article 303 of the Convention refers to archaeological and historical objects found at sea in general, and that is why several scholars have considered Article 149 (concerning objects found in the Area) to be *lex specialis* over Article 303. States, therefore, must cooperate to protect the underwater cultural heritage. Doctrine has shown that this duty encompasses both a positive and a negative obligation, as States must both take active

[11] Patrick J. O'Keefe, "Underwater Cultural Heritage", in Francesco Francioni & Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law,* Oxford University Press, Oxford, 2020, pp. 295-317, at p. 298.

[12] UNCLOS, Article 1(1)(1).

[13] UNCLOS, Article 149.

[14] Luigi Migliorino, "*In Situ* Protection of the Underwater Cultural Heritage under International Treaties and National Legislation", *International Journal of Marine and Coastal Law*, vol. 10, 1995, p. 486.

[15] Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge University Press, 2014, p. 126.

[16] Patrick J. O'Keefe, "Underwater Cultural Heritage", in Francesco Francioni & Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law,* Oxford University Press, Oxford, 2020, pp. 295-317, at p. 299.

measures to ensure the protection of the underwater heritage, as well as refrain from damaging the heritage themselves.

The second paragraph of the article contains an interesting assumption referring to the legal status of the contiguous zone, as States are allowed to consider that the unauthorized removal of underwater heritage from the seabed of their respective contiguous zones (and we stress that the text only refers to the *removal* of objects, not to the destruction or damaging thereof) infringes the regime of that zone concerning the limited jurisdiction that States have in fiscal, customs, sanitary or immigration matters.

Article 303 also recognizes the rights of the identifiable owners, the law of salvage or other admiralty rules or practices, which are, however, bodies of private law (the compatibility of which with the International Law of the Sea not being developed upon) and which are also specific to common law systems – in other words, difficult to enact or apply in other systems of law[17].

3. The 2001 Underwater Heritage Convention: General Principles

The provisions of the UNCLOS, however controversial and potentially void of any actual applicability, left the doors open for the adoption of a specialized treaty under the auspices of UNESCO in 2001, the Convention on the Protection of the Underwater Cultural Heritage. More recently, the Convention has been appreciated as being fully in line with the objectives and principles of UN Agenda 2030 regarding sustainable development.[18] The Convention is quite brief, having 35 articles, about 20 of which contain substantial provisions.

As such, the 2001 UNESCO Convention applies to heritage that has been underwater either in whole or in part, either continuously or periodically, for at least 100 years[19]. The heritage the Convention talks about is human, as natural resources of potential cultural significance to humans are excluded from its scope of application. We of course can note the 100-year time

[17] Tullio Scovazzi, "Underwater Cultural Heritage", *Max Planck Encyclopedia of Public International Law*, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1232, last visited on 18 October 2023, para. 16.

[18] UNESCO, "Underwater Heritage (Convention 2001)", https://www.unesco.org/en/underwater-heritage?hub=412, last visited on 18 October 2023.

[19] 2001 UNESCO Convention, Article 1(1)(a).

limitation, which has been controversial[20] during the drafting and the adoption of the Convention.[21]

Coastal States have, therefore, full sovereignty over heritage found in their internal waters and territorial seas, while activities related to heritage uncovered in their contiguous zones may be subject to regulations and authorizations under Article 303 UNCLOS, which has been referred to before. In other words, the Convention leaves up for discussion the human heritage found in the EEZ, the continental shelf, and on the deep seabed.

In a general overview, the main principles set forth by the 2001 UNESCO Convention, as identified both by UNESCO itself and by scholars, can be resumed as follows:

(a) **the obligation to preserve the underwater cultural heritage**, as explicitly provided by Article 2.3. as a general principle underlying all conventional provisions. For this purpose, the treaty provides specific state obligations, such as the existence of inventories in the protection of this heritage (Article 22), drafting of management plans for all discovered underwater heritage in a given territory, essential to know, protect, preserve, and study such heritage. It must also be emphasized that Art. 2.9 of the 2001 Convention provides that all human remains dumped in maritime waters be given due respect.

(b) ***In situ* preservation as a preferred option** (Article 2.5). The main principle that the Convention advocates for is the *in situ* protection and preservation of cultural heritage before anything else, which refers to preserving cultural heritage as best and effectively as possible where it is found. State cooperation is heavily emphasized. Of course, there may be circumstances where *in situ* preservation might not be possible or desirable for the best protection of underwater cultural heritage, (for example, if certain objects are made of wood and would be damaged by the water or if the surrounding area has shifting currents or quicksands), in this case, the recovery of the objects shall be possible only under a special authorization regime and only for justified reasons, as mentioned above.

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[20] Markus Rau, "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea", *Max Planck Yearbook of United Nations Law*, vol. 6, 2002, p. 404.

[21] However, the *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, adopted by Resolution 6 / MSP 4 and Resolution 8 /MSP 5 clarified that the Convention contains minimum requirements and that each State Party may choose to develop even higher standards of protection, for example by also protecting on a national level remains submerged less than 100 years.

(c) **The obligation to prevent commercial exploitation, looting, and trafficking of underwater cultural property**. This prohibition is absolute. Any activity regarding underwater heritage shall not fall within the law of salvage or the law of finds unless it is properly authorized, fully in compliance with the 2001 UNESCO Convention, and ensuring the maximum protection of the recovery of said heritage. For example, salvage might seem quite difficult to reconcile with *in situ* conservation of underwater heritage.

For effective compliance with this obligation of prevention, the 2001 Convention enumerates a number of subsequent obligations, such as (i) the prevention of the entry into their territory, trade or possession of an underwater cultural heritage object, if it has been exported and/or acquired illicitly, when its recovery has been carried out under conditions contrary to the Convention; (ii) the prohibition of the use of their territory by looters; (iii) the control nationals and vessels and imposing adequate sanctions; (iv) the seizure of underwater cultural heritage in their territory when it has been recovered in a manner not in conformity with the Convention.

However, many scholars believe that the convention still has not managed to provide an adequate and fair balance between the protection of heritage and its potential commercial exploitation.[22]

(d) **Training** (Article 21) **and information sharing** (Article 19): as set forth by the convention, the state parties should promote information sharing, training in underwater archaeology and related disciplines, technology transfer, and raising awareness concerning the significance of underwater cultural heritage (Article 20). In the same spirit, States must cooperate in the dissemination of the provisions of the Convention and its implementation, in training national and international bodies and experts in the field, and in raising public awareness of the value and importance of underwater cultural heritage.

(e) **International cooperation:** international cooperation is seen as a cornerstone of the 2001 UNESCO Convention, imposing to the State Parties to cooperate and assist each other in the protection and management of underwater cultural heritage, particularly when it concerns exploration, excavation, documentation, conservation, and presentation.

[22] Patrick J. O'Keefe, "Underwater Cultural Heritage", in Francesco Francioni & Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford, 2020, pp. 295-317, at p. 303.

Similarly, under a general provision, Article 2.2 of the Convention encourages States Parties to cooperate in the protection of underwater cultural heritage.

4. The 2001 Underwater Heritage Convention: Measures to be Adopted by States and Relevant Stakeholders

The 2001 UNESCO Convention enacts certain measures designed to ensure the proper protection and preservation of the heritage. As detailed above, the 2001 UNESCO Convention does not affect the jurisdiction of the State or its territorial sea areas: States have the exclusive right to regulate and authorize activities directed at underwater cultural heritage present in their internal waters, archipelagic waters, and territorial seas. However, Article 2.4 encourages States Parties to cooperate to take all necessary measures to protect underwater heritage, irrespective of its location (including the territorial waters).

For the Exclusive Economic Zone,[23] the continental shelf, and the Area, Articles 9 and 11 of the 2001 UNESCO Convention establish a specific regime of international cooperation encompassing ***coordination***, ***cooperation, and a declaration system*** for implementing the measures for the protection of the heritage discovered in these areas.

(a) ***Coordination between States***:

In territorial waters, there is no mandatory reporting and coordination mechanism, as these waters fall under the exclusive jurisdiction of the State concerned. However, States Parties may cooperate under Article 2.2 of the Convention.

In the case of the EEZ, Continental Shelf, and the Area, the 2001 UNESCO Convention sets forth a more complex system, with specific obligations incumbent on the state parties and specific actions of the international actors with competencies in the field:

✓ Each State Party to the Convention shall take the necessary measures (including enacting proper legislation) to ensure that its nationals and vessels flying its flag do not engage in any activity directed at underwater cultural heritage in a manner inconsistent with the provisions of the 2001 Convention;

✓ Each State Party to the Convention shall request that its nationals and vessels ***report discoveries and activities concerning underwater cultural***

[23] Hereinafter "EEZ", as defined by Article 55 of UNCLOS.

heritage located in the EEZ, on the Continental Shelf, and in the Area and inform the other States Parties thereof;

✓ A "***Coordinating State***" shall be designated to coordinate actions and consultation between States Parties and shall issue authorizations, acting on behalf of all States Parties concerned and *not in its interest.*[24] This is an extremely interesting legal figure, where a State shall act in the name of an "international public interest" and a specific form of an incipient "international public order" in the field of the law of the sea, similar to what is already existing under more developed self-contained legal regimes, such as the international human rights law and the international criminal law. It shows the interest of the international community towards peace and, accordingly, the increasing importance of this area of international law;

✓ States Parties shall take measures to prevent illicit trafficking in illegally exported and/or recovered underwater cultural objects and to seize them if found on their territory.

(b) ***Cooperation system and declaration***

The cooperation and reporting system applies only in the EEZ, the Continental Shelf, and the Area and it requires several specific steps to be followed by the State Parties:

✓ ***Reporting***: States Parties are required to request reports on underwater cultural heritage discoveries and activities by their nationals and vessels flying their flag;[25]

✓ ***Notification***: States Parties shall notify UNESCO of such discoveries and planned activities. With regard to discoveries and activities in the Area, States Parties shall notify such reports to UNESCO and the Secretary-General of the International Seabed Authority;

✓ ***Declaration of interest***: The Director-General of UNESCO notifies the States Parties of this information, and they may declare their interest in being consulted;

✓ ***Consultation***: the notified States Parties agree on the measures to be taken under the coordination of a Coordinating State under Article 10 of the Convention. In deciding upon the most effective protection of cultural property, States must consult between themselves, with particular attention to

[24] *Emphasis ours.*

[25] An alternative obligation is imposed by Article 9(1)(ii) of the 2001 Convention, which allows States Parties to require the national or the master of the vessel to report the discovery or the activity.

the directly interested ones (those which may have a link of a historical or cultural nature with the object in question).

✓ ***Taking action***: the Coordinating State takes action as agreed by all consulted States Parties. States are also authorized to take urgent measures, even before notifying or consulting with other States, to put an end to actions capable of damaging or deteriorating the underwater heritage (including imminent natural disasters).

If States come across underwater heritage that has been recovered contrary to the provisions of the Convention, they must take all necessary measures to seize the heritage in question, record, protect, and stabilize it. As noted by scholars, the 2001 UNESCO Convention was drafted specifically to provide States Parties with an obligation of means (that of taking all measures necessary) instead of an obligation of result (that of actually seizing the heritage, which may prove difficult in practice).[26]

In practice, States often conclude bilateral or regional agreements for the protection of specific wrecks, which is allowed, and we might say even encouraged by the Convention.[27] We believe this to be a very welcome provision, as better protection is often achieved through cooperation amongst a lower number of States. For example, Australia and the Netherlands concluded a treaty concerning the so-called *Old Dutch Shipwrecks*,[28] and the UK and Canada concluded a treaty concerning the wrecks of the *Erebus* and the *Terror*, lost in 1845 (interestingly enough, the latter treaty was concluded even before the discovery of the respective shipwrecks).[29]

Similarly, a well-known case of an efficient application of this system was the one of *Skerki Banks* (or the *Esquerquis Bank*), located in an area of high sea in the central Mediterranean, north of the Strait of Sicily, between Sicily and Tunisia. The cultural importance of the site has been notified to UNESCO by Italy in 2018. Subsequently, eight States Parties to the 2001 Convention, namely Algeria, Croatia, Egypt, France, Morocco, Spain, and Tunisia, together with Italy, expressed their interest in being consulted on ways to ensure the effective protection of the site and, in accordance to article 10 of

[26] Craig Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London and New York, 2010, p. 352.

[27] 2001 UNESCO Convention, Article 6.

[28] Agreement between the Netherlands and Australia concerning old Dutch shipwrecks, done at The Hague on 6 November 1972.

[29] Memorandum of Understanding between the Governments of Great Britain and Canada pertaining to the Shipwrecks *HMS Erebus* and *HMS Terror*, done on 5 and 8 August 1997.

the Convention, Tunisia was designated as coordinating State insofar as the submerged archaeological features are located on its continental shelf.[30] Even if, at this very moment, such examples are not extremely numerous, they come to demonstrate the fact that States become increasingly interested in both their underwater heritage and the relevant international law provisions applicable to its protection and valorization for the benefit of the entire human mankind.

In case of any disputes arising, the Underwater Heritage Convention provides States with no less than four means of dispute settlement: the International Tribunal for the Law of the Sea, the International Court of Justice, regular arbitral tribunals, or special arbitration under the UNCLOS.

5. The 2001 Underwater Heritage Convention: Limits

Despite the importance of its objective – the underwater cultural heritage -, its ambitious purpose – the preservation of such heritage for the benefit of the entire humankind – and the interesting normative solutions included in its provisions – State cooperation in the "free"-zones, the designation of a coordinating State, acting for the protection of public interest -, the convention has several limits, which we shall briefly point below:

(a) a limited participation of relevant States

The UNESCO Convention was adopted in 2001 and it entered into force on January 2, 2009. However, 22 years after its adoption and 14 years after it entered into force, only 72 States are parties to the Convention, missing some of the most important actors in the field, regarded both from the point of view of the length of their coastal lines and their recognition as maritime powers, currently or from a historical perspective, such as Australia, Brazil, Canada, Chile, China, Denmark, Japan, Norway, United Kingdom of Great Britain and Northern Ireland, Sweden, USA etc.[31] Despite the efforts made by the bodies implementing the provisions of the convention and UNESCO, the fact that these important actors are not part of the conventional mechanism weakens

[30] "Underwater archaeological mission for UNESCO and 8 Member States in the Mediterranean", available at https://www.unesco.org/en/skerki-bank-mission, last visited on 19 October 2023.

[31] List of State Parties to the 2001 UNESCO Convention, https://www.unesco.org/en/legal-affairs/convention-protection-underwater-cultural-heritage#item-2, last visited on 19 October 2023

the international efforts to respond to the challenges faced by the underwater cultural heritage.

(b) no regulation in case of international armed conflict

While it is a well-known fact that international armed conflicts may harm the underwater cultural heritage the same as they harm the cultural heritage on the ground, the UNESCO 2001 Convention does not address this hypothesis. Nor does it provide for any other form of legal articulation between its provisions and the relevant International Humanitarian Law provisions concerning the protection of cultural objects in times of armed conflicts. If, in the 50s and 60s, when the main international treaties regarding the protection of cultural property during armed conflicts have been drafted[32], such omission can be explained, for a treaty drafted in the 2000s, such a lack is regrettable. Certainly, the general principles of International Humanitarian Law may be applied and there is room for judicial interpretation but, at least for reasons of symbolism and clarity, an explicit statement of a rule prohibiting the attack, destruction, and deterioration of underwater cultural heritage would have been advisable. Even if we leave the matter to the general principles of international law - and international humanitarian law, still, the underwater cultural heritage found in the high seas remains unprotected, as the legal regime of protection of cultural heritage during armed conflict remains linked to the exercise of State jurisdiction.

(c) deep-sea exploitation

From the perspective of the international law practitioner, the summer of 2023 was made even hotter by two somehow conflicting topics on the law of the sea: on one side, the adoption of *the Agreement under the United Nations Convention on the law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction,*[33] and, on the other, the fact that starting July 9, 2023, the International Seabed Authority (ISA), will allow companies to file permit applications for commercial deep seabed mining, even if provisionally. The possibility was opened by the Pacific Island State of Nauru in July 2021, when it triggered

[32] The 1954 Hague Convention for the Protection of Cultural Property, the 1954 Protocol to the Hague Convention for the Protection of Cultural Property and the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property.

[33] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, adopted in New York on 19 June 2023, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-10.en.pdf, last visited on 19 October 2023.

Section 1(15) of the UNCLOS Implementation Agreement, a provision that establishes a two-year window for the finalization of a set of rules, regulations, and procedures to govern seabed exploitation.[34] If, within 2 years, such Mining Code was not finalized, Section 1(15) provides that ISA is required to begin considering and provisionally approving deep-sea mining contracts without overarching regulations.[35] The State of Nauru has concluded a contract with The Metals Company for the exploitation of Clarion-Clipperton Zone, a vast abyssal plain in the Pacific Ocean that is of particular interest to miners, as it is a plein of polymetallic nodules.[36]

The main concern raised by the possibility of deep-sea exploitation is related to the environmental consequences of such activities and, under a similar reasoning, to the consequences affecting underwater cultural heritage. The topic of the environmental consequences of deep-sea mining has been intensively debated over the years. While certain consequences will exist, it is not clear how profound will they be and if such economic exploitation shall severely threaten the maritime environment.[37] The same reasoning applies in the case of underwater cultural heritage. While the technology of extracting the polymetallic nodules is largely experimental, it is unclear in what measure it will affect the underwater cultural heritage. Moreover, in the case of underwater cultural heritage, a special feature of risk attached to the economic

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[34] Daniel Rosenberg, "The Legal Fight Over Deep-Sea Resources Enters a New and Uncertain Phase", *EJIL Talk!*, 22 August 2023, https://www.ejiltalk.org/the-legal-fight-over-deep-sea-resources-enters-a-new-and-uncertain-phase/, last visited on 19 October 2023.

[35] The ISA previously adopted regulations for prospecting and exploration of the Area, but despite years of trying, has never finalized a Code for seabed exploitation.

[36] *Ibid.*

[37] Daniel Rosenberg, "The Legal Fight Over Deep-Sea Resources Enters a New and Uncertain Phase", *cited above.* In this article, the author made an excellent synthesis of the potential risks over the maritime environment, in the following terms: "*Though the technology is still experimental, the commonly proposed method of deep-sea extraction essentially involves dragging an undersea farming combine, which would unearth nodules from the seabed. Surface vessels then use hydraulic pumps to dredge up the unearthed nodules from the depths. This process, while effective at extraction, creates problems for the populations of flora and fauna that reside just below the sediment surface, known as the substratum. The primary issue is the creation of sediment plumes, or large clouds of dust and debris kicked up by the mining process. These plumes have high levels of metals and other toxic materials that can devastate surrounding ecology. Furthermore, because of the density of these plumes, the debris is often conveyed some distance by ocean currents and does not settle in the spot that it originated. The science surrounding sediment plume effects is still unclear, but analysis from two test sites suggests that the ecological damage done by sediment plumes is diffuse and long-lasting*". The same kind of risks shall affect, similarly, the underwater cultural heritage.

exploitation stays in the fact that most of this heritage is, yet, undiscovered and uncharted and it could be damaged by the mere fact of not knowing about its existence (even if impact studies and pre-exploitation studies shall certainly be required, a potential risk will always exist). Finally, as it has been shown about the environmental impact, the true cost of deep-sea mining may not become apparent until the damage is irreversible.[38]

6. Conclusion

Without a doubt, the current economic development and demographic growth lead to an increased interest of States in discovering and exploiting new resources, and this could not have been avoided in the underwater area in general and the deep sea in particular. Equally, the advanced technical possibilities have shown that underwater areas are hiding the most extensive and the most important museum of mankind, by hosting, in addition to the amazing biodiversity that constitutes the essential premise for the survival of mankind, a cultural and spiritual heritage which we have the legal and moral duty of preserving, for the benefit of future generations. Both the general provisions of UNCLOS, as well as the provisions of the 2001 UNESCO Convention, have set this ambitious goal, but the limits of these regulations – many of them deriving from the specific nature of the areas where the underwater cultural heritage is located – are clear. In these circumstances, the reaction of the States – both in embracing the relevant norms of International Law and concerning the effective practices developed in the exploitation of maritime resources – shall prove essential for the correct management of these unique and priceless treasures.

[38] *Ibid.*

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Overview of the European Union as a Sea Policy Actor

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Abstract: *This article provides a concise overview of the European Union's involvement in sea-related policies, covering maritime and marine policies, EU fisheries policy, environmental initiatives, blue growth strategy, and sea management practices. With Europe's extensive coastline and a coastal population of 214 million within the EU, the significance of these policies is evident. The article traces the historical evolution of these policies, emphasizing the transition from the community method to intergovernmental approaches in recent maritime policy developments. Legal foundations, particularly for the Common Fisheries Policy (CFP) and Marine Strategy Framework Directive (MSFD), highlighting the role of the European Parliament in legislation. The importance of EU-Member State collaboration in safeguarding marine ecosystems has also been tackled in this paper. The article underscores the EU's significant role in sea-related policies, reflecting its commitment to responsible marine activities. It identifies policy challenges and suggests potential solutions, paving the way for a more integrated European approach to seas and oceans.*

Key-words: *European Union; maritime & marine policy; EU fisheries policy; blue growth; sea management.*

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1. Introduction: Blue Growth - The EU’s Overarching Goal

The overarching objective of Blue Growth within the European Union encapsulates a multifaceted agenda aimed at fostering the sustainable expansion of marine and maritime activities. This entails a holistic approach, incorporating a various range of dimensions. First and foremost, economic prosperity stands as a fundamental principle, underpinned by the development of various marine sectors, such as aquaculture, coastal tourism, marine biotechnology, ocean energy, and seabed mining. These sectors hold the potential to not only generate economic value, but also provide employment opportunities. Simultaneously, the Blue Growth initiative is intrinsically tied to environmental considerations. It seeks to ensure the harmonious coexistence of marine activities with the fragile ecosystems of the seas and oceans. Therefore, environmental sustainability forms an essential pillar of Blue Growth, necessitating the prudent management of marine resources and the mitigation of adverse impacts on the marine environment. Moreover, Blue Growth extends its scope to encompass social and societal dimensions by addressing issues such as the well-being of coastal communities and maritime safety. In essence, the European Union's pursuit of Blue Growth is a complex endeavour aimed at achieving economic progress, ecological harmony, and social well-being within the marine and maritime domain.

The EU's sea-related policies offer a comprehensive framework for balancing economic development and sustainability. The EU can effectively encourage economic growth within the maritime sector while safeguarding marine ecosystems for current and future generations by embracing integrated approaches, circular economy principles, sustainable management strategies, and international cooperation. The success of these policies depends on collaborative efforts, effective implementation, and the ongoing commitment of member states, industries, and civil society to a shared vision of a prosperous and sustainable "Blue Europe".

The existing literature on promoting economic development and sustainability through EU sea-related policies provides valuable insights into the complexities of achieving a balance between economic development and sustainability within the maritime sector. However, transitioning from theory and policy to practical implementation in EU Marine and Maritime Policies requires a comprehensive approach that encompasses policy coherence, stakeholder engagement, capacity building, monitoring, adaptability, funding, international cooperation, communication, legal frameworks, and innovation. By addressing these aspects systematically, the EU can make significant strides toward achieving a "Blue Europe" that is sustainable, prosperous, and environmentally responsible.

2. The Legal Basis Regarding the EU Sea-Related Policies

"We generally associate environmental sustainability with the colour green. Considering that 70 percent of the surface of our planet is made up of oceans and, given their vital role in many natural processes and the rich biodiversity they support, it could just as well be blue."[1]

According to "the SOPHIE project"[2], nestled between four seas and two ocean basins and boasting a coastline spanning approximately 70,000 km (for EU coastal states exclusively), Europe can truly be regarded as a maritime continent.[3]

In conclusion, the statistics presented above underscore the profound impact and significance of EU sea-related policies. Europe's extensive coastline and substantial coastal population make these policies crucial for the livelihoods and economies of millions, as evidenced by the substantial employment, turnover, and gross value added within the EU's Blue Economy.

Through both descriptive and analytical elements, this article conducts a review of existing literature to understand the current state of knowledge, key concepts, and areas of interest in the EU sea-related policies. A variety of documents has been analysed, including EU policy documents, academic articles, reports, and relevant research papers. The objectives of this article are to provide an overview of the EU as a sea policy actor, identify challenges within the EU sea-related policies, and suggest some potential solutions.

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[1] Daniel Calleja Alleja Crespo, "Blue Growth Strategy", *The European Files*, Issue no. 47, Director-General of DG Environment, European Commission, June 2017, Brussels, p. 17, https://www.europeanfiles.eu/wp-content/uploads/2017/06/The-European-Files-Blue-Growth-Strategy-June-2017-Issue-47.pdf.

[2] *Seas, Oceans and Public Health in Europe (SOPHIE)* is a pan-European project working towards protecting both human health and the health of the marine environment.

[3] Directorate- General for Maritime Affairs and Fisheries, Joint Research Center (European Commission), *The EU Blue Economy Report 2019*, Publications Office of the European Union, Luxembourg, 2019, https://op.europa.eu/en/publication-detail/-/publication/676bbd4a-7dd9-11e9-9f05-01aa75ed71a1/language-en/, last visited 10 November 2023.

2.1. Evolution of the legal basis in the European Community/European Union treaties

The establishment of the European Union as a significant actor in maritime policy has evolved progressively from a legal perspective, beginning with the original Treaty of Rome (1958), which incorporated provisions concerning fisheries and maritime transport policy. Subsequent reform treaties have introduced additional treaty foundations, thereby enabling the establishment of what today can be referred to as a "Blue Europe." The chronological development of these policies starts with the formulation of the Common Fisheries Policy during the 1970s and 1980s, followed by the establishment of the Common Maritime Transport Policy and policies centred around marine environmental protection and maritime safety, predominantly developed during the 1980s and 1990s. In its early stages, these policies operated within the framework of the community method, wherein the European Commission proposed legislation, the Council of Ministers adopted it (today together with the EP) - sometimes through qualified majority voting—and the European Court of Justice resolved disputes through binding judgments and interpreted the EU law provisions.[4]

Common Fisheries Policy (CFP)

The CFP emerged as the inaugural marine policy and it arguably stands as the policy most closely linked to the EU's sea-oriented endeavours, the "Blue Europe".[5]

As such, the inception of a common fisheries policy (CFP) finds its roots in the Treaty of Rome[6], where it was initially interconnected with the common agricultural policy. However it progressively gained autonomy over the course of time. Its principal objective now is to secure sustainable fisheries while ensuring steady incomes and stable employment for fishermen. Today, the legal foundation for the Common Fisheries Policy (CFP) can be found in

[4] Finn Laursen, *The Development of the EU as Sea – Policy actor – Fish, Ships, Navies*, Edward Elgar Publishing, 2020, pp. 1 - 2. For this issue, see also Ștefan Bogrea, *The European Union's Role as an Actor in International Law of the Sea Issues: History and Adjudication*, Romanian Journal of International Law No. 20/2018, p. 141 *et. seq.* .

[5] Ibidem, p. 68.

[6] Signed – 1957, entered into force - 1958.

Articles 38-43 of the Treaty on the Functioning of the European Union (TFEU).[7]

The TFEU brought several innovations concerning the role of the Parliament in developing legislation related to the CFP. An important alteration lies in the fact that legislation deemed essential for the advancement of CFP objectives is now established through the ordinary legislative procedure (formerly termed the co-decision procedure), thereby granting Parliament a co-legislative role. In terms of the endorsement of international fisheries agreements, the Lisbon Treaty outlines that these agreements must be signed by the Council once the Parliament has given its consent.[8]

According to the authors Luc van Hoof and J. van Tatenhove, "the CFP encompasses different policy domains reflected in the four main policy pillars: conservation policy, structural policy, market policy and international policy". The authors add that "the fisheries discourse has remained one of seeking a compromise between long and short-term economic and ecological objectives. The discourse could be labelled as being in search for long-term sustainability, in which environmental sustainability is perceived as instrumental for economic sustainability".[9]

The Integrated Maritime Policy (IMP)

As regards the Integrated Maritime Policy (IMP) (the *economic* pillar of *Blue Growth*) of the European Union, it represents a comprehensive strategy encompassing all EU policies linked to maritime affairs. The fundamental premise underlying this policy is that the EU can optimize the use of its maritime areas while minimizing environmental repercussions through the

[7] After the entering into force of the last amending treaty – the Treaty of Lisbon (signed – 2007, entered into force – 2009).

[8] Irina Popescu, "The Common Fisheries Policy: Origins and Development" [Fact Sheet], https://www.europarl.europa.eu/factsheets/en/sheet/114/the-common-fisheries-policy-origins-and-development, last visited on 21.08.2023.

[9] Luc van Hoof, J. van Tatenhove, *EU Marine Policy on the Move: the Tension between Fisheries and Maritime Policy*, Elsevier Ltd., 2009, pp. 726 – 732, https://www.sciencedirect.com/science/article/abs/pii/S0308597X09000256, last visited on 21.08.2023, p.728.

synchronization of its diverse interconnected undertakings involving oceans, seas, and coastlines.[10]

The foundation for the integrated maritime policy is established through Articles 42 (agriculture and fisheries), 43(2) (agriculture and fisheries), 91(1) (transports), 100(2) (transports), 173(3) (industry), 175 (economic, social, territorial cohesion and structural funds), 188 (research and technological development), 192(1) (environment), 194(2) (energy), and 195(2) (tourism) of the Treaty on the Functioning of the European Union (TFEU). [11]

The EU Treaty (TEU) does not explicitly define a specialized, dedicated legal basis regarding maritime policy *per se*. Nevertheless, Regulation (EU) No 508/2014, adopted by the European Parliament and the Council on 15 May 2014, concerning the European Maritime and Fisheries Fund, serves as the legal framework for its enactment. This regulation is rooted in the aforementioned articles of the TFEU. [12]

According to the authors Luc van Hoof and J. van Tatenhove, "The Maritime Policy is an inclusive approach, embracing and incorporating CFP and MSFD. This integration raises the question of inclusion of increasingly heterogeneous stakes and stakeholders (shipping, oil and gas extraction, fisheries conservation) and also raises the issue of balancing ecological and economic objectives."[13]

The Integrated Maritime Policy encompasses the following intersecting policy domains[14] and aims at "integration beyond the sum of the individual parts"[15], which are the following: Advancing Blue Growth, Enhancing Marine Data and Knowledge, Promoting Integrated Maritime Surveillance, Crafting Sea Basin Strategies & Facilitating Maritime/Marine Spatial Planning (MSP).[16]

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[10] Marcus Ernst Gerhard Breuer, *Integrated Maritime Policy of the European Union* [Fact Sheet], https://www.europarl.europa.eu/factsheets/en/sheet/121/integrated-maritime-policy-of-the-european-union, last visited on 21.08.2023.

[11] ibidem

[12] ibidem

[13] Luc van Hoof, J. van Tatenhove, *op.cit.* p.730.

[14] Marcus Ernst Gerhard Breuer, *op. cit.*

[15] Luc van Hoof, J. van Tatenhove, *op.cit.*

[16] Directive 2014/89/EU of the European Parliament and of the Council establishing a framework for maritime spatial planning.

"*The Maritime Spatial Planning* process (as part of the IMP) has the ability to gather people around a table, mapping where different activities may take place or not and eventually agreeing (or agreeing to disagree) on a plan for future development. (…) With a transparent physical mapping process, the impact of different activities will be made more visible.".[17]

Marine and Coastal Environment

It is obvious that through treaty reforms (Single European Act – 1987 – first legal basis for the environmental policy[18], then the Maastricht Treaty – 1993 – introducing the qualified majority voting for most environmental policy and co-decision) the EU has taken on a role as a participant in marine environmental policy.

The primary instrument employed by the EU to safeguard and preserve the well-being of our coastlines, seas, and oceans is the *Marine Strategy Framework Directive (MSFD*), which is the *environmental* pillar of the *Blue Growth*. By means of this Directive, the ecosystem-centred approach has been consolidated as a legally binding and enforceable principle guiding the management of the entirety of the EU's marine environment.[19]

The legal foundation for the MSFD is rooted in Article 192(1) (environment) of the TFEU. The MSFD will enhance the effectiveness of safeguarding the marine environment, directly fostering the implementation of the right to environmental protection enshrined in Article 37 of the EU Charter of Fundamental Rights. Upholding a robust standard of protection and enhancing environmental quality, both these goals align with the objectives stipulated in the Treaty on the European Union (Article 3(3) TEU).

[17] Jessica Hjerpe Olausson, , "Blue Growth Strategy", *The European Files*, Issue no. 47, Director-General of DG Environment, European Commission, June 2017, Brussels, p. 19, https://www.europeanfiles.eu/wp-content/uploads/2017/06/The-European-Files-Blue-Growth-Strategy-June-2017-Issue-47.pdf.

[18] And also for the subsidiarity principle.

[19] European Commission, Marine Environment, https://environment.ec.europa.eu/topics/marine-environment_en, last visited on 10 November 2023.

2.2. Short considerations regarding the relevant aspects of the latest amending treaty signed by the member states in Lisbon[20]

Additional considerations will be made concerning the latest amending Treaty, specifically the one signed in Lisbon in 2007 and subsequently entered into force in 2009. The Treaty of Lisbon, a significant treaty reform, introduced several key changes in EU sea-related policies and also confirmed already established aspects. In the following paragraphs, we will make a concise inventory of the most important points to be considered.

Regarding the relevant aspects of the latest amending treaty signed by the member states in Lisbon, here are the most important:

Expanded Application of the Ordinary Legislative Procedure: The Treaty extended the use of the ordinary legislative procedure, previously known as co-decision, to multiple policy areas, including fisheries, sea transport, and the marine environment within the EU.

Enhanced Role of the European Parliament: This shift empowered the European Parliament, strengthening its influence in these policy areas.

Distinct Title for Fisheries Policy: While agriculture and fisheries were initially grouped together, the Lisbon Treaty recognized the unique attributes of fisheries, leading to the establishment of a dedicated title solely for fisheries policy.

Inclusion of Environmental Policy: The Treaty also brought environmental policy *into the ordinary legislative procedure*, requiring consultation with the Economic and Social Committee and the Committee of the Regions.

Exclusive Competence for Marine Biological Resources: Article 3 TFEU designated the conservation of marine biological resources under the common fisheries policy as an exclusive competence of the EU.

Shared Competencies: While the Treaty granted exclusive competence in certain areas, most competencies were categorized as shared, covering aspects beyond the conservation of marine biological resources within fisheries policy.

Shared Competencies in Other Areas: Competencies related to the environment, transport, and the area of freedom, security, and justice were also classified as shared competencies under Article 4 TFUE.

These provisions reflect the Treaty of Lisbon's profound impact on the structure and operation of EU sea-related policies, reinforcing parliamentary

[20] Finn Laursen, *op.cit.*, pp. 37-40.

involvement and addressing the unique characteristics of fisheries, while extending the scope of environmental considerations, reflecting evolving priorities and the need for more inclusive decision-making processes.

If we are to conclude as regards the progression of refining the treaty basis for a "Blue Europe", we can notice that it has followed an incremental trajectory, marked by numerous small, but deliberate steps, with member states recognizing the necessity to advance at each juncture. Often, this course has been propelled by shifts in global political dynamics and the economic landscape. Nonetheless, domestic dynamics have equally played a role, spurred by mounting demands from stakeholders such as fishermen, the shipping industry, and environmental advocacy groups. Undoubtedly, environmental concerns have gained momentum over the years, compelling policymakers to delve more deeply into the vitality of our oceans. Moreover, the empowerment of the European Parliament through the Lisbon Treaty appears to have catalysed the nascent movement toward infusing ecological considerations into the concept of a "Blue Europe".

2.3. Implementation and enforcement – responsible EU institutions and types of EU law acts used, all in the spirit of sincere cooperation

Designing policies is a distinct process, yet the effective implementation and enforcement of these policies constitute another critical aspect. This responsibility significantly rests with member states, operating in collaboration with the Commission and various other institutions.

EU acts

Finn Laursen, in his book, *The Development of the EU as Sea – Policy actor – Fish, Ships, Navies*[21] notes that, as regards the types of acts used by the EU, and hence the level of governance responsible for their enforcement, the *common fisheries policy* is primarily established through regulations that hold *direct* applicability within member states. Conversely, when the policy hinges on directives outlining diverse objectives, as is notably the case with much of the *marine environmental policy*, these directives need transposition into national law. The Commission takes an active role in overseeing implementation and has the authority to initiate legal proceedings against member states that fail to execute new legislation.

EU institutional framework

[21] Finn Laursen, *op. cit.*, p. 186 *et seq*.

It is important to note, according to the above-mentioned author, that the Commission lacks an independent enforcement body to oversee policies. Consequently, the enforcement of fish quotas and vessel standards rest primarily with member states. However, these efforts are conducted under the Commission's supervision and increasingly involve various specialized agencies established for this very purpose.[22]

The primary *responsibility for implementing* common EU policies lies with member states, according to Finn Laursen, aligning with the Treaty's principle of *sincere cooperation*. In essence, regarding implementation and enforcement, the EU predominantly operates in a relatively intergovernmental manner, although with a touch of supra-nationalism, as Finn Laursen puts it.[23]

Initially, the member states held predominant authority over the treaties; however, as time progressed, other important actors assumed prominence. The Commission, endowed with the right of initiative, emerged as a central participant, alongside the Council that assumed the role of legislator. The European Court of Justice assumed the crucial tasks of interpreting EU provisions and adjudicating disputes. Subsequently, the European Parliament, following the entry into force of the Lisbon Treaty, was integrated even more into the ordinary legislative procedure, marking a notable augmentation of its influence within this context.[24]

As regards the larger context of the evolution of these policies, we consider the Commission's White Paper on the Future of Europe is particularly pertinent to the notion that **crises** frequently propel policy advancements, as it articulates:[25] "Europe's challenges show no sign of abating. (…) The Union has often been built on the back of crises and false starts. From the European Defense Community that never got off the ground in the 1950s, to the exchange rate shocks of the 1970s, through to aborted accessions and rejections in referenda in recent decades, Europe has always been at a crossroads and has always adapted and evolved.".

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[22] For more details on the concept of ecological risk, see Sorin Alexandru Vernea, *Particularitățile răspunderii penale în cazul infracțiunilor îndreptate împotriva mediului*, Ed. Hamangiu, 2020, p. 22.

[23] Finn Laursen, *op.cit.*, pp. 196-197.

[24] Ibidem, p. 208.

[25] European Commission, "White Paper on the Future of Europe - Reflections and Scenarios for the EU27 by 2025", pp. 2-3, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52017DC2025, last visited on 21.08.2023,

Catalyzed by crises such as the depletion of fish stocks or significant environmental catastrophes, the impetus for reform within policy-making in the *lato sensu* maritime domain structures has become evident. These reforms operated at a systemic level, where *inter-institutional negotiations* assumed significance.[26]

3. Loyal Cooperation, Multilevel Governance, and Cross-Cutting Policy Tools - The Path to Achieving a Blue Europe

The achievement of a "Blue Europe," characterized by sustainable marine and maritime policies, hinges on a combination of factors that facilitate cooperation, governance, and policy alignment within the European Union (EU) and its member states. This section explores, in a concise manner, the concepts of loyal cooperation,[27]multilevel governance, cross-cutting policy tools, interdependence, and the tension between holistic and sectoral approaches. These elements collectively contribute to the realization of a comprehensive and cohesive strategy for the sustainable management of Europe's marine resources and activities.

Loyal Cooperation within the EU and Member States

Loyal cooperation,[28] a fundamental principle of EU law, underscores the necessity for member states (and also the EU) to collaborate in their common interest. In the context of marine and maritime policies, this principle mandates that member states work collectively to address challenges that transcend national borders. Achieving a Blue Europe requires member states to set aside individual interests in favour of collaborative efforts that promote sustainable resource management, environmental protection, and economic growth. The principle of loyal cooperation drives the development of cohesive policies, encouraging the alignment of national strategies with broader EU objectives.

The Treaty on the European Union (TEU) contains several provisions regarding the principle of "loyal cooperation" within the EU. Article 4(3) TEU states that the EU and its member states shall "facilitate the achievement

[26] Finn Laursen, *op.cit.*, p. 208.

[27] On the role of principles as sources of the EU law, see Takis Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford EC Law Library, 2006, pp. 1-59.

[28] For more details about loyal cooperation, see Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, *Principiul cooperarii loiale – principiu constituțional în dreptul Uniunii Europene*, In Honorem Ioan Muraru, Ștefan Deaconu, Elena Simina Tănăsescu (coord.), *Despre Constituție in mileniul III*, Ed. Hamangiu, 2019, pp. 158-173.

of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives." This principle underscores the idea that member states should work together in a spirit of solidarity to achieve common objectives and uphold the values of the EU.

Multilevel Governance within the EU

Multilevel governance recognizes that effective policy implementation requires coordination and cooperation across various levels of governance – from local and regional to national and supranational. In the context of marine and maritime policies, multilevel governance acknowledges the diverse stakeholders involved, including coastal communities, industries, environmental organizations, and governmental bodies. This approach fosters open dialogue, information sharing, and joint decision-making, enabling policies to reflect the interests and concerns of all stakeholders.

Cross-Cutting Policy Tools and Interdependence

Blue Europe also needs policies that transcend traditional sectoral boundaries. Crosscutting policy tools, such as integrated maritime strategies, provide a means to bridge sectors like fisheries, shipping, tourism, and environmental protection. These tools promote an inclusive approach that considers the interconnection of various marine activities.

Holistic versus Sectoral Approach

Finally, a central debate in marine and maritime policy formulation is whether to adopt a holistic or sectoral approach. While a holistic approach considers the entire marine ecosystem and its functions, sectoral approaches focus on individual sectors like fisheries or shipping. Balancing these approaches is crucial. A holistic approach acknowledges the cumulative impacts of multiple sectors on the marine environment, encouraging integrated solutions. On the other hand, sectoral approaches recognize the diverse needs of each industry and enable targeted policies. Striking the right balance is essential for effective policy-making that addresses complex challenges while ensuring sector-specific requirements are met, as a one-size-fits-all all solution is not an appropriate approach.

The transition from policy to practical implementation is a key element in achieving a "Blue Europe" through the EU's Marine and Maritime Policies. Ultimately, transitioning from policy to practical implementation is the bridge that connects these elements. It involves turning policy aspirations into concrete actions on the ground, whether it is sustainable fisheries management, marine spatial planning or environmental protection.

4. Challenges and Solutions

In the vast and ever-evolving seascape of EU sea-related policies, we inevitably encounter challenges that demand our attention and innovative solutions. As we navigate the intricate waters of maritime governance, it is essential to shine a light on the key issues that these policies confront. While these challenges are formidable, they are not insurmountable. Indeed, they serve as the vessel within which the future of EU sea-related policies is forged, while seeking pathways to a more sustainable, prosperous, and environmentally responsible "Blue Europe".

4.1. Key issues

Obviously, the primary aim of fishermen is to *maximize their catch*, a pursuit that inherently carries the potential for overexploitation of fish stocks. This worrying risk required the implementation of conservation and management strategies, including measures, such as Total Allowable Catches (TACs), quotas, and regulations governing mesh sizes[29], fishing seasons, and related considerations. However, the possibility for non-compliance with these regulations is significant, underscoring the imperative for robust enforcement mechanisms. The daily obligation of executing and overseeing implementation largely rests within the purview of member states, which might be inclined to exhibit leniency in enforcement. This tolerance could potentially stem from pressures exerted by fishing and shipping entities through lobbying efforts. [30]

Additional challenges and issues which may affect the achievement of the "Blue Europe" include the following:

Climate Change: Rising sea levels, ocean acidification, and extreme weather events pose significant challenges to the sustainability of marine ecosystems and industries. Adapting to these changes is a key concern.

Pollution: Marine pollution from plastics, chemicals, and waste continues to harm ocean health. Effective waste management and reduction of single-use plastics are pressing issues.

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[29] Case-law C-304/02, Commission des Communautés européennes / République française, Arrêt de la Cour dans l'affaire C-304/02, "Pour la première fois la cour condamne un état membre à la fois à une astreinte et à une amende forfaitaire en raison de son manquement grave et persistant au droit communautaire*", Communiqué de Presse n. 68/05*, 12 July 2005, https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp050068fr.pdf.

[30] Finn Laursen, *op.cit.*, p. 211.

Resource Conflicts: Competing interests, such as offshore energy production, shipping routes, and fisheries, can lead to conflicts over resource allocation and usage.

Illegal, Unreported, and Unregulated (IUU) Fishing: IUU fishing undermines sustainable fisheries management and conservation efforts. Strengthening enforcement and cooperation is essential.

Biodiversity Loss: Loss of marine biodiversity due to habitat destruction and invasive species impacts the resilience and functionality of marine ecosystems.

Technological Challenges: Effective implementation of marine policies often requires advanced technology for monitoring and enforcement, which can be expensive and technically challenging.

Data Gaps: Limited data on marine ecosystems and activities can hinder evidence-based policymaking and sustainable management.

Global Cooperation: Given the transboundary nature of oceans, international cooperation and agreements are crucial, but achieving consensus among nations can be complex.

Public Awareness: Increasing public awareness and engagement in marine conservation and sustainable practices is an ongoing challenge.

All these issues highlight the multifaceted nature of achieving a sustainable and integrated Blue Europe. Addressing them requires comprehensive policies, collaboration, and innovative solutions.

4.2. Possible approaches to achieve a sustainable Blue Economy

In the pursuit of a harmonious blend between economic prosperity and environmental sustainability within the EU marine and maritime policies, several proposals for potential remedies come to the forefront. These "remedies" aim to strike a balance between economic development and sustainability and they advocate for a holistic approach that considers the long-term health of the oceans and coastal regions while fostering economic growth and job creation. These possible approaches are the following:

Eco-Friendly Technology Adoption: One approach is to encourage the adoption of environmentally friendly technologies within the maritime sector. This includes promoting the use of cleaner propulsion systems, renewable energy sources for vessels and sustainable fishing practices. Incentives and subsidies can be provided to industries transitioning to eco-conscious technologies, thus aligning economic growth with ecological responsibility.

Regulatory Framework Enhancement: Strengthening and refining existing regulations is crucial. Proposals may involve setting more stringent limits on resource exploitation, such as fishing quotas and stricter emissions standards for maritime transportation. These regulations need to be transparent, enforced effectively, and regularly updated to reflect evolving sustainability goals.

Research and Innovation: Investing in research and innovation is fundamental to finding sustainable solutions. This not only boosts economic growth, but also empowers industries with the tools to reduce their environmental footprint.

Public and Private Sector Collaboration: Fostering collaboration between public institutions, private enterprises and civil society organizations is key: creating platforms for dialogue, joint ventures and partnerships that facilitate knowledge sharing and joint efforts towards sustainable practices.

Education and Awareness: The importance of education and awareness campaigns is also high. These initiatives can inform both policymakers and the public about the significance of a Blue Economy. When individuals and organizations understand the benefits of sustainable practices, they are more likely to support and engage in initiatives that promote economic growth without compromising the marine environment.

Incentive-Based Approaches: These incentives encourage businesses to incorporate eco-friendly practices into their operations, thereby achieving both economic and environmental goals.

Long-Term Planning: The comprehensive maritime strategies should include clear targets and milestones for sustainable growth, with regular evaluations to measure progress. Long-term planning provides stability and direction, making it easier for industries to invest in sustainable practices.

Global Cooperation: Recognizing that the challenges facing the marine and maritime sectors are global in nature could enhance international cooperation. Collaboration with neighboring countries and international organizations is essential to harmonize policies, share best practices, and address common challenges effectively.

Circular Economy: circular economy practices within the maritime sector could successfully reduce waste and improve resource efficiency.

An Integrated Maritime Policy: Last, but not least, an integrated maritime policy is essential. As indicated by Fatima Castro Moreira and Barbara Magalhaes Bravo in their paper, *"Marine and coastal environments are under pressure from several pollution sources. Most of the environmental law has*

been developed on a sectoral basis and does not reflect the interdependence of the various issues and their solutions. Oceans and seas are influenced by many activities, interests and policies and are interlinked. A holistic, integrated approach *(emphasis ours) is the best way to handle maritime affairs, with States cooperation not only on an EU States basis, but also with third States and International Organizations."*[31] The concluding remarks of the above-mentioned authors underscore the significance of the Integrated Maritime Policy (IMP) as a groundbreaking approach to enhancing the sustainable development of sea-related activities. This innovative policy framework represents a departure from traditional sectoral approaches, recognizing that by integrating various sea and ocean policies, Europe can attain superior economic outcomes while simultaneously minimizing environmental impact.

In concluding this section on the principle of sustainability, it is worth referencing the insights of author Finn Laursen[32]. He emphasizes that within the realm of EU sea policies, sustainability should take precedence as the guiding principle. This perspective entails a shift in focus, de-emphasizing the supply and geopolitical considerations associated with the external dimension of the Common Fisheries Policy (CFP).

This reevaluation aligns with broader global efforts to ensure the long-term health and viability of our oceans and fisheries. By prioritizing sustainability, the EU can play a more proactive role in preserving marine ecosystems and supporting the livelihoods of those dependent on these resources, ultimately contributing to the well-being of current and future generations.

4.3. Connecting the Blue Economy with Health & Well-being

In the realm of sea policy, the next significant step, both from a practical and research standpoint, lies in the concept of "closing the loop"[33].

While we have taken substantial decisive steps in shaping policies concerning our oceans and maritime activities, there is an intriguing connection that

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[31] Fatima Castro Moreira, Barbara Magalhaes Bravo, *EU Integrated Maritime Policy and Multilevel Governance*, Juridical Tribune, 2022, pp. 535 – 548, at p. 535, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132643, last visited on 21.08.2023.

[32] Finn Laursen, *op.cit.*, p. 176.

[33] For details about this concept, see Oonagh McMeel, Nathalie Tonné, Jan-Bart Calewaert, "Human Health and EU Maritime Policy: Closing the Loop", *SOPHIE Project Policy Brief Report*, Brussels, 2019, https://sophie2020.eu/wp/wp-content/uploads/2020/03/SOPHIE_Policy_Maritime_Report_2020_Final.pdf, last visited on 21.08.2023.

demands our attention: the intricate interplay between sea policies and human health and well-being. The seas, with their vast resources and diverse ecosystems, are inextricably linked to our own prosperity and sustenance.

On the other hand, as authors Easkey Britton, Christine Domegan, and Patricia McHugh put it, actually, "from coastal waters to open seas, there is no part of the ocean that remains unaffected by the growing and interconnected pressures from climate change, biodiversity loss, and further degradation caused by human activities".[34]

In the following paragraphs, we find it useful to highlight the key findings of the "*Human health and EU maritime policy: Closing the Loop*" study, which strongly resonate with our perspective: [35]

- The study mentions that, through the inception of the *EU Integrated Maritime Policy* in 2007, Europe marked a substantial step toward putting together its perspective on maritime policy. Departing from the previously fragmented and sector-focused policy framework, the Integrated Maritime Policy acknowledged the interconnected nature of coastal seas and oceans as a unified system.[36]

- Significant advancements have been achieved by the EU through the establishment of dedicated tools. These include *the Marine Strategy Framework Directive* (addressing the marine environment), *Marine Knowledge 2020* (focusing on marine data), the *Maritime Spatial Planning Directive* (centered on spatial planning), and the *Blue Growth Strategy* (concentrating on the economy). A number of these strategies and legislative tools also incorporate considerations related to human health. [37]

- Regarding the evolution of the health–related provisions through the amending treaties, according to the above-mentioned study, the *Maastricht* Treaty of 1992 (Treaty on European Union – TEU) outlines the "attainment of a high level of health protection" as one of the collective policies or efforts that the Community should execute to fulfil its objectives. Article 129 (Public Health) develops this by emphasizing that the Community should contribute

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[34] Easkey Britton, Christine Domegan, Patricia McHugh, "Accelerating Sustainable Ocean Policy: The Dynamics of Multiple Stakeholder Priorities and Actions for Oceans and Human Health", Marine Policy, Elsevier, vol. 124, no. 2/21, p. 1. https://www.sciencedirect.com/science/article/pii/S0308597X20309829?via%3Dihub, last visited 10 November 2023.

[35] Oonagh McMeel et al., *op.cit.*

[36] Ibidem, p. 2.

[37] Ibidem, p. 3.

to this elevated public health standard through collaborative efforts among Member States and by offering support to Member State initiatives when needed. The article also underscores that health protection requisites are an integral component of the Community's other policies and emphasizes the necessity for cooperation with third countries and relevant international organizations in the realm of public health. Later, the Treaty of *Amsterdam* in 1997 takes this commitment even further, mandating that 'a high level of human health protection' must be assured in both defining and carrying out all of the Union's policies and activities (Article 152, Public Health). [38] We can add the fact that provisions regarding health are also to be found in the consolidated versions of the treaties, after the last of the amending treaties (signed in Lisbon, 2009): art. 4-2-k TFEU (about shared competence domains: "common safety concerns in public health matters, for the aspects defined in this Treaty"), art. 6 TFEU (about complementary EU competence: "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health"), art. 9 TFEU ("In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."), Title XIV Public Health - Article 168, etc. .

- Within the EU framework, Member States bear the primary responsibility for health matters, including the formulation of their health policies, and the organization and delivery of health services and medical care. The role of the EU is to complement national health policies in the pursuit of safeguarding and enhancing human health (as outlined in the Treaty on the Functioning of the EU) by ensuring that all policies actively safeguard and promote human health. The EU possesses the authority to enact health-related legislation and it has exercised this authority in specific domains, such as introducing directives and regulations pertaining to pharmaceuticals and tobacco, among other areas. Additionally, the EU can put forth recommendations concerning public health for EU member states, as exemplified by the Council's Recommendation on smoke-free environments. Although the EU's influence in health affairs is circumscribed, it does wield

[38] Ibidem, p. 7.

a significant role in fostering collaboration and encouraging the efficiency of member-state health systems. [39]

- The study's conclusive remarks note that over the past 12 years, the EU has meticulously crafted a robust and cohesive framework for marine and maritime policies. Nonetheless, the integration of human health and well-being within maritime policy remains an area that warrants further attention.[40]

- According to the study's authors, Oonagh McMeel, Nathalie Tonné and Jan-Bart Calewaer, "*Oceans and Human Health (OHH)* is a metadiscipline with applications across several EU policy areas, the most obvious being environment, maritime affairs, public health, and research and innovation. Given that the European Union started out as an economic community, it is not surprising that the development of a sustainable maritime economy is clearly a priority for the EU Integrated Maritime Policy. However, the scope of European cooperation has broadened since the early days of the European Economic Community (EEC). This is even in the text of the 1992 Maastricht Treaty, Article 3 of which states that among the goals of the new European Union is 'peace, its values and "*the wellbeing of its people*."'[41]

Developing on this point, it is noteworthy that the core objective of promoting peace, values, and the *well-being* of its people remains unchanged over time within the EU Treaties, even in the aftermath of the Lisbon Treaty (2009). As outlined in article 3 para. 1 of TEU: 'The Union's aim is to promote peace, its values and the *well-being* of its peoples.' This enduring objective signifies the EU's unwavering commitment to fostering and dedication to well-being, encompassing not only economic prosperity, but also the broader welfare and quality of life of its citizens.

5. Final Remarks

Over time, the scope of Blue Europe's functions has progressively widened, as also stressed by author Finn Laursen stressed. It all began with the incorporation of provisions for fisheries and transport policy within the EEC Treaty of 1958. Following this initial step, the development of these policies saw a gradual unfolding, with more notable progress starting around 1970. The expansion of maritime transport policy has been intertwined with

[39] Ibidem, p. 8.

[40] Ibidem, p. 9.

[41] Ibidem, p. 25.

the internal market's evolution and gained momentum as the 1992 deadline approached. Simultaneously, the initiation of environmental policy took root in the early 1970s, even though it lacked a well-defined treaty basis. However, its growth accelerated following the establishment of a foundational framework through the Single European Act in 1987.[42]

In conclusion, the journey of Blue Europe's development has been marked by a gradual expansion in scope, beginning with modest provisions in the EEC Treaty of 1958 and steadily evolving into a comprehensive framework for marine and maritime policies. However, the true test lies in the present moment. While policy discussions now emphasize sustainability and safety, these ideals must be translated into concrete actions to truly make a difference. Encouragingly, there is a discernible shift away from the previous dominance of economic interests, giving rise to a heightened focus on social responsibility and environmental sustainability within Blue Europe. This transformation is a positive step, yet it should not remain at the level of mere rhetoric. It is imperative that these values become tangible and deeply integrated into policy frameworks.

In this evolving landscape, the European Union has embarked on a path that seeks to harmonize economic prosperity with ethical and ecological considerations. However, the journey is far from complete. There is still work to be done to consolidate this shift and ensure that these principles are not just ideals, but integral components of Blue Europe's "DNA", as Finn Laursen is concluding in his book.[43]

We will end this paper with the words of the President of the European Commission, who stated: *'The European Green Deal provides the necessary frame, incentives, and investment – but it is the people, the inventors, the engineers who develop the solutions*.'[44] These words from President Ursula von der Leyen show a fundamental truth about the European Union's approach to tackling the challenges posed by its sea-related policies. While policies and frameworks like the European Green Deal provide the essential structure and incentives for sustainable development, it is ultimately the individuals, the innovators and the problem solvers who/that hold the key to transforming these policies into practical, effective solutions. As we navigate the complex seas of marine and maritime policies, let President von der

[42] Finn Laursen, *op.cit.*, p. 213.

[43] Ibidem, p. 214.

[44] Ursula von der Leyen, "State of the Union 2023", 2023 State of the Union Address by President von der Leyen, , September 2023, Strasbourg. https://state-of-the-union.ec.europa.eu/index_en

Leyen's words serve as a reminder that it is not just about policy documents; it is about the commitment and determination of individuals to turn those policies into a sustainable reality. It is about harnessing the collective power of human creativity and innovation to ensure that Blue Europe thrives for generations to come.

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Le Rôle de l'Union Européenne dans la Protection de la Mer Noire contre la Pollution et l'Éventuelle Adhésion à la Convention de Bucarest

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Résumé: *À l'heure actuelle, l'adhésion de l'Union européenne à la Convention de Bucarest est-elle nécessaire et opportune? C'est une question qui reste d'actualité et qui interroge aussi sur l'application de la Convention par les Parties contractantes dans le contexte du conflit en Ukraine. L'analyse ci-dessous présente brièvement les compétences de l'Union européenne dans le domaine de l'environnement, le cadre juridique de l'adhésion à la Convention en tant que priorité de l'Union et le status-quo des relations entre les parties contractantes de la Convention et l'Union européenne comme élément d'actualité de la recherche qui n'a pas été encore pris en compte. Dans ce cadre, la démarche scientifique peut être développée pour intégrer l'image de la mer Noire après-guerre et la potentielle nouvelle position de l'Union par rapport à la Convention.*

Mots-clés: *compétences de l'Union européenne, Convention de Bucarest, adhésion, conflit en Ukraine.*

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The Role of the European Union in the protection of the Black Sea against pollution, and the possible accession to the Bucharest Convention

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Abstract: *At present, is the accession of the European Union to the Bucharest Convention necessary and opportune? This is a question that remains relevant, but which may call into question the application of the Convention by the contracting Parties in the context of the conflict in Ukraine. The analysis below briefly presents the competences of the European Union in the field of the environment, the legal framework for accession to the Convention as a priority of the Union and the status quo of relations between contracting Parties to the Convention and the European Union as a current element of research which has not yet been taken into account. In this context, a scientific approach can be developed to integrate the image of the post-war Black Sea and the potential new position of the Union in relation to the Convention.*

Key-words: *competences of the European Union, Bucharest Convention, accession, conflict in Ukraine.*

1. Considérations générales

L'idée européenne a toujours représenté une notion complexe qui définit le développement politique, économique et social même du continent européen qui a été mise en place par les Communautés européennes après la deuxième guerre mondiale.

Aujourd'hui, l'Union européenne s'est élargie vers la mer Noire, une région riche en histoire et ressources; de plus, on considère que la sécurité[1] et le bien-être des citoyens de l'Union dépend, à la fois, de ce qui offert la mer Noire et ses voisins, c'est pourquoi l'Union essaie d'y être présente en vertu des compétences acquises comme organisation internationale intergouvernementale d'intégration.[2]

La présence de l'Union dans cette région suppose, à la fois, l'adhésion à la Convention de lutte contre la pollution dans la mer Noire signée par les Etats riverains, qui, dans leur plupart, ont, dans nos jours, une relation spéciale avec l'Union. Mais cette adhésion ne s'est jamais produite à des raisons juridiques et politiques (l'opposition de certains Etats signataires de la Convention), bien qu'elle ait été une priorité pour l'Union.

Du point de vue académique, notre recherche montre que l'actuel conflit en Ukraine a changé la perspective concernant l'adhésion de l'UE à la Convention de Bucarest. Depuis l'année dernière, l'Ukraine est un État candidat à l'adhésion à l'UE et à l'avenir les négociations pour l'application des règles de l'UE dans la législation nationale seront ouvertes. La Turquie reste officiellement un État candidat à l'adhésion à l'UE même si les négociations d'adhésion n'avancent pas. La Géorgie a également demandé à devenir membre de l'UE.

[1] Elena Lazăr, *Migration by Sea – Current Challenges in International Law*, no. 20/2018, *Revista română de drept internaţional*, pp. 49-53.

[2] Oana-Mihaela Salomia, "European Legal Instruments for Green and Digital Transition", *Challenges of the Knowledge Society Bucharest*, 14th Edition, (May 21th 2021), , "Nicolae Titulescu" University Publishing House, Bucharest, pp. 487: « As international intergovernmental integration organization, the European Union acts within the limits of the powers conferred by the Member States in order to achieve the common objectives set out in the Treaties, objectives which diversify and multiply as society itself evolves globally »

2. Le cadre de l'adhésion de l'Union européenne à la Convention de Bucarest

La qualité d'État membre d'une organisation internationale intergouvernementale d'intégration[3], telle que l'Union européenne implique l'attribution des pouvoirs législatifs à cette structure supranationale dans des domaines spécifiques, par le biais d'un traité international.

2.1 Compétences de l'UE en matière de politique environnementale marine

Les sources du droit de l'environnement de l'UE par lesquelles l'Union exerce ses compétences sont représentées par: les sources primaires – les traités de l'UE; le droit secondaire, dérivé (actes législatifs); les accords internationaux auxquels l'Union est partie et les arrêts de la Cour de justice de l'Union européenne.

En ce qui concerne les compétences de l'UE, qui ont fait l'objet des recherches scientifiques précises, l'environnement est progressivement devenu un domaine de compétence partagée avec les États membres selon l'art. 4 al. 2 (e) du Traité sur le fonctionnement de l'Union européenne.[4] L 'Acte Unique Européen a introduit le principe de la subsidiarité au sein de cette politique, principe qui permet à l'UE d'intervenir dans des domaines qui ne relèvent pas de sa compétence exclusive, uniquement si et dans la mesure où les objectifs de l'action envisagée ne peuvent être atteints de manière satisfaisante par les États membres, ni au niveau central, ni au niveau régional et local, mais qui, en raison des dimensions et des effets de l'action envisagée, peuvent être mieux réalisés au niveau de l'Union (art. 5, paragraphe 3, du Traité sur la Union européenne). Ainsi, l'UE peut adopter des actes législatifs afin d'harmoniser la législation des États membres dans ce domaine en tant qu'élément de l'intégration européenne.

Le domaine de l'environnement est aussi complexe que celui de l'agriculture et des transports, domaines de compétence partagée, devenues de compétence exclusive par exercice de l'Union.

Plus précisément, pour la protection de l'environnement marin, on a adopté la *Directive 2008/56/CE du Parlement Européen et du Conseil du 17 juin 2008 établissant un cadre d'action communautaire dans le domaine de la*

[3] Roxana-Mariana Popescu, "Legal Personality of International Intergovernmental Organization", *Challenges of the Knowledge Society Bucharest*, May 21th 2021, 14th Edition, Nicolae Titulescu University Publishing House, pp. 466-470.

[4] Mihaela Augustina Niță (Dumitrașcu), *Dreptul Uniunii Europene I*, ediția II-a, Ed. Universul Juridic, București,2023, pp. 44.

politique pour le milieu marin (directive-cadre « stratégie pour le milieu marin ») qui « met en place un cadre permettant aux États membres de prendre toutes les mesures nécessaires pour réaliser ou maintenir un bon état écologique du milieu marin au plus tard en 2020 ». Conformément à la Directive, « les États membres tiennent dûment compte du fait que les eaux marines placées sous leur souveraineté ou leur juridiction font partie intégrante des régions marines suivantes: a) la mer Baltique; b) l'Atlantique du Nord-Est; c) la mer Méditerranée; d) la mer Noire ».

Cet acte législatif tient compte du fait que la protection de ces régions marines ne peut se réaliser qu'en coopération avec les États tiers, là où il est le cas, « coopération régionale » représentant la « coopération et coordination des activités entre des États membres et, chaque fois que possible, des pays tiers partageant la même région ou sous-région marine, aux fins de l'élaboration et de la mise en œuvre de stratégies marines ». De plus, il est évident que la directive « s'applique à toutes les eaux marines (…), et prend en compte les effets transfrontaliers sur la qualité du milieu marin des États tiers appartenant à une même région ou sous-région marine ».

Quant à la compétence des États membres en matière de politique environnementale, conformément à l'art. 191 par. 4 du TFUE, « dans leurs domaines de compétence respectifs, l'Union et les États membres coopèrent avec les pays tiers et avec les organisations internationales compétentes.[5] Les modalités de coopération de l'Union peuvent faire l'objet d'accords entre l'Union et les tiers concernés ».

Parallèlement, la protection de l'environnement est assurée par des traités internationaux bilatéraux ou multilatéraux conclus par les États membres de l'UE avec des pays tiers, sous les auspices des Nations Unies; en outre, l'Union européenne contribue au strict respect et au développement du droit international, en tant que son objectif général, y compris le respect des principes de la Charte des Nations Unies (art. 3.5 du Traité sur le fonctionnement de l'Union Européenne). Cette base juridique permet à l'Union à accéder elle-même aux conventions internationales pour mieux garantir la protection de l'environnement au niveau international.[6]

[5] Voir Ion Gâlea, Carmen Achimescu, « Les Métamorphoses de la Commission du Danube », no 15/2021, *Revista română de drept internațional*, pp. 58-72.

[6] Voir Ștefan Bogrea, "The European Union's Role as an Actor in International Law of the Sea", no 20/2018, *Revista română de drept internaţional*, no 20/2018, pp. 141-149.

2.2 Le processus d'adhésion de l'UE à la Convention de Bucarest

La Convention de Bucarest a été conclue en 1992, avant que la Roumanie et la Bulgarie deviennent membres de l'UE, et comme traité international a établi un mécanisme de lutte contre la pollution de la mer Noire par ces deux États ainsi que par la Géorgie, la Fédération de Russie, la République de Turquie et l'Ukraine.

Comme indiqué, la Convention représente le cadre de base de l'accord et trois protocoles spécifiques sont signés :

(1) le contrôle des sources terrestres de pollution ;

(2) déversement de déchets ; et

(3) action commune en cas d'accidents (tels que les marées noires).

L'objectif fondamental de la Convention pour la protection de la mer Noire contre la pollution est « de justifier l'obligation générale des parties contractantes de prévenir, réduire et contrôler la pollution dans la mer Noire afin de protéger et de préserver le milieu marin et de fournir cadre juridique pour la coopération et les actions concertées pour remplir cette obligation »[7].

Conformément à leur nouveau statut juridique d'État membre de l'Union Européenne, la Roumanie et la Bulgarie ont eu l'obligation de vérifier la conformité de cette convention avec le droit de l'UE et si ses règles s'avéraient en contradiction avec la politique environnementale de l'UE. Par conséquent, ces deux États membres auraient dû modifier la convention ou s'en retirer.

« Suite à l'adhésion de la Bulgarie et de la Roumanie à l'UE, la Commission a déclaré que l'adhésion de l'UE à la Convention pour la protection de la mer Noire contre la pollution (la Convention de Bucarest) est une priorité », mais la Convention de Bucarest n'est ouverte qu'aux Etats riverains conformément à l'art. XXVIII par. 3 où il est indiqué que : « La présente Convention sera ouverte à l'adhésion de tout État non membre de la mer Noire intéressé à atteindre les objectifs de la présente Convention et à contribuer de manière substantielle à la protection et à la préservation de l'environnement marin de la mer Noire, à condition que ledit État ait été invité par toutes les Parties contractantes ».

De plus, la « Communication de la Commission au Conseil et au Parlement européen. La synergie de la mer Noire - Une nouvelle initiative de

[7] Voir Ion Gâlea, Carmen Achimescu, « L'apparence de modernité de la Convention de Belgrade de 1948 relative à la navigation sur le Danube » ; Adriana Almășan, Ioana Vârsta, Cristina Elisabeta Zamșa, *In honorem Flavius Antoniu Baias. Aparenta în drept. The appearance in law. L'apparence en droit*, Ed. Hamangiu, București, 2021.

coopération régionale » /* COM/2007/0160 final[8] a prévu que « La stratégie communautaire pour la protection et la conservation du milieu marin ainsi que la proposition de directive « Stratégie pour le milieu marin » adoptées par la Commission en 2005[9] reconnaissent la nécessité d'aborder les problèmes posés par le milieu marin au niveau régional (…). À cet effet, les États membres seront encouragés à mener des activités dans le cadre de conventions sur les mers régionales, notamment la commission de la mer Noire (…). L'adhésion de la Communauté à la convention sur la protection de la mer Noire contre la pollution est une priorité » .

Vu que pour l'adhésion de l'UE à la Convention il est nécessaire à modifier la Convention, la Bulgarie et la Roumanie ont présenté une proposition à cet égard lors de la réunion ministérielle de 2009. Même si cinq des six États de la mer Noire étaient prêts à soutenir l'amendement proposé à l'époque, celui-ci n'a pas été approuvé; cependant, il a été convenu que des travaux supplémentaires seraient menés sur cet aspect; un groupe de travail ad hoc au sein de la Commission de la mer Noire (CMN), le secrétariat de la convention, s'est réuni deux fois en 2010; en étroite coopération avec la Roumanie, les services de la Commission ont tenté, tout au long de l'année 2010, de promouvoir cette activité afin d'obtenir un texte d'amendement qui serait acceptable pour toutes les parties contractantes ».[9]

« Malheureusement, les résultats des discussions techniques sur l'amendement ont été bien en deçà de nos attentes et de nos efforts ; certains États de la mer Noire, même s'ils ne rejettent pas ouvertement l'adhésion à l'UE, semblent suivre une tactique dilatoire et insister sur des questions institutionnelles qui ont déjà été résolues à d'autres occasions. Ce type de questions institutionnelles ne semble pas être un sujet de préoccupation dans d'autres conventions internationales (par exemple sur la biodiversité et le changement climatique), y compris les conventions sur la protection des mers

[8] At 5 March 2019**,** the EEAS and the European Commission published the third implementation report of the Black Sea Synergy. The Joint Staff Working Document "Black Sea Synergy: review of a regional cooperation initiative – period 2015-2018" is a factual review, underlining results, drawing lessons learned and flagging key aspects, further informing the developments of this initiative. It confirms the practical utility of the Black Sea Synergy initiative, its positive contribution to regional cooperation and its yet untapped potential.

https://www.eeas.europa.eu/eeas/black-sea-synergy_en.

[9]Answer given by Mr Potočnik on behalf of the Commission, 14.3.2011.

https://www.europarl.europa.eu/doceo/document/E-7-2011-000614-ASW_RO.html

autour de l'Europe, auxquelles ces pays sont parties aux côtés de l'UE ».[10]

Dans la doctrine on trouve que la documentation interne de la Commission de la mer Noire montre que la principale préoccupation de la Russie concerne la répartition des droits de vote et des droits de décision entre la Commission européenne et les deux États membres, la Roumanie et la Bulgarie. Les oppositions turque et ukrainienne ont adopté un ton plus diplomatique et ont invoqué le texte actuel de la Convention, qui ne prévoit pas la possibilité pour une organisation d'intégration économique régionale, comme l'UE, d'y devenir partie[11].

Le document « The EU's Black Sea policy: Where do we stand? [12] », elaboré pour le Parlement européen souligne que la Russie s'est fermement opposée à l'adhésion de l'UE à la Convention de Bucarest contre la pollution de la mer Noire. Son opposition a empêché une coopération plus étroite entre la Commission européenne et la Commission de la mer Noire (de la Convention de Bucarest), l'un des piliers logiques pour développer le partenariat environnemental de la synergie de la mer Noire. L'attitude russe à l'égard de l'UE au sein de la Convention de Bucarest/Commission de la mer Noire est également incohérente parce que la Russie a coopéré étroitement au fil des années avec la Commission et avec les États membres de l'UE au sein de l'organisation sœur de la Commission de la mer Noire dans la mer Baltique, à savoir l'intergouvernementale Marine baltique. Commission de Protection de l'Environnement (HELCOM ou Commission d'Helsinki) qui a toujours accueilli favorablement la Commission ».

Dans ce contexte-ci, l'adhésion de l'UE à la Convention de Bucarest a été analysée sous différents points de vue et trois scénarios qui diffèrent en fonction de la position du grand acteur dans la Convention ont été présentés[13]:

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[10] Answer given by Mr Potočnik on behalf of the Commission, 14.3.2011.

https://www.europarl.europa.eu/doceo/document/E-7-2011-000614-ASW_RO.html

[11] Basak Bayramoglu, Corina Haita-Falah, "*With or without the European Union: the Convention for the Protection of the Balck Sea Against Pollution"*, February 2019.

[12] Fernando Garcés de Los Fayos, Directorate-General for External Policies of the Union Policy Department, Brussels, September 2013, p. 12.

https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491519/EXPO-AFET_SP(2013)491519_EN.pdf

[13] Basak Bayramoglu, Corina Haita-Falah, *idem*.

1) « le premier scénario est le scénario du statu quo dans lequel l'UE n'est pas partie à la Convention et n'a donc aucun pouvoir coercitif sur les efforts de réduction des émissions des deux groupes de pays ;
2) le deuxième scénario, que nous appelons le scénario sans blocage (ou sans délégation), est celui dans lequel le grand acteur est partie à la Convention, mais les États membres décident indépendamment sur leurs niveaux de réduction individuels. Dans ce cas, nous disons que l'UE ne forme pas de bloc de décision avec les États membres ou que ces derniers ne délèguent pas leurs décisions de réduction à l'UE.
   En tant que partie à la Convention, l'UE peut effectuer des transferts vers tous les pays côtiers pour les compenser pour avoir entrepris des efforts de réduction négociés.
3) le troisième scénario que nous considérons est le scénario de bloc (ou de délégation). Ce scénario est presque identique au scénario sans blocage, sauf qu'au lieu que le joueur décide de son propre niveau de réduction, il délègue cette décision au grand joueur afin qu'il forme un bloc de décision ».

« Entre 2015 et 2018, l'UE a continué d'exprimer officiellement, par des moyens techniques et diplomatiques, dialogue, son intérêt à devenir partie à la Convention pour la protection de la mer Noire contre la pollution (Convention de Bucarest) et à son organe, la Commission de la mer Noire. Le septième programme d'action pour l'environnement[14] énonce l'engagement de l'UE à adhérer à la mer Noire Commission. L'adhésion à la Convention de Bucarest pourrait amener le statut institutionnel de l'UE à s'aligner sur sa contribution substantielle à la protection des zones marines et côtières de la mer Noire environnement. L'adhésion à l'UE pourrait également constituer une raison pour davantage de soutien aux activités de protection de l'environnement de cette région marine ».[15]

Il convient de noter que la Convention de Bucarest est la seule convention européenne sur les mers régionales à laquelle l'UE n'est pas partie.

[14] Le huitième programme - Le programme d'action général de l'Union pour l'environnement à l'horizon 2030 ne mentionne plus un tel objectif.

https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:32022D0591

[15] Joint Staff Working Document *Black Sea Synergy: review of a regional cooperation initiative - period 2015-2018* Brussels, 5.3.2019, SWD(2019) 100 final

https://www.eeas.europa.eu/sites/default/files/swd_2019_100_f1_joint_staff_working_paper_en_v3_p1_1013788-1.pdf.

3. Conclusions et perspectives

En 2011, le Commissaire pour l'environnement avouait que « La Commission maintient son objectif d'adhésion de l'UE à la Convention de Bucarest et continuera à déployer les efforts appropriés, à tous les niveaux nécessaires, pour atteindre cet objectif. L'adhésion à cette Convention nous permettra non seulement de participer au processus décisionnel d'une manière proportionnelle à notre contribution technique et financière déjà substantielle à la protection de l'environnement dans la région, mais facilitera également le respect par la Bulgarie et la Roumanie de l'acquis de l'UE, ainsi que la proximité de la Turquie, pays candidat, avec elle – un exemple en est la directive-cadre sur la stratégie pour le milieu marin, qui appelle explicitement à la coopération régional ».[16]

Il est bien évident que, dans le droit de l'environnement, « l'UE est partie à de nombreux accords internationaux visant à protéger les espèces et leurs habitats. (…) Il existe en outre diverses organisations environnementales internationales établies aux niveaux mondial, régional, sous régional et bilatéral dont l'UE est partie ».[17] Actuellement, en relation avec la Convention de Bucarest, l'UE est observatrice (représentée par la Commission européenne - CE, DG Environnement) et l'Agence européenne pour l'environnement est partenaire.

Pourtant, nous apprécions que le conflit en Ukraine ait changé la perspective concernant l'adhésion de l'UE à la Convention de Bucarest.

Ainsi, nous estimons qu'une série d'aspects doivent être pris en compte, y compris ceux concernant la participation de la Russie à cette Convention.

De plus, depuis l'année dernière, l'Ukraine est un État candidat à l'adhésion à l'UE et les négociations pour l'application des règles de l'UE dans la législation nationale seront ouvertes. En plus, la Turquie reste officiellement un État candidat à l'adhésion à l'UE, [18] même si les négociations d'adhésion n'avancent pas. La Géorgie a également demandé à devenir membre de l'UE.

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[16]Answer given by Mr Potočnik on behalf of the Commission, 14.3.2011

https://www.europarl.europa.eu/doceo/document/E-7-2011-000614-ASW_RO.html

[17]Answer given by Mr Potočnik on behalf of the Commission, 14.3.2011

https://www.europarl.europa.eu/doceo/document/E-7-2011-000614-ASW_RO.html

[18] Bogdan Aurescu, "*The Role of the European Union in the Wider Black Sea Region"*, pp. 39: The accession of Turkey to the EU will boost its role in the Black Sea region, increase its presence and project its interests better across the wider Black Sea are

https://www.esiweb.org/pdf/esi_turkey_tpq_vol10_no1_Bogdan%20Aurescu.pdf.

Toutes les parties contractantes, à l'exception de la Fédération de Russie, entretiennent désormais des relations solides avec l'UE et accepte de respecter et d'appliquer les règles européennes en matière de politique environnementale.

En outre, on peut noter que, pendant cette période de conflit, la Commission pour la protection de la mer Noire contre la pollution a mené ses activités, avec la participation de représentants de la Fédération de Russie.[19] Mais, à la fois, on se demande si pendant la guerre en Ukraine, la lutte contre la pollution est toujours menée par tous les Etats contractants. La guerre entre deux Parties contractantes ne pollue-t-elle pas la mer Noire ?

Dans la dynamique du contexte international, nous considérons que l'éventuelle adhésion de l'UE à la Convention de Bucarest devrait prendre en compte à la fois la fin et les conséquences de la guerre en Ukraine et les priorités de la nouvelle Commission européenne, qui sera approuvée à la fin de l'année prochaine par le nouveau Parlement européen.

En conclusion, la démarche scientifique peut être développée pour intégrer l'image de la Mer Noire après-guerre et une potentielle nouvelle position de l'Union par rapport à la Convention. Il est bien évident que l'UE est partie à de nombreux accords internationaux dans le domaine de l'environnement, mais l'adhésion à la Convention de Bucarest pourrait, d'une part, resurgir aussi des questions sur l'intérêt stratégique et politique dans cette région qui constitue la frontière externe de l'Union avec deux pays dont l'appartenance aux valeurs de l'Europe est souvent remise en cause et, d'autre part, ce processus garantirait aux citoyens des Etats Membres la sécurité et le bien-être comme objectifs de l'Union.

Alors, dans ce cas, serait-il utile que l'UE adhère à la Convention ? Question tout à fait ouverte à de futures recherches.

[19] http://www.blacksea-commission.org, dernière visite du site internet, le 04/10/2023.

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Contribuţia doctorandului şi masterandului / Ph.D. and LL.M. Candidate's Contribution

Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute

Part III: The Effects of Immunities on the Obligation to Extradite or Prosecute

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Abstract: *This article concludes a trilogy*[1] *examining the interaction between the immunities of state officials and the obligation to extradite or prosecute. It focuses on the manner in which personal and functional immunities impact this obligation. Through doctrinal and comparative legal research, it addresses key questions, such as whether aut dedere aut judicare is a procedural bar or a substantial defence, and whether immunities apply in respect to international crimes. Additionally, the study delves into immunity waiver, suggesting implicit waivers via treaties as a solution to reconcile the conflict between the obligation to extradite or prosecute and the obligation to observe immunities.*

Key-words: *Obligation to extradite or prosecute, Immunities, Waiver, International Crimes*

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The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

[1] Before proceeding with this article, we recommend reading the first two articles of the trilogy, where the principle of *aut dedere aut judicare* and the obligations to respect immunities are being studied. See Part I: The Principle of aut Dedere aut Judicare, *Romanian Journal of International Law*, No. 27/2022, p. 39; and Part II: Immunities and the Existence of a Conflict of Norms, *Romanian Journal of International Law*, No. 28/2022, p. 57.

1. Introduction

It is first important first to differentiate between immunities that have their basis in international law, and those arising from domestic legislation. Most States offer certain types of immunities to their own senior officials, particularly to ensure that they are able to perform their functions while being protected from politically motivated prosecutions.[2] These immunities, however, stem from constitutional or domestic legislative acts, and not from any obligation under international law. It is a purely internal matter over which any State has the freedom to decide as it pleases, provided that it does not come into conflict with international obligations. Should such a conflict arise, the international obligation would prevail, since a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[3] Accordingly, the international obligation to extradite or prosecute would prevail over domestic immunities.

The scope of this study, however, is limited to 'international' immunities, for their interaction with the Obligation to Extradite or Prosecute ('OEP') is more controversial. As indicated in the previous article of the trilogy, such immunities benefit only officials who are foreign to the state where the question of exercising jurisdiction arises. Thus, when discussing the interplay between the OEP and immunities, there will always be an element of extraneity: a foreign official who would normally benefit from immunities in the State where prosecution is being considered. The question then rises as to which of the two should prevail, the *aut dedere aut judicare* obligation or the obligation to observe immunities.

2. Effects of Personal Immunity on the OEP

With regard to personal immunities, their effect on the OEP is relatively straightforward, because it is widely accepted that immunity *ratione personae* is absolute. In the *Arrest Warrant case*, the Court concluded that there are no exceptions to the rule granting personal immunity from criminal jurisdiction, even in cases of grave international crimes such as war crimes and crimes against humanity.[4] The Court also did not distinguish between prosecution and extradition. It referred to immunity as protecting the individual concerned 'against any act of authority of another State which would hinder him or her

[2] See, e.g., Art. 72 of the Romanian Constitution.

[3] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 27.

[4] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Merits, Judgement of 14 February 2002, [2002] ICJ Rep. 3, para. 58.

in the performance of his or her duties'.[5] As such, in the conflict of norms between the OEP and the obligation to observe the personal immunity of an individual, the latter would prevail.

Having discussed the elements and components of the OEP in the first article, one could be tempted to conclude that personal immunity somehow precludes the establishment of jurisdiction by the state over the foreign official. Nevertheless, that is not the case. The Court clarified in the same case that

> The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.[6]

The Court then addresses the specific situation of OEP, finding that

> [A]lthough various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law.[7]

This paragraph implies that the jurisdiction of the State may extend over the individual in question, yet the immunity essentially renders the jurisdiction ineffective. This is important to note, since it means that the OEP component consisting of the duty to establish jurisdiction is actually fulfilled. Only afterwards do immunities intervene and effectively preclude the exercise of jurisdiction. However, even then, one could further distinguish which types of jurisdiction are affected by this process. The legislative jurisdiction remains unaltered, the State still being able to prescribe a certain conduct through domestic laws. The continued existence of criminal responsibility[8] is proof of this, since responsibility could not exist if the state was unable to extend its domestic laws to impose criminal responsibility for the specific conduct. Only the adjudicative and executive jurisdictions are affected by immunities.

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[5] Ibid, para. 54.

[6] Ibid, para. 59.

[7] Ibid.

[8] Ibid, para. 60: 'The immunity from jurisdiction […] does not mean that they enjoy impunity in respect of any crimes they might have committed. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. […] Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.

Consequently, the effect of immunity *ratione personae* is that it makes prosecution and extradition, the two elements of the obligation *aut dedere aut judicare*, impossible to perform. The scope of the State's jurisdiction remains unaffected, but its exercise, at least relating to the adjudicatory and executive powers, is obstructed. Personal immunity is therefore a circumstance that always excludes the operation of the obligation to extradite or prosecute.

3. Effects of Functional Immunity on the OEP

The mechanism through which immunities interact with the elements and components of the OEP has been discussed in the previous section. However, the effects of functional immunity differ, and depending on the doctrine one chooses to follow, the conclusions can be quite divergent.

3.1. Procedural bar or substantive defence?

As already discussed,[9] immunities are regarded as a procedural bar to jurisdiction before foreign courts. Nevertheless, some authors have made a case that functional immunities operate differently, pertaining to substantive law.[10] They argue that immunities *ratione materiae* actually entail a 'mechanism that shifts the responsibility from the official to the State',[11] because the act executed by the official is attributable to the State rather than the individual. Although not expressly declaring that it represents an issue of substantive law, this view seems to also be confirmed by the ICTY Appeals Chamber in the *Blaškić* case: 'their official action can only be attributed to the State',[12] which is why '[t]hey cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State'.[13]

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[9] See Filip Andrei Lariu, "Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute. Part II: Immunities and the Existence of a Conflict of Norms", *Romanian Journal of International Law,* No. 28/2022, p. 57.

[10] Antonio Cassese, *International Law*, Second edition, OUP, Oxford, 2005, at 450; Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes - Some Comments on the Congo v. Belgium Case", *EJIL*, Vol. 13, 2002, p. 863; Dapo Akande, Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", *EJIL*, Vol. 21, 2010, p. 826; Dapo Akande, "International Law Immunities and the International Criminal Court", *AJIL*, Vol. 98, 2004, p. 413.

[11] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, Brill Nijhoff, Leiden, 2015, p. 23.

[12] Bogdan Aurescu, Ion Galea, Lazar Elena, Ioana Oltean, *Scurtă culegere de jurisprudență*, Hamangiu, 2018, pp. 168-170.

[13] *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR 108 bis, Ap. Ch, 29 October 1997, para. 38. See also *Prosecutor v. Radislav Krstic*, Decision of the Appeals

Proponents of this approach also consider that the earliest stage in which the issue of functional immunity can be assessed is during the merits of the case, after the court has confirmed the official nature and the wrongfulness of the act.

> Criminal proceedings cannot be dismissed *in limine litis* simply on the basis of the person's status. Investigation into the merits of the case is required in order to determine whether the State official committed the alleged wrongful act in an official capacity on behalf of the State. Only then, will the accused benefit from immunity *ratione materiae*, thus diverting the responsibility for the wrongful conduct to the State.[14]

This stands in stark contrast with the currently accepted view in international law, which asserts that issues of immunities need to be addressed at the outset of the proceedings. The ICJ maintained that domestic courts have the duty to rule on immunities from jurisdiction as a 'preliminary issue […] which must be expeditiously decided *in limine litis*'.[15]

3.2. Exception of international crimes

First, it is important to note that, unlike with personal immunities, there is no general consensus on whether immunities *ratione materiae* operate when international crimes have been committed. Recent State practice seems to go in the direction of favouring the fight against impunity to the detriment of functional immunities. As such, State courts have repeatedly ruled that there is no immunity *ratione materiae* for persons who have committed international crimes. In a most recent example, the German Supreme Court maintained that a Syrian officer does not benefit from functional immunity when it comes to prosecution for war crimes.[16]

State practice confirming international crimes as an exception from functional immunity goes even farther back in time. In this regard, the oldest case before a State court was the *Eichmann case*, where the Israeli Supreme Court dismissed the defence of immunity, arguing that 'there is no basis for the

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Chamber on Application for Subpoenas, Case No. IT-98-33-A, Ap. Ch, 1 July 2003, para. 26.

[14] Pedretti, cit. supra, p. 24.

[15] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep 62, p. 88, para. 63; see also Roman Kolodkin, Third report on immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/646 (2011), at 227.

[16] Supreme Court of Germany (Bundesgerichtshof), Judgement of 28 January 2021, Case no. 3 StR 564/19; Tom Syring, "Introductory Note to Judgment on Foreign Soldiers' Immunity for War Crimes Committed Abroad", *International Legal Materials*, 2021.

doctrine when the matter pertains to acts prohibited by the law of nations' and that 'those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission'.[17] While acknowledging the personal immunity of the Israeli Prime Minister Sharon, Belgium also maintained that immunity does not block the prosecution of General Yaron.[18] In their communications to the ILC, various governments supported the same view that functional immunities do not apply in cases of international crimes. The Dutch Government stated that 'the plea of immunity *ratione materiae* was unavailable for international crimes'.[19] The Italian Government had a similar position.[20] Spain went even further, providing in its domestic legislation that 'the crimes of genocide, enforced disappearance, war crimes and crimes against humanity shall be excluded from that immunity'.[21]

Nevertheless, State practice on this issue has not been uniform, including conflicting examples such as the refusal of Germany to prosecute former Chinese President Jiang Zemin for several international crimes.[22] In fact, even some of the aforementioned States applied a different standard when it came to officials from allied states.[23] Furthermore, in their communication with the

[17] Supreme Court of Israel, *Attorney-General of Israel v. Adolf Eichmann*, Judgement of 11 December 1961, Case No. 40/61, 36 ILR 277, pp. 309-10.

[18] Supreme Court of Belgium, *HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*, Judgement of 12 February 2003, Case No.P.02.1139.F/2.

[19] UNGA Sixth Committee, Summary Record of 29th Meeting, UN Doc. A/C.6/71/SR.29 (2016), para. 7.

[20] UNGA Sixth Committee, Summary Record of 22nd Meeting, UN Doc. A/C.6/67/SR.22 (2012), paras. 82-3.

[21] Spain, Organic Act 16/2015, Official Gazette No. 258 of 28 October 2015, Art. 23.

[22] Prosecutor General at the Federal Supreme Court of Germany, *Jiang Zemin case*, Decision of 24 June 2009, Case No. 3 ARP 654/03-2.

[23] E.g., U.S. officials were not prosecuted by French and Swiss authorities because they were deemed to benefit from functional immunity. *See* Letter from the Public Prosecutor to the Paris Court of Appeal, Case of Donald Rumsfeld, 27 February 2008.

ILC, China,[24] the United States,[25] Russia,[26] Sudan,[27] Sri Lanka,[28] and Israel[29] expressed similar views that functional immunities exist and continue to operate even in cases of international crimes.

The lack of a consensus around whether functional immunities exist when it comes to international crimes has led Special Rapporteur Kolodkin to conclude that 'it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm'.[30] As a matter of fact, most ILC members did not view State practice as consistent enough to point to a new customary law exception in this regard.[31]

On this issue, the legal literature has also stepped in, proposing two main views. On the one hand, a more activist view which tries to reduce impunity as much as possible would contend that international crimes can never be considered official acts because it is not within the functions of the state to commit them.[32] The crimes would therefore constitute private acts which are not covered by functional immunity. Another approach that could justify this view is to consider that the *jus cogens* prohibition of the crimes somehow precludes the application of functional immunity. Alternatively, it has also

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[24] UNGA Sixth Committee, Summary Record of 23rd Meeting, UN Doc. A/C.6/72/SR.23 (2017), para. 58.

[25] UNGA Sixth Committee, Summary Record of 21st Meeting, UN Doc. A/C.6/72/SR.21 (2017), paras. 20-6.

[26] UNGA Sixth Committee, Summary Record of 27th Meeting, UN Doc. A/C.6/71/SR.27 (2016), para. 66.

[27] UNGA Sixth Committee, Summary Record of 28th Meeting, UN Doc. A/C.6/71/SR.28 (2016), paras. 3-6.

[28] UNGA Sixth Committee, Summary Record of 30th Meeting, UN Doc. A/C.6/71/SR.30 (2016), para. 10.

[29] UNGA Sixth Committee, Summary Record of 24th Meeting, UN Doc. A/C.6/72/SR.24 (2017), paras. 109-13.

[30] *See* Roman Kolodkin, Second report on immunity of State officials from foreign criminal jurisdiction, cit. supra, para. 90.

[31] Rosanne van Alebeek, "The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?" *AJIL*, Vol. 112, 2018.

[32] ILC Immunity of State officials from foreign criminal jurisdiction - Memorandum by the Secretariat, UN. Doc. A/CN.4/596 (2008), at 191; Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", *AJPIL*, Vol. 46, 1994, pp. 227-8.

been argued that 'the right of victims to judicial redress was so fundamental that such immunity had to be set aside'.[33] All these views, although in the minority, can be found in both domestic[34] and international cases.[35]

The theories described above, however, are not accepted by the majority of scholars in the field. Many maintain that functional immunity is absolute, just like personal immunity, since it has developed as a customary rule without any exceptions.[36] The only instance which this approach could interpret as an exception, also called 'the territorial tort exception',[37] is the instance where:

> criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime.[38]

There are indeed strong arguments to support the premise for the near-absolute nature of the immunity *ratione materiae*.

First of all, while international crimes can certainly be committed as private acts, it should be noted that they are in most cases committed in an official capacity.[39] The persons responsible for their perpetration use the State

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[33] Pierre d'Argent, "Immunity of State Officials and the Obligation to Prosecute", in Anne Peters et al (eds.), *Immunities in the Age of Global Constitutionalism*, Brill Nijhoff, Leiden, 2014, p. 251; Riccardo Mazzeschi, "The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories", in Pia Acconci et al (eds.), *International Law and the Protection of Humanity*, 2017, p. 530.

[34] Swiss Federal Criminal Court, *A. v. Office of the Attorney General*, Judgement of 25 July 2012, Case no. BB.2011.140.

[35] *Prosecutor v. Blaskic*, cit. supra, para. 41.

[36] d'Argent, cit. supra, p. 251. For the opposite view, see Micaela Frulli, "Some Reflections on the Functional Immunity of State Officials", *The Italian Yearbook of International Law Online*, Vol. 19, 2009.

[37] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 237.

[38] Roman Kolodkin, cit. supra, para. 94 (p); This view seems to be supported by extensive state practice. See *Khurts Bat v. The Investigating Judge of the German Federal Court*, cit. supra, paras. 63-101 and per Judge Foskett, paras. 104-5; Federal Court of Justice of Germany, *The Staschynskij case*, Judgement of 9 October 1962, Case no. 9 StE 4/62; UK Divisional Court, *R v. Lambeth Justices, ex parte Yusufu*, Judgement of 8 February 1985; High Court of Justiciary of Scotland, *Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah*, Judgement of 10 October 2000, Case No. 1475/99.

[39] See ILC Immunity of State officials from foreign criminal jurisdiction - Memorandum by the Secretariat, cit. supra, para. 192; Josette Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant case: Some Critical Remarks', *LJIL*, Vol. 16, 2003, p.

institutions, such as the military or police, as instruments to commit the acts. Moreover, sometimes it is the law itself that requires a crime to be committed by an official. Such is the case with the Convention Against Torture, which stipulates that 'the term "torture" means any act […] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[40]

When the conditions are fulfilled, it is crucial to consider international crimes as official acts. This is because it also has implications on the responsibility of the State. If the crimes are committed in private capacity, then the acts will never be attributable to States. 'The conduct of any State organ shall be considered an act of that State […] whether the organ exercises legislative, executive, judicial or any other functions'.[41] Should one admit that the official has not committed the crime in an official capacity, and therefore not exercising State functions, it would be impossible to attribute the conduct to the State and ultimately hold it responsible.[42]

Another argument that dismisses the 'activist approach' and indirectly reinforces the near-absolute nature of functional immunity is that of a lack of conflict of norms between *jus cogens* rules and immunities. The object of the norms is different, the former pertaining to substantive law, as a prohibition

262; *Arrest Warrant of 1 April 2000*, cit. supra, p. 162, para. 36 (Judge Van den Wyngaert, Dissenting opinion): '[The Court] could and indeed should have added that war crimes and crimes against humanity can never fall into [the] category [of private acts]. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than 'official' acts.'.

[40] 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, Art. 1; It is important to note that not all instances of torture require it to be committed by an official. The *ad hoc* international criminal tribunals have repeatedly held that when torture is committed as a war crime, the perpetrator does not need to act in an official capacity. See *Prosecutor v. Laurent Semanza*, Judgement in the Appeals Chamber, Case No. ICTR-97-20-A, A. Ch, 20 May 2005, para. 248*;* Christoph Burchard, "Torture in the Jurisprudence of the Ad Hoc Tribunals", *JICJ,* Vol. 6, 2008, p. 171.

[41] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), Art. 4.

[42] For an argument which contends that the crimes are official acts, but *ultra vires,* see Micaela Frulli, "On the consequence of customary rule granting functional immunity to state officials and its exceptions: back to square one", *Duke Journal of Comparative and International Law*, Vol. 26, 2016, p. 498.

to commit an act, while the latter are purely procedural, as obstacles to the exercise of jurisdiction.[43]

Last but not least, there is no rule in customary international law that the very commission of the wrongful act entails the implicit waiver of immunities,[44] nor is the right of victims to adjudication absolute and able to remove immunities.[45]

It would appear that immunity *ratione materiae*, just like immunity *ratione personae*, has the ability to procedurally block the exercise of jurisdiction, thus leaving the obligation to extradite or prosecute inoperable. Even though there is increasing state practice to show an exception in instances where international crimes are committed, such practice is not yet widespread and consistent enough to crystallise the exception into customary law.[46] It is therefore necessary to look towards other theories that would render functional immunity inoperable when it comes to international crimes and, implicitly, the obligation to extradite or prosecute. Such a theory will be discussed in the following section.

4. Waiver of Immunities

Since they are not peremptory norms, derogations from immunities are possible, in the form of waivers. Both personal and functional immunities can be waived by the State on whose behalf the official is acting or has acted in

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99, p. 140, para. 93; See also Leonard Caplan, "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory", *AJIL*, Vol. 97, 2003.

[44] d'Argent, cit. supra, p. 252.

[45] A case that confirms this, albeit with regards to the immunities of international organisations, is the *Stichting Mothers of Srebrenica et al. v. United Nations* case before the Dutch Supreme Court. The Court ruled that the White & Kennedy Logic, a theory developed by the ECtHR which rejects claims of immunities where there is no proper legal remedy for the victim, does not apply. The case was also inadmissible before the ECtHR. Indeed, the Logic used in the 1999 *Waite & Kennedy v. Germany* case (para. 68), although invoked numerous times before the ECtHR, has never been successful in subsequent cases, possibly indicating that even the ECtHR has renounced its theory. See Henry Schermers, Niels Blokker, *International Institutional Law*, Brill Nijhoff, Leiden, 2018, pp. 408, 1081.

[46] Rosanne Alebeek, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts", in Tom Ruys *et al.* (Eds.), *The Cambridge Handbook of Immunities and International Law*, CUP, Cambridge, 2019, p. 517.

the past.[47] The waiver is executed by the competent authorities or even by the individual[48] if such matters are within his official functions.[49] However, because immunities are a prerogative of the State and not of the individual, even in cases where the person can waive their own immunity, they do so not in its individual capacity, but in its capacity of State organ. It is important to note, though, that such a waiver does not imply the renunciation by the State of its sovereign immunity related to *acta iure imperii*.[50]

Indeed, the possibility of waiver, especially of diplomatic immunity, has been well crystalized in customary international law, being also confirmed in treaties.[51] Of special importance, however, is the practice of States regarding the waiver of immunities for officials who have committed international crimes. In this regard, it is important to distinguish between a lack of immunity due to the operation of the waiver, and the actual 'exception of international crimes', discussed in the previous section. Examples where States considered that they had to waive the immunity of the official accused of international crimes include cases like Ferdinand Marcos,[52] Hissène Habré,[53] Prosper Avril,[54] and Sánchez de Lozada.[55] In all these instances, the

[47] There is a case to be made that the UN Security Council also has the power to remove immunities. Considering the creation of the ad hoc international criminal tribunals, and their jurisdiction over officials who have committed international crimes, that certainly seems to be true. However, since the OEP is an obligation on states and does not concern the Security Council, the discussion on the powers of the Security Council in this area will not be further addressed. They are not relevant for the study of the interplay between the OEP and immunities. For an article that addresses these issues in depth, see Sophie Papillon, "Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?", ICLR, Vol. 10, 2010, p. 275.

[48] Hernandez, cit. supra, p. 233.

[49] This may usually happen with high-ranking officials such as heads of states within whose powers it is to waive immunities.

[50] d'Argent, cit. supra, p. 247.

[51] *Arrest Warrant case*, cit. supra, para. 62; Ian Brownlie, *Principles of Public International Law*, OUP, Oxford, 2008, p. 340; 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95, Art. 32.

[52] Former Pesident of the Philippines, see Federal Court of Switzerland, *Ferdinand et Imelda Marcos v. Office fédéral de la police*, Judgement of 2 November 1989, Case no. BGE 115 Ib?, p. 496.

[53] Letter of the Chadian Minister of Justice on the Immunity of Hissène Habré, 7 Oct. 2002, 329/MJ/CAB/2002.

[54] US District Court, *Paul v. Avril*, Judgement of 14 January 1993, 812 F. Supp. 207.

[55] US Court of Appeals, *Mamani v. Berzain*, Judgement of 29 August 2011, 654 F. 3d 1148.

wording used by States in their communications for the purpose of waiving immunities could give rise to some confusion. Despite being at times vague, referring generally to any immunities that the individuals 'may enjoy',[56] or sometimes using ambiguous terms that could be interpreted as meaning that the individuals do not have immunity at all,[57] the States end up clarifying that the individuals do indeed benefit from immunities. Besides, if a State deems it necessary to discuss the issue of immunity, there should be a presumption that the person concerned would normally have been entitled to immunity, or at the very least the State were convinced by it.[58] It cannot be presumed that the State just wanted to 'clarify' that there is no immunity.

4.1. Implicit waiver through treaties

Having discussed the possibility of States waiving the immunity of their officials, it is now essential to consider the form of such waiver. The most common and clear manner is by States sending a diplomatic note through which they express their intention to waive the immunities of the official in question. However, this is not the only option. The waiver can be also implied from the conduct of the State, at least in regard to functional immunities. Special Rapporteur Kolodkin maintained that there are different procedural rules for invoking functional and personal immunities respectively. For the latter, the State exercising jurisdiction must consider itself the question of immunity, the official's state bearing no duty to do anything in this regard. For immunity *ratione materiae*, on the other hand, it is the official's State who is responsible for invoking it. 'The State exercising jurisdiction is not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.'[59] The same report contends that in the case of immunity *ratione personae* vis-à-vis heads of States, heads of government, or ministers of foreign affairs, waiver must always be express.[60]

Seeing that the implicit waiver of functional immunities is permitted, there is no reason why such a waiver cannot be included in treaties. As stated above, immunities are not peremptory norms. Consequently, states can freely dispose of them through international agreements. Furthermore, there is nothing in international law that would suggest that waiver must occur only

[56] US Court of Appeals, *In re Doe*, Judgement of 19 October 1988, 860 F. 2d 40.

[57] Pedretti, cit. supra, p. 84.

[58] Cassese (2005), cit. supra, p. 119.

[59] Roman Kolodkin, Third report on immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/646 (2011), para. 61(e)-(f).

[60] Ibid., para. 61(l).

retrospectively: a State may agree to lift an official's immunity before another state even decides to exercise its jurisdiction over the individual in question. Indeed, looking on the UN Convention on Jurisdictional Immunities of States and Their Property, it is clear that treaties are an accepted manner of removing such immunities.[61] Whether or not such a treaty waiver can be implicit, authors have argued that:

> When States enter into an international agreement creating or recognizing an international crime and imposing the obligation to punish it, this is logically incompatible with the upholding of immunity where the accused is a foreign State official. As such, the necessary implication is that these States have opted to waive in advance any State immunity presumptively attaching to the impugned conduct, insofar as it is inconsistent with the agreement. In short, the act of establishing universal and mandatory criminal jurisdiction in respect of potentially official conduct constitutes consent in advance to the exercise of that jurisdiction by foreign municipal courts, regardless of the doctrine of State immunity.[62]

The contradictory character of this matter is even more obvious when the nature of the crime itself requires that it be committed by an official, as is the case with torture. Precisely that was the object of the *Pinochet case*.[63] Although it was accepted that the accused would normally benefit from functional immunity even in respect to international crimes, the Convention against Torture was interpreted in such a way as to preclude the applicability of immunities.

Lord Hutton rejected the argument that the Convention was designed to give one state jurisdiction to prosecute only if the other state decided to waive the immunity: 'I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present

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[61] 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/49, Art. 7(1) reads: 'A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; (c) or by a declaration before the court or by a written communication in a specific proceeding. Another example, albeit of a more explicit waiver of immunity, is contained in Art. 27 of the Rome Statue of the International Criminal Court. '.

[62] Roger O'Keefe, "The European Convention on State Immunity and International Crimes", *CYELS*, Vol. 2, 1999, p. 513.

[63] UK House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others*, Decision of 24 March 1999.

in another state'.[64] Lord Millet, using a similar approach, affirmed that Chile must be taken 'to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture'.[65] Even though there was no general consensus on how exactly the immunity has been eliminated, most Judges accepted that the Accused did not benefit from immunity due to the operation of the Convention against Torture.

4.2. Effects of implicit waiver on the OEP

Having established how waivers function, and particularly the various forms in which they may be exercised, we will now look at how such waivers interact with the obligation to extradite or prosecute. Of special importance for our discussion is the implicit waiver through a treaty, as discussed in the previous subsection. It is contradictory to, on the one hand, impose an obligation prosecute, and, at the same time, confer immunity from criminal jurisdiction to the perpetrator. To solve this apparent paradox, one could use the theory of implied waiver through the prism of rules that help solve conflicts of norms.

Since both treaties and custom are 'equally capable of generating norms of comparable weight, and overlap and coexist with one another without any hierarchy',[66] other rules are necessary to solve a potential conflict of norms. The most useful in this regard are two guiding principles identified by the Latin maxims of *lex posteriori derogat priori* ('more recent law prevails over an inconsistent earlier law') and *lex specialis derogat legii generali* ('specific rules prevail over rules of general application').

The former establishes the rule that in the case of a conflict or norms, the most recent one will have priority over the conflicting older norms. Usually, it is the treaty provision that temporally succeeds the customary rule, especially when they are created for the specific purpose of codifying or replacing existing custom.[67] Nevertheless, this is not always the case. More recently formed custom may just as well replace older treaties. In our concrete example, immunities belong to the sphere of customary law, while the OEP

[64] Ibid., p. 215.

[65] Ibid., p. 231.

[66] Hernandez, cit. supra, p. 34.

[67] Richard Baxter, "Multilateral Treaties as Evidence of Customary International Law", *BYIL*, Vol. 41, 1966, p. 275.

is a treaty obligation.[68] While the two have the same value in the hierarchy of norms, there is no doubt that the OEP is more recent, even when considering the earliest instruments where it was first included, such as the Geneva Conventions or the Genocide Convention. Therefore, in a conflict between the obligation to observe immunities and the obligation to extradite or prosecute, the latter would prevail if one were to invoke the principle of *lex posteriori*.

As regards the principle of *lex specialis,* it has been repeatedly affirmed that treaty norms, when compared to customary law, represent special law.[69] In the words of Hernandez, 'should an inconsistency arise, it is to be presumed that parties to a treaty were aware of the existing customary rule and have decided to exclude its application'.[70] Regarding the interplay of immunities and the OEP, the latter could be seen as *lex specialis.* The customary law of immunities represents the *lex generalis*, but the States intended to create a special regime with the inclusion of OEP clauses in treaties. Of course, it could certainly be argued that immunities are actually the exception from the general rule that is prosecution. While the default is that the perpetrator must be prosecuted, immunities, acting as an obstacle, impede the exercise of jurisdiction. However, even though they can be seen in this sense as an exception, immunities cannot be considered *lex specialis* and the OEP *lex generalis*. This is because immunities are not limited to international crimes, but rather to all (official) acts.[71] The OEP, on the other hand, is a special regime created specifically for certain international crimes. As such, one could say that the OEP institutes an exception to the exception, thereby returning to the general rule. In any case, when it comes to the crimes that imply the OEP, immunities represent *lex generalis* and the OEP *lex specialis.* In a conflict of norms, the obligation *aut dedere aut judicare* would therefore prevail. This argument is particularly relevant when it comes immunity

[68] Because the customary nature of the OEP is not yet settled, we will treat it purely as a treaty norm.

[69] *Gabcikovo-Nagymaros Project (HungarylSlovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Rep. 7, p. 76, para. 132; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, p. 137.

[70] Hernandez, cit. supra, p. 34; See also *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Merits, Judgment of 13 July 2009, [2009] ICJ Rep. 213, p. 233, para. 36.

[71] Depending on the type of immunities in question. See the previous article in the trilogy.

ratione materiae, where some exceptions from the absolute character of the immunities may be accepted.

Nevertheless, certain conditions need to be fulfilled. First, there must be an international obligation to extradite or prosecute. The *jus cogens* prohibition of a crime, and the *possibility* of prosecution on the basis of universal jurisdiction are not enough to exclude immunity, as demonstrated by all the discussed cases. The State in question must be bound by a treaty provision to extend and exercise its criminal jurisdiction over the accused.

Secondly, the OEP must exist between both the State exercising the jurisdiction, and the state of the accused. This is achieved when both States are parties to the treaty which contains the obligation *aut dedere aut judicare*.

> The argument is that the state cannot claim the benefit of such immunity nor complain about the prosecution abroad of its official because it has consented that the prosecuting state has an obligation to do so. [72]

On the other hand, no implicit waiver can be inferred if one of the States in question is not party to a treaty that contains the OEP. The basis for waiver is the consent of the State. If a State did not even agree to being bound by the obligation to extradite or prosecute, then the foundation for presuming the consent to waive the functional immunity is entirely absent.

In conclusion, both personal and functional immunities possess certain particularities that influence the effects they have on the obligation to extradite or prosecute. Immunity *ratione personae* is widely seen as absolute, allowing for no exceptions apart from where the State of the official expressly waives it. Immunity *ratione materiae*, on the other hand, although traditionally also viewed as near-absolute, does seem to allow for some exceptions. By using the theory of implied waiver, OEP provisions in treaties can be interpreted as representing the prospective consent of States to the exercise of jurisdiction by foreign courts over their officials accused of international crimes.

[72] d'Argent, cit. supra, p. 254.

5. Conclusions

The interplay between immunities and the obligation to extradite or prosecute is an intricate matter with most of the issues still disputed. Nevertheless, upon a close examination of the OEP and the obligation to observe immunities, several conclusions can be drawn.

First, there seems indeed to be a conflict of norms between the OEP and the obligation to observe immunities. A state cannot fulfil both of them simultaneously in relation to the same person. While some authors have tried to reconcile them by limiting the scope of the OEP, such arguments prove to be lacking.

Having established that there is a conflict between the object of the OEP and that of immunities, one must then turn to rules that decide which of the two would prevail over the other. On the one hand, the absolute character of personal immunities remains uncontested. While immunity *ratione personae* does not affect the obligation to establish jurisdiction, it does nevertheless obstruct its exercise, and implicitly, the two constitutive elements of the OEP: prosecution and extradition.

On the other hand, it is becoming increasingly accepted that functional immunity is not absolute. While state practice is not yet uniform enough to point to a complete lack of functional immunity for international crimes, there are nevertheless other grounds for excluding it. One is provided by the theory of implied waiver through treaty provision. The argument goes that States have prospectively waived the immunity of their officials when they have agreed to be bound by the obligation to extradite or prosecute. Since it would be contradictory to demand the prosecution of a person and at the same time maintain that the person in question has immunity from prosecution, it must be considered that states wanted to create special rules to derogate from the general regime of immunities. While the general rule is that functional immunities impede the exercise of jurisdiction, when it comes to certain crimes covered by the OEP, immunity *ratione materiae* is to be considered waived through the operation of the implied consent of the states.

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Tide of Destiny: The Forthcoming Advisory Opinion of the International Court of Justice and its Potential Impact on the Future of Small Island States

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Abstract: *This article will briefly analyze the recent developments regarding the request made by the United Nations General Assembly for an Advisory Opinion from the International Court of Justice on the 29th of March 2023, as well as succinctly examine the legal challenges posed by sea-level rise and climate change affecting small island States more broadly. The questions we will explore in this article are: What are States' obligations de lege lata regarding their actions leading to a global rise in sea levels due to their effects on climate change? What are the potential implications of the upcoming ICJ advisory opinion? What are the consequences of partial or complete territorial loss caused by climate change for States?*

Key-words: *Advisory Opinion, Climate Change, Jus Cogens, Statehood, Sea-level rise.*

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1. Introduction

The summer of 2023 was the hottest three-month period on record, resulting in unprecedented sea surface temperatures.[1] Amidst this critical challenge, UN Secretary-General António Guterres warned that "*The era of global warming has ended, the era of global boiling has arrived.*"[2] Climate change has now become a threat to the very existence of the so-called Small Island Developing States (SIDS)[3] as some are predicted to be fully submerged underwater in less than 50 years.[4] As such, there is a real possibility the international community will have to deal with this disturbing reality within our lifetime.

In an attempt to anticipate and counteract the devastating effects of climate change, some small island States are actively fighting for recognition on the international scene and are seeking remedies via diplomatic, political, as well as legal avenues. On the 29th of March 2023, a significant milestone was reached as the United Nations General Assembly (UNGA) passed Resolution A/RES/77/276, formally asking the International Court of Justice (ICJ) to provide an advisory opinion regarding the obligations of States under international law concerning climate change.[5]

The Republic of Vanuatu spearheaded this initiative and managed to lead a global coalition of 132 co-sponsoring States in the adoption of the Resolution (Romania was part of the core group of 18 nations that drafted the questions for the ICJ). As Vanuatu stated on their purpose-built website for promoting the initiative,[6] while all principal organs of the United Nations took a stance in this respect, the ICJ has not yet clarified the implications of climate change under international law. The adoption of the Resolution is the most recent development in a series of attempts to clarify state responsibility under

[1]https://public.wmo.int/en/media/press-release/earth-had-hottest-three-month-period-record-unprecedented-sea-surface

[2]https://www.theguardian.com/science/2023/jul/27/scientists-july-world-hottest-month-record-climate-temperatures#:~:text=Karsten%20Haustein%20at%20Leipzig%20University,it%20was%20over%2C%20he%20said.

[3] https://www.un.org/ohrlls/content/about-small-island-developing-states.

[4] https://www.businessinsider.com/these-island-nations-could-be-underwater-in-as-little-as-fifty-years-2015-12.

[5]https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf.

[6] https://www.vanuatuicj.com/why-icj.

international law for the damaging effects of anthropogenic climate change. Previously, the Commission of Small Island States on Climate Change and International Law submitted a request to the International Tribunal for the Law of the Sea in December 2022,[7] and Chile and Colombia promoted a joint request for an advisory opinion from the Inter-American Court of Human Rights in January 2023[8] on similar issues.

2. The legal landscape regarding State responsibility in relation to environmental obligations and the potential implications of the ICJ Advisory Opinion

It remains to be seen whether the ICJ will find that international law today can adequately address all questions raised in the request for the Advisory Opinion. However, without anticipating the Court's findings, we will attempt to outline the legal landscape that surrounds the issue of State responsibility regarding climate change, and more specifically, we will try to discover if small island States disproportionately affected by fast sea-level rise can obtain legal compensation from large greenhouse gas (GHG) emitters.

2.1. Legal Landscape

There are several international law principles that shape the notion of State responsibility in relation to environmental obligation *de lege lata*. The Trail Smelter arbitration[9] introduced 2 important principles, namely the "*no harm*" principle which binds States to prevent, reduce and control the risk of environmental harm to other States and the "*poluter pays*" principle.[10] The *"no harm"* principle was also enshrined later in Principle 21 of the Stockholm Declaration,[11] and in Principle 2 of the Rio Declaration.[12] Moreover, the ICJ stated that the obligation to ensure that activities within their jurisdiction or

[7]https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

[8] https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

[9] *Trail smelter case* (United States v Canada), 16 April 1938 and 11 March 1941, Vol III, 1905–1982.

[10] Malgosia Fitzmaurice & Agnes Viktoria Rydberg (2023). *Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice*?, Yearbook of International Disaster Law Online, 4(1), pp. 281-305.

[11] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment (1972) UN Doc A/CONF. 48/14, at 2 and Corr. 1.

[12] Rio Declaration on Environment and Development, 1992, UN Doc A/CONF.151/26 (vol. I).

control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction is a rule of customary international law in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*.[13] In the same advisory opinion[14], the ICJ affirmed that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[15]

Furthermore, in the *Gabčíkovo-Nagymaros* case, the ICJ found that: "*Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development*."[16]

Similarly, in the *Pulp Mills* case, the ICJ stated, citing previous decisions: "*The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' [Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22]. A State is thus obliged to use all the means at its disposal in order to avoid activities that take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law*

[13] *Threat or Use of Nuclear Weapons (Advisory Opinion)*,1996, ICJ Rep 226.

[14] Bogdan Aurescu, Ion Gâlea, Lazăr Elena, Ioana Oltean*, Scurtă culegere de jurisprudență,* Hamangiu, Bucharest, 2018, pp. 156-158.

[15] For a deeper analysis of sustainable development and the rights of future generations see Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie (2018). *Principles of International Environmental Law* (4th ed.) Cambridge University Press, pp. 221-222.

[16] *Gabčikovo-Nagymaros Project*, Hungary v Slovakia, Judgment, ICJ 1997.

relating to the environment' (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29)."[17]

Another principle acknowledged by the Court is the "*due diligence*" principle that was laid out in the *Corfu Channel Case*[18]: "*every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*". This principle was later reinforced and developed in the cases of *Costa Rica v. Nicaragua* where the ICJ outlined the obligation of carrying out an environmental impact assessment: "*Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment*."

The main shortcoming of these expressed principles is the fact that they retain a high level of ambiguity as to how they might be applied in the context of the current global warming issues we are facing.[19] The obligations stemming from them are obligations of conduct and could be therefore fulfilled by taking reasonable measures within a State's jurisdiction to prevent environmental harm, but it remains unclear what would constitute a breach of this *erga omnes* obligation in terms of a threshold for GHG emissions that are causing the worldwide sea-level rise.

Authors have also pointed out that the notion of "*highest possible ambition*",[20] introduced by the Paris Agreement sets out a new standard of care for climate affairs. Still, it remains unclear how national and international courts will interpret the Agreement in litigation proceedings. Other international instruments such as the 1992 United Nations Framework Convention on Climate Change[21] and its extension, the 1997 Kyoto Protocol[22], also aimed to determine industrialized countries to limit their GHG emissions to predetermined targets. However, the compliance of signatory States varied

[17] *Pulp Mills on the River Uruguay*, Argentina v Uruguay, ICJ.

[18] *Corfu Channel*, United Kingdom v Albania, Judgment, ICJ.

[19]https://brill.com/view/journals/yido/4/1/article-p281_13.xml?language=en&ebody=full%20html-copy1#FN000109.

[20] Voigt, Christina, *The Paris Agreement: What Is the Standard of Conduct for Parties*, March 21, 2016. QIL, Zoom-in 26 (2016), pp.17-28.

[21] UNFCCC, 1992: United Nations Framework Convention On Climate Change, 1992.

[22] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.

significantly and some major GHG emitters such as Canada and Japan withdrew from the Kyoto Protocol, while the United States failed to ratify it.

Yet, probably the biggest legal challenge for small island States remains proving, within the ambit of State Responsibility, the direct link between the actions of a particular State and the rise in global sea levels as to be able to obtain compensations.

2.2. What can the ICJ Advisory Opinion accomplish?

While not preempting the Court's findings, we can briefly touch upon what we see as the actual and potential impact of an Advisory Opinion in the matter of climate change as was requested by the UNGA.

In adopting the Resolution, the UNGA acknowledged that "*climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it*" as well as noting that "*the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouse gases are unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected*".[23]

The State of Vanuatu pointed out that the ICJ is the only main UN organ that has not had the chance to clarify the implications of climate change.[24] Advisory Opinions of the ICJ are admittedly not binding, but they carry great legal weight, moral authority, and in this case, the advisory opinion might contribute to the clarification of the international law obligations States have with respect to their actions that are causing the current rise in sea levels across the globe.

In issuing their opinion, the ICJ could take into consideration the watershed decision of the UN Human Rights Committee (*CCPR/C/135/D/3624/2019*) which determined that Australia's insufficient protection of indigenous Torres Islanders from the adverse consequences of climate change amounted to a violation of their rights to preserve their cultural heritage and to be free from

[23] Resolution adopted by the General Assembly on 29 March 2023, A/RES/77/276.

[24] https://www.vanuatuicj.com/why-icj.

unwarranted intrusions into their personal life, family, and residence. Committee member Hélène Tigroudja stated that: "*This decision marks a significant development as the Committee has created a pathway for individuals to assert claims where national systems have failed to take appropriate measures to protect those most vulnerable to the negative impacts of climate change on the enjoyment of their human rights*".[25]

As such, if the ICJ were to issue an Advisory Opinion clearly affirming the environmental responsibilities of States under international law as outlined in the Resolution, it would likely trigger a surge in litigation against big GHG emitters, both at the national jurisdiction level, as well as on the international stage.

On the other hand, should the ICJ fail to clarify the boundaries of the current international legal responsibility surrounding the aforementioned matters, this could even prove to be a setback for small island States that will be seeking justice and restitution in courts in the future.

3. What are the consequences of partial or complete territorial loss caused by climate change for States?

The 1933 Montevideo Convention on the Rights and Duties of States names as an objective criterion for statehood, *inter alia*, that a State must possess a defined territory.[26] This convention was in fact a codification of what was accepted as customary international law, being thus universally applicable. In terms of what constitutes a "*defined territory*" in practice, international law does not establish a specific minimum territorial requirement for the existence of a sovereign State.

Sea-level rise has the potential to transform the already limited territories of low-lying atoll nations into uninhabitable land, reduce them to the status of "*rocks*" as defined by Article 121(3) of the UN Law of the Sea Convention (LOSC), or submerge them entirely. In the first two scenarios, the requirement for territorial effectiveness would still be met, as uninhabitable islands and rocks are considered land under international law.[27]

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[25] UN Human Rights Committee CCPR/C/135/D/3624/2019: Daniel Billy and others v Australia (Torres Strait Islanders Petition).

[26] *Montevideo Convention on the Rights and Duties of States* December 26, 1933.

[27] Gerrard, Michael, & Wannier, Gregory , *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate"*, Cambridge University Press, 2013, p. 60.

However, if only a low-tide elevation remains from the original island, the "*defined territory*" criterion is no longer satisfied. In the Case concerning the Maritime Delimitation and Territorial Questions between Qatar and Bahrain of 2001, the ICJ rejected Bahrain's argument that low-tide elevations inherently qualify as territory: "*The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the: sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.*"[28]

If we are to look at this criterion from a teleological standpoint, it becomes clear that the territory of a State would have to, at the minimum, be able to sustain organised communities that can at least become the precursors of an organised society. As such, the land would have to be inhabitable for it to functionally serve as basis for statehood.[29]

Nevertheless, authors have made the argument for the existence of a legal duty for the international community to continue recognizing small island States that have lost their effective statehood.[30] Thus, if the loss of territory of a small island nation is a consequence of the violation of a *jus cogens* norm, the international community might have the obligation to continue recognizing said nation as a peer, even though it no longer fulfils all criteria for statehood. This argument is made by firstly examining the opposite situation where State practice has consistently withheld statehood recognition from entities that have come into existence through acts of aggression or the use of force, contravening the right to self-determination, or as a result of the implementation of a system of racial discrimination. One instance of this practice concerned The Turkish Republic of Northern Cyprus, which arose in 1983 after the Turkish military intervention. This republic was only ever recognised by Turkey. The ICJ has affirmed the existence of an obligation of

[28] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Qatar v Bahrain, Judgment, Merits, ICJ.

[29] Gerrard, Michael, & Wannier, Gregory, *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate",* Cambridge University Press, 2013, p. 61.

[30] Gerrard, Michael, & Wannier, Gregory , *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate",* Cambridge University Press, 2013, p. 72-87.

nonrecognition in two advisory opinions: the *Namibia Advisory Opinion*[31] of 1971 and the *Wall Advisory Opinion* of 2004. The ICJ stated in the latter that: "*Given the character and the importance of the rights and obligations involved, the Court is of the view that al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem*."[32]

Regarding the State practice concerning the recognition of States whose effectiveness has been affected in violation of *jus cogens* norms, there is yet to be a case where climate change played a crucial part, but we can draw similarities from the cases where involuntary State extinction was due to foreign military interventions and unlawful occupations. Examples[33] of this are the States annexed between 1936 and 1940, including Austria, Poland, Czechoslovakia, and the Baltic States, managed to maintain their recognition and international legal status despite the annexation. The Baltic States, in particular, serve as an example of how statehood persists even after illegal annexation, re-emerging as the same legal entities after more than half a century without territorial control. Similarly, when Iraq occupied and annexed Kuwait in 1990, the UN Security Council declared these actions "null and void" and called "for the restoration of Kuwait's sovereignty, independence and territorial integrity and of the authority of its legitimate government."[34] In line with the duty not to recognize the unlawfully established new regime, there is also a duty to continue acknowledging the international legal personality of the occupied or annexed State. Moreover, Article 41 (2) of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts specifies that: "*No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation*",[35] thus expanding the scope of the obligation to all violations of *jus cogens*

[31] Advisory Opinion on *the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ, 21 June 1971.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion.

[33] Gerrard, Michael, & Wannier, Gregory , *"Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate."*, Cambridge University Press, 2013, p. 74-75.

[34] U.N. SC Res. 662 (Aug. 9, 1990) and U.N. SC Res. 674 (Oct. 29, 1990).

[35] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001.

peremptory norms and not just for the cases where there is an unlawful use of force.

Hence, it logically follows that the disappearance of an island State would constitute a breach of fundamental international norms such as their people's right to self-determination[36] and the right to permanent sovereignty over natural resources[37]. This would create, in turn, an unlawful situation that shall not be recognized by the international community. The ICJ also recognized in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[38] the right of every State to survival, which could likewise play an important role in shaping the legal framework around the eventual dissolution of a State due to climate change-induced loss of territory. However, in light of Article 40 (2) of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, a breach of peremptory norms has to be "*serious*" in order to trigger the duty of nonrecognition of the subsequent situation. This is another element that could prove daunting to demonstrate by a disappearing island State in search for recognition, since the ILC defines "serious" as follows: *"A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligatio n."*[39] Finding a breach is thus inextricably linked with finding the responsible State or States, which is a particularly thorny aspect of climate change litigation.

As authors have previously theorised,[40] the deterritorialized surviving state entities could bring about an entirely new category of international actors: "*the Nation Ex-Situ*". This would be a status that allows for the persistence of a sovereign State, being afforded all the same rights and benefits of sovereignty in perpetuity, ignoring the classical "*defined territory*" requirement for statehood. Only time can tell how this will work in reality and if it's something the international community would find acceptable

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[36] *Case Concerning East Timor* (Portugal v. Australia), ICJ, 30 June 1995, at 102: "*In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable*."

[37] *Armed Activities on the Territory of the Congo Case* (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Rep. 2005, 168, at 251 (Dec. 19).

[38] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion.

[39] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001.

[40] Maxine Burkett, "The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era", 2 Climate Law 1 (2011).

withing the current international law framework. It is noteworthy to address the fact that deterritorialized States are not an entirely new concept. For example, the Sovereign Military Order of Malta, historically regarded as a sovereign international entity, is acknowledged by numerous States and possesses the privileges of engaging in diplomatic relations, making treaties, and participating in international organizations. This is notably despite the loss of its territory when expelled from Malta by Napoleon in 1798.[41] The Holy See was also recognized as a State despite not possessing a territory for long periods of time in their history. Also recognized within international law is the concept of functional sovereignty, which is not contingent on territorial control. Historically, this notion has been applied in scenarios like '*governments-in-exile*' or diaspora communities like the Palestinians, who have experienced displacement due to invasion and colonization.[42]

4. Conclusions

In the face of the existential threat posed by anthropogenic climate change and the intricate legal challenges it presents, the forthcoming ICJ advisory opinion on climate change has the potential to become a landmark in the evolution of international law with regards to environmental issues. As explored in this article, this advisory opinion is anticipated to shed some light on a myriad of complex issues that have so far vexed the global community. However, there is also the possibility that the advisory opinion will not prove to be what Vanuatu and the other States sponsoring their initiative hoped for. A certain risk is always associated with seeking an advisory opinion from the ICJ. However, it's evident that small island States recognize the urgency of altering their current trajectory, as they perceive it as leading directly toward peril and State extinction.

As previously stated, there is also a possibility that the Court's findings will encompass an examination of how current State actions can violate the rights of future generations, particularly given their close link with the adverse

[41] Maxine Burkett, "The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era", 2 Climate Law 1 (2011); Rayfuse, Rosemary, "(W)hither Tuvalu? International Law and Disappearing States", University of New South Wales Faculty of Law Research SeriesNo. 9/2009).

[42] Rayfuse, Rosemary, "(W)hither Tuvalu? International Law and Disappearing States", University of New South Wales Faculty of Law Research Series,Paper No. 9/2009.

impacts of climate change and the concept of fiduciary care.[43] On this thought, Judge Weeramantry noted the following in his dissenting opinion to the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*: "*This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law with an authority matched by no other tribunal must, in its jurisprudence, pay due recognition to the rights of future generations. If there is any tribunal that can recognize and protect their interests under the law, it is this Court*."[44]

In consideration of the foregoing analysis, the subject matter of the current international legal landscape as it pertains to the consequences of potential territorial loss and displacement on statehood, human rights and State responsibility is undeniably complex and cannot be adequately addressed in such a concise format. This article provides only a brief exploration of the main opportunities and challenges surrounding the impending ICJ Advisory Opinion, as well as succinctly present the legal framework pertaining to the issues under consideration.

[43] Susannah Willcox, Michael B. Gerrard and Gregory E. Wannier, ``Threatened Island Nations. Legal Implications of Rising Seas and a Changing Climate``, European Journal of International Law, Volume 25, Issue 1, February 2014, p. 343–348.

[44] ICJ, Dissenting Opinion of Judge Weeramantry to the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996.

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