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The Romanian Journal of International Law is published biannually by ADIRI – The International Law Section (the Romanian Branch of the International Law Association). Established in 1966, ADIRI is currently an association of public interest. The Association provides qualified expertise in the field of international relations and international law, as well as for European affairs. As a forum of scientific debate, it organizes seminars, conferences and elaborates studies and opinions upon request or at its own initiative. In order to contact ADIRI – The International Law Section or the Editorial Board, you may write to the following e-mail addresses: bogdan.aurescu@drept.unibuc.ro; ion.galea@drept.unibuc.ro; lazar_elena2@yahoo.com.

CUPRINS

Negulescu în contextul avizului consultativ al Curţii Permanente de Justiţie Internaţională privind competenţa Comisiei Europene a Dunării pe sectorul dintre Galaţi şi Brăila

SUMMARY

Restitutio

Cuvânt-înainte

Această nouă ediţie a Revistei Române de Drept Internaţional, prima după o scurtă întrerupere, inaugurează seria ediţiilor *on-line* ale publicaţiei. Sperăm ca această modalitate modernă de prezentare să genereze o deschidere cât mai mare a Revistei şi o receptare cât mai amplă în cadrul mediului academic şi în rândul practicienilor. De asemenea, pentru a conferi maximă deschidere internaţională, am ales ca articolele să fie publicate numai într-o limbă de circulaţie internaţională (engleză sau franceză).

Prezentul volum se deschide cu o secţiune de *Discursuri ale marilor personalităţi* din domeniul dreptului internaţional public şi prezintă un discurs pe tema *Convenţiei-Cadru pentru protecţia minorităţilor naţionale* şi a consecinţelor acesteia, susţinut de Preşedintele Comisiei de la Veneţia, Gianni Buquicchio, la Cluj-Napoca, la 30 aprilie 2015, în cadrul Conferinţei internaţionale dedicate minorităţilor naţionale, cu ocazia împlinirii a 20 de ani de la adoptarea şi ratificarea de către România a Convenţiei-Cadru, primul stat care a ratificat acest important instrument juridic al protecţiei persoanelor aparţinând minorităţilor naţionale.

Urmează o serie de trei *Articole* ce analizează probleme actuale de interes din domeiul dreptului internaţional. Primul dintre acestea, semnat de către subsemnatul şi de către lector univ. dr. Ion Gâlea, exprimă câteva propuneri *de lege ferenda* de revizuire a dispoziţiilor Constituţiei României cu relevanţă pentru reglementarea relaţiei dintre dreptul internaţional şi cel intern. Articolul apare în contextul recent al iniţiativelor de revizuire constituţională din România, propunându-şi să actualizeze textul legii fundamentale române în concordanţă cu realităţile practice ale dreptului internaţional. Cea de-a doua contribuţie aparţine dr. Ion Diaconu şi prezintă o serie de perspective asupra normelor imperative ale dreptului internaţional (*jus cogens*), îndeosebi printr-o analiză detaliată a practicii recente a tribunalelor internaţionale şi regionale. Al treilea articol este semnat de Gbenga Oduntan, conferenţiar universitar la Universitatea din Kent, şi realizează o analiză excelentă a consecinţelor juridice ale nerespectării avizului consultativ al Curţii Internaţionale de Justiţie privind construirea unui zid în teritoriile palestiniene ocupate.

Secţiunea de *Comentarii privind activitatea organizaţiilor internaţionale în domeniul dreptului internaţional* cuprinde două materiale. Primul dintre acestea, semnat de către Radu Mihai Şerbănescu, analizează Planul comun de acţiune cuprinzător (*Joint Comprehensive Plan of Action*) susţinut prin Rezoluţia Consiliului de Securitate 2231/2015. Articolul examinează în mod detaliat evenimentele ce au condus la adoptarea Planului, dispoziţiile acestuia, precum şi consecinţele viitoare. Al doilea articol este scris de Simona Gabriela Voiculescu şi aduce în discuţie importanţa celei de-a doua declaraţii a Ucrainei de acceptare a jurisdicţiei Curţii Penale Internaţionale. Analizând efectele acestei declaraţii în special din perspectiva Procurorului Curţii, articolul realizează o comparaţie a situaţiei cu evenimentele din Georgia, în legătură cu care, recent, procurorul CPI a solicitat formal dechiderea unei anchete oficiale.

În rubrica *Evenimente relevante din practica românească a aplicării dreptului internaţional* sunt publicate două articole. Primul, o contribuţie a Alinei Orosan, înfăţişează situaţia procedurilor judiciare şi administrative derulate într-un stat străin şi care sunt îndreptate împotriva statului român din perspectiva comunicării actelor procedurale, printr-o analiză a cadrului juridic şi a practicii internaţionale în materie. Cel de-al doilea material, scris de conf. univ dr. Ion Gâlea, analizează efectele legii privind acceptarea, de către România, a jurisdicţiei obligatorii a Curţii Internaţionale de Justiţie, textul legii exprimând într-un mod echilibrat importanţa acordată de politica externă a României dreptului internaţional.

Rubrica de *Studii şi comentarii de jurisprudenţă şi legislaţie* cuprinde două articole. Raluca-Elena Călin analizează Hotărârea Curţii de Justiţie a Uniunii Europene în acţiunea de anulare promovată de Comisia Europeană împotriva Consiliului Uniunii Europene ce face obiectul Cauzei C-425/13. Hotărârea pune în discuţie, în premieră, atribuţiile instituţionale de negociere a acordurilor internaţionale în numele Uniunii Europene, iar articolul surprinde şi modul în care principiul

echilibrului instituţional funcţionează la nivelul Uniunii. În cel de-al doilea articol, Elena Lazăr discută despre rolul hotărârilor pronunţate în cauzele *Kadi*, acestea având o importanţă deosebită în vederea înţelegerii relaţiei dintre ordinea juridică a ONU şi cea a Uniunii Europene, precum şi a modului în care interacţionează diferitele instituţii internaţionale şi regionale – abordările diferite putând conduce la rezultate diferite.

Ca parte a rubricii *Contribuţia doctorandului şi masterandului*, publicăm un articol semnat de către Viorel Chiricioiu, care analizează în mod critic evoluţia reglementărilor internaţionale în domeniul securităţii aviaţiei civile, în special felul în care aceste reglementări au fost adoptate ca efecte directe ale principalelor incidente aviatice, urmărindu-se incriminarea cât mai multor fapte periculoase.

Secţiunea *Restitutio* cuprinde o analiză efectuată de Irina Munteanu asupra opiniei dizidente a Judecătorului Demetru Negulescu la avizul consultativ al Curții Permanente de Justiție Internațională în problema jurisdicției Comisiei Europene a Dunării pe sectorul dintre Galați și Brăila. La aproape 100 de ani de la emiterea avizului, analiza surprinde primul contact de fond pe care România l-a avut cu instanța de la Haga, precursoarea Curții Internaționale de Justiție, discutându-se elemente esențiale de drept internațional public, precum suveranitatea teritorială a statelor.

Sperăm că prezentul număr al RRDI reuşeşte să surprindă problemele curente cu care se confruntă în present lumea dreptului internaţional public şi să atragă atenţia prin modul de analiză a acestora.

Prof. univ. dr. Bogdan Aurescu,
Redactor-şef al RRDI,
Preşedintele Secţiei de Drept Internaţional al ADIRI
(Ramura Română a International Law Association)

Foreword

This new edition of the Romanian Journal of International Law, the first after a brief interruption, opens the series of the *on-line* issues of the Journal. We hope that this modern way of presentation would contribute to a larger opening and a wider reception among academics and practicioners. At the same time, in order to grant maximum international access to the Journal, we chose that its content be published only in widely used languages (English or French).

This volume opens with a section of *Speeches of important personalities* in the world of Public International Law, which presents the speech on the subject of the *Framework Convention for the Protection of National Minorities* and its consequences, held by the President of the Venice Commission, Gianni Buquicchio, in Cluj-Napoca on 30 April 2015 at the International Conference regarding the protection of national minorities, on the occasion of the 20th anniversary since the adoption and ratification by Romania of the Framework Convention, our country being the first to ratify this very important legal instrument for the protection of persons belonging to national minorities.

This is followed by three *Articles* analysing current Public International Law issues of interest. The first essay, signed by Professor Dr. Bogdan Aurescu and Lecturer Dr. Ion Gâlea, expresses a number of *de lege ferenda* proposals for the revision of those provisions of the Constitution of Romania with relevance for the relationship between international law and domestic law. The article appears within the recent context of the Romanian constitutional reviewing initiatives and it aims at updating the provisions of the Romanian fundamental law in accordance with the practical realities of International law. The second contribution belongs to Dr. Ion Diaconu and it offers a number of perspectives on the peremptory norms of international law (*jus cogens*), particularly through a detailed analysis of the recent case law of international and regional courts. The third article is authored by Gbenga Oduntan, Senior Lecturer in Law at the University of Kent, and draws an excellent analysis of the legal consequences for disregarding the International Court of Justice's advisory opinion regarding the construction of a wall in the occupied Palestinian territory.

The *Commentaries regarding the Activities of the International Bodies in the Field of International Law* section contains two materials. The first one, signed by Radu Mihai Şerbănescu, analyses the Joint Comprehensive Plan of Action endorsed by the Security Council Resolution 2231/2015. The article examines in detail the events leading to the adoption of the Plan, its provisions, as well as its foreseeable consequences. The second article is written by Simona Gabriela Voiculescu and it discusses the importance of Ukraine's second declaration of acceptance of the International Criminal Court's jurisdiction. By analysing this declaration, especially through the perspective of the Prosecutor of the Court, the article draws a comparison with the events in Georgia, in relation to which the Prosecutor of the Court has recently asked for the approval of the opening of an offcial investigation.

Two articles are published in the section *Events of Relevance in the Romanian Practice of Implementing International Law*. The first one, a contribution by Alina Orosan, presents the status of the judicial and administrative procedures undertaken in foreign States and directed against Romania, from the perspective of the notification of procedural acts, through an analysis of the legal framework and of the relevant international practice. The second article, written by Senior Lecturer Dr. Ion Gâlea, analyses the effects of Romania's declaration accepting the compulsory jurisdiction of the International Court of Justice, its text expressing in a balanced way the importance Romania's foreign policy places upon International Law.

The section of *Studies and Comments on Case Law and Legislation* has two articles. Raluca-Elena Călin analyses the Decision of the Court of Justice of the European Union in the action for annulment brought by the European Commission against the Council of the European Union, which is the object of Case C-425/13. The

Decision discusses, for the first time, the institutional powers to negotiate international agreements on behalf of the EU, the article also pointing to the way the principle of institutional balance functions within the Union. In the second article, Elena Lazăr discusses the role of the *Kadi* judgments, which have an important role in the understanding of the relationship between the UN legal order and the EU one, as well as of the interaction between the various international and regional institutions – as different approaches may lead to different results.

As part of the *Ph.D. and Master Candidate's Contribution*, we publish an article authored by Viorel Chiricioiu which critically analyzes the evolution of the international legal regulations in the field of civil aviation security, especially how these regulations have been adopted as direct consequences of the main aviation incidents, with the intent of criminalising as many threats as possible.

The *Restitutio* section presents an analysis done by Irina Munteanu of the dissenting opinion of Judge Demetre Negulescu in the advisory opinion of the Permanent Court of International Justice in the case concerning the Jurisdiction of the European Commission of the Danube between Galatz and Brăila. Almost 100 years later, the analysis manages to present the first substantial contact between Romania and the Hague Court, the predecessor of the International Court of Justice, discussing essential Public International Law issues, such as the territorial sovereignty of States.

We hope that this issue of RJIL manages to capture the current problems in the world of Public International Law and to draw attention through the way they are analysed.

Professor Dr. Bogdan Aurescu,
Editor-in-chief of RJIL,
President of the International Law Section of ADIRI
(The Romanian Branch of International Law Association)

Note: The opinons expressed in the articles and comments published in this issue belong to the authors only and do not engage the institutions where they act, the Romanian Journal of International Law or ADIRI.

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
CE / EC	– Comunitatea Europeană / European Community
CEDO / ECHR	– Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights
CIJ / ICJ	– Curtea Internaţională de Justiţie / International Court of Justice
CJCE / CJEC	– Curtea de Justiţie a Comunităţilor Europene / Court of Justice of the European Communities
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
IATA	– Asociaţia Internaţională de Transport Aerian / International Air Transport Association
JCPOA	– Planul comun de acţiune cuprinzător / Joint Comprehensive Plan of Action
NATO	– Organizaţia Tratatului Nord-Atlantic / North Atlantic Treaty Organization
OACI / ICAO	– Organizaţia Internaţională a Aviaţiei Civile / International Civil Aviation Organization
OIM / ILO	– Organizaţia Internaţională a Muncii / International Labour Organization
ONU / UN	– Organizaţia Naţiunilor Unite / United Nations
PESC / CFSP	– Politica Externă şi de Securitate Comună / Common Foreign and Security Policy
TFUE / TFEU	– Tratatul privind funcţionarea Uniunii Europene / Treaty on the functioning of the European Union
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
UNESCO	– Organizaţia Naţiunilor Unite pentru Educaţie, Ştiinţă şi Cultură / United Nations Educational, Scientific and Cultural Organization

DISCURSURI/SPEECHES

International Conference "20 years of Framework Convention for the Protection of National Minorities, 20 years of inter-culturalism, cultural diversity, tolerance, integration" Cluj-Napoca, 30 April 2015

Gianni BUQUICCHIO[*]

Abstract: *This represents the speech of Mr. Gianni Buquicchio, the president of the Venice Commission, at the International Conference regarding the protection of national minorities, held at Cluj-Napoca, on the 30 of April 2015.*

Key-words*: Protection of national minorities, Convention for the Protection of National Minorities, diversity, integration, inter-culturalism.*

Honourable Rector,
Mr Minister,
Ladies and Gentlemen,

It is a great honour and pleasure for me to be invited today to address this important event dedicated to the celebration of the 20th anniversary of the opening to signature, on 1 February 1995, of the Council of Europe's Framework Convention for the Protection of National Minorities, the only international legally binding instrument dealing with the protection of national minorities in all its dimensions, well-known since then by all of us as the Framework Convention.

Today's Conference also marks the 20th anniversary of the ratification, on 29 April 1995, of the Framework Convention by Romania, as the first state party to this Convention, thereby giving international legal expression to its firm commitment for the protection of its national minorities.

I should first like to thank you, Mr. Rector, for your warm words of welcome and to thank your University and the Ministry of Foreign Affairs for inviting me to be here with you today.

I am delighted to join you for such a special occasion and, as rightly pointed out in the title of the conference, to celebrate with you 20 years of inter-culturality, of living together in dialogue, respect and mutual understanding in the Romanian society.

This conference is only the first of a series of events planned until the end of 2015 to celebrate the efforts and the substantial progress made since the ratification of the Framework Convention on the path of the development and consolidation of a more cohesive society, respectful of diversity and of the rights of all.

I am convinced that these events will also serve as a perfect opportunity to discuss the major challenges that your country has been facing in the implementation of the Framework Convention, to learn from this experience and to take a look at the new challenges that lie ahead.

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[*] *President of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, Doctor Honoris Causa of the University of Bucharest, ex-Secretary of the Venice Commission.*

It is also particularly fitting that this event is taking place here in Cluj-Napoca, this beautiful city that is home to many identities - ethnic, cultural, linguistic and religious - and which made this diversity is own identity.

Your University is one of the most successful examples of the efforts made by Romania to promote multicultural dialogue and diversity while at the same time providing conditions for the preservation and development of specific identities.

This is certainly one of the reasons why your city had the honour to be designated as the 2015 European Capital of Youth. Let me congratulate you, Honourable Rector, for hosting this event and you, Dear Minister, my dear friend, for supporting this excellent initiative.

Ladies and Gentlemen,

As you certainly know, the Venice Commission's main task has been, from its very first years, to advise States in the process of adoption of constitutions and laws in conformity with the standards of Europe's constitutional heritage. It was important for us to contribute in this way to their effort to lay down the foundations of a new, democratic society, governed by the rule of law and based on commonly shared values.

The respect and protection of national minorities and their identities are undoubtedly, and must be, a prominent dimension in this process. As Vaclav Havel once said so well,

"*One aspect of the immense and wonderful colour and mystery of life is not only that each person is different and that no one can perfectly understand anyone else, but also that groups of people differ from one another as groups: in their customs, their traditions, their temperament, their way of life and thinking, their hierarchy of values, and of course in their faith, the colour of their skin, their way of dressing and so on…. This "otherness" …..can of course be accepted with understanding and tolerance as something that enriches life; it can be honoured and respected, it can even be enjoyed*."

We can safely go further to say that the protection of this otherness and therefore of diversity, the promotion of tolerance, dialogue and mutual respect between all, are essential requirements of a democratic society, and a good indicator of its maturity. At the same time democracy is the only system capable of dealing with the problems of minorities in a peaceful, fair and just way.

It is in that spirit that the Venice Commission has actively contributed, from its earliest years, to the definition of rights, principles and standards for the protection of national minorities and to the dissemination of good practices in this field.

Since its creation in 1990, the Venice Commission has been closely involved in the efforts made to provide an instrument guaranteeing minority rights at the European level. In February 1991, at the request of the Parliamentary Assembly of the Council of Europe, the Commission proposed a draft "European Convention for the Protection of Minorities."

This draft already set out an extensive range of rights for minorities, while striving to find a balance between the minimum level of protection to guarantee to minorities and the duties incumbent on them.

It included, *inter alia*, provisions relating to the use of language before public authorities and to minority education.

While minorities were defined as a group, the protection guaranteed to them in various fields placed emphasis on the individual dimension of their rights.

A threefold oversight system was proposed, with a mandatory system of periodic reports and two optional supervisory mechanisms - the interstate complaint and the individual complaint.

The draft was never adopted by the Council of Europe's Committee of Ministers. Another way was chosen.

Yet, apart from the controversial issue of the definition and to some extent the proposed monitoring system, which had been considered too binding, our draft has been an important reference document in the elaboration of the Framework Convention and its basic elements have been largely taken over by the Convention. The Venice Commission also played an active role in the development work of the latter.

There is no doubt, the entry into force of the Framework Convention in 1998, the first ever legally binding instrument on minority rights, marked the beginning of a new stage in minority protection.

A common, multilateral, platform for dialogue and action was offered to States to address the issue of minorities in a harmonized way. I recall that the Convention is open to accession by non-member States of the Council of Europe.

The key actors are the States as the duty bearers and the persons belonging to national minorities as the rights holders. The Framework Convention makes it clear from its Article 1 that it is a human rights instrument designed to protect national minorities and to promote their rights, and as such falls within the scope of international co-operation.

I see it as an unquestionable qualitative leap that, after long years of reluctance and hesitation, States have been able to agree on the need to address minority rights as fundamental rights to which all should have access, regardless of ethnic origin, language, culture, traditions and history of their community. This approach essentially endorses one of the general principles laid down by our 1991 draft.

Over the years, the Framework Convention has become a de facto yardstick and safety net for minority protection in Europe. It provides States with excellent guidelines for their legislation, policies and practices, through programmatic, as well as specific, action-oriented, substantive provisions.

In addition, it may serve as a peaceful platform for interstate dialogue, when the threat of inter-ethnic conflict arises, although its multilateral dimension was privileged as an asset from its launch.

Described originally as a weak instrument, lacking precision and commonly agreed definitions, the practice has shown that its "weakness" was its strength. By leaving States with considerable discretion to adapt the implementation measures to national realities, the Convention was more attractive.

Thirty-nine States are now bound by this treaty. Minority issues less and less lead to crisis situations; minority protection has become an integral part of ordinary public policies with the minorities themselves increasingly involved in devising and implementing those policies.

The Framework Convention's monitoring mechanism has been instrumental to its implementation. In particular, its independent supervisory body, the Advisory Committee, has played a facilitating role by bringing duty bearers and rights holders together, by interpreting the Convention and giving it life and - thanks to a good understanding of national realities - by ultimately contributing to making it owned and valued locally.

The Venice Commission has remained actively engaged in the clarification and promotion of minority standards both through its thematic reports and when advising states on draft minority rights or related domestic legislation. Its activities in this field are complementary to the supervisory work of the Framework Convention.

Under its mandate, it was the Commission's duty to make sure that a sound constitutional and legislative framework, in line with the principles enshrined in the Framework Convention, was put in place by States as a guarantee for the effective protection of their minorities and the full enjoyment of individual rights and freedoms by all.

In our country opinions, we examined laws or draft legislation dealing specifically with the protection of national minorities (Hungary – 1993, Republic of Moldova (1995 and 1999), Croatia (1996, 2002), Bosnia and Herzegovina (2001), Serbia and Montenegro (2003), Lithuania (2003), Romania (2005), and Ukraine (2004). We also examined constitutional provisions of relevance for the rights of minorities as in the case of Hungary (in 2012), Romania (in 2014) or of Croatia.

At the request of the Parliamentary Assembly in 2002, we undertook the complex and sensitive task of identifying groups of people that may be covered by the Framework Convention in Belgium, once the Convention is ratified by this country.

It soon became obvious to us that a genuine protection of minorities involves *the recognition of their existence and their identity*, as well as, under the principle of equality, *the participation of persons belonging to minorities in public life.*

Thus, we had to deal with the key issues of *recognition as a subject of minority protection and access to this protection.* We also had to examine *definitions of national minorities* and *minority lists* provided by national constitutions and laws, and to acknowledge the *difficulties arising for those remaining outside* this framework (as you can see in our opinions on Bosnia and Herzegovina and Croatia in 2001).

We also investigated the delicate issues of the *use of the citizenship criterion* in the definition and the protection of national minorities, and *the involvement of kin-States* in the protection of their minorities abroad.

When the Commission adopted in October 2001 its *Report on "preferential treatment of national minorities by their kin-State*", the reflection about the question of the acceptable degree of involvement of kin-States in minority protection was only starting to be discussed.

At that stage, there was little experience, and the principles outlined in the report needed to be confronted with the practice.

The Report was later considered to have set out acceptable standards of conduct for States in their relations with kin-minorities residing on the territory of another State.

In particular, as you certainly know, it served as a mediation tool between Hungary and Romania in their dispute over the Hungarian "Status Law".

As to *the citizenship criterion*, the Commission initially pointed out, in its country opinions, that limiting the definition and the protection of "minorities" to citizens only, was not, in itself, contrary to States' obligations under international law, provided that non-citizens identifying themselves as belonging to a national minority enjoyed, on an equal footing, the fundamental rights to which everyone is entitled (see Croatia, Opinion on the Constitutional Law on the Rights of National Minorities, March 2003).

Following a more dynamic tendency - in the related debate in international law - to extend minority protection to non-citizens, the Commission took a clearer stand when it concluded, in its *2006 Report on non-citizens and minority rights*, that it was preferable that States consider citizenship as a legitimate condition for accessing *certain* minority rights, rather than as a constitutive element of the definition of "minority".

In the Commission's view, the scope of the minority rights had to be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary (see also the 2007 Opinion on the Constitution of Montenegro).

In a broader perspective, we were interested in *the diversity of legal models of minority protection in Europe*, their national characteristics, as well as the aspects which can serve as a useful source of inspiration at the European level (as already laid down in our *Report on the protection of minorities of 1994).*

Further important matters submitted to our consideration were touching upon complex issues such as: *territorial integrity, local self-government and territorial administrative reforms* and their impact on the protection of minorities and their identities (as was the case in the opinion adopted in 1999 in relation to the Republic of Moldova).

Special attention was devoted by the Commission *to the participation of minorities in political life, in the elected organs of the State and especially in the national Parliament*. This involved the examination of broader issues of electoral law, such as the influence of electoral systems on the representation of political groups and the importance of political parties of national minorities as a factor in the representation of such minorities.

The Commission's *2000 Report on electoral law and national minorities* points out that only a few states have established specific rules on the representation of minorities in elected bodies.

The participation of persons belonging to national minorities in public life through elected office does not therefore arise from the application of special rules for minorities, but from general electoral rules that are likely to increase the chances of success of the candidates from minorities (i.e. exceptions to threshold rules, reserved seats, over-representation of regions where the minority is the majority).

Also, in our *2008 Report on the issue of dual voting for persons belonging to national minorities*, we concluded that, where specific rules on the representation of national minorities are retained, these should remain exceptional measures, justifiable only when they are essential for the integration of minorities and implemented in accordance with the principle of proportionality.

More specific identity issues, such as *language*, have also been the subject of our reflection. It was essential for the Commission, in view of the high sensitivity of such issues, to adequately tailor its recommendations on State language policies and their impact on the linguistic identity of minorities to the social, historical and political background of the country (Slovakia and Ukraine).

It became more and more clear to us, when drafts have been submitted to the Commission repeatedly, that the issue of minorities and their identities can only be addressed through a gradual approach based on dialogue, mutual understanding and sometimes compromise.

Furthermore, it was obvious that, beyond the commitments undertaken by States, the approach favoured is primarily based on policy choices and that, in general, the way minority issues are handled is a matter of mutual trust between the majority and minorities.

Ladies and Gentlemen,

The co-operation between the Venice Commission and Romania has always been extremely fruitful. Romania turned to the Venice Commission as a reliable partner to whom it could bring the problems it was facing, to be told of other countries' experiences, and find ideas and advice on how to solve these problems.

As part of this excellent co-operation, in June 2004, the Commission adopted an *Opinion on the draft law concerning the support for Romanians living abroad.* Subject to some - important - clarifications and specifications, the draft was considered to be generally in conformity with applicable principles and standards, as referred to by the Commission in its report on the Preferential Treatment of National Minorities by their Kin-State.

In October 2005, the Commission adopted an *Opinion on the Draft "Law on the Statute of National Minorities Living in Romania",* aimed at introducing the model of "cultural autonomy" for national minorities as a novelty in the Romanian legal order.

We pointed out that, although, in principle, it could constitute a satisfactory framework for the protection of minority rights in Romania, the draft also contained certain important limitations and uncertainties. We therefore recommended that the shortcomings noted be addressed through appropriate amendments in order to ensure its full compliance with international standards.

The Commission also examined constitutional provisions related to minority protection on several occasions, including most recently in March 2014, when the Romanian authorities turned to it to seek advice in the context of the revision of the Romanian Constitution.

Ladies and Gentlemen,

It is certainly not the task of the Venice Commission to monitor minority protection in your country. The Commission was nevertheless pleased to note, on all

occasions, Romania's positive and constructive approach to the protection of minorities, as well as its authorities' genuine concern for the respect of the Framework Convention and other applicable standards. Romania was also a pro-active partner for us when preparing our general reports on issues of interest for minority protection.

Finally, I was informed that the organisers of today's event have opted to focus, for the forthcoming debate, on the issues of diversity, dialogue and mutual understanding; these concepts are highly valued by Romania in its continuous effort to ensure the harmonious integration of all within society.

I intentionally started my presentation today with some words on the acceptance of otherness and its importance as something that enriches life, can be respected and honoured.

I see it as a pre-requisite for all kinds of measures, policies, frameworks for the protection and development of both minorities' and majorities' and their successful interaction.

I am conscious however that, as enriching as cultural diversity is, managing it, living harmoniously in a diverse society is a challenge. Moreover, diversity is a dynamic phenomenon, developing as society develops. Multiple and dynamic, it has become a non-negotiable feature of modern society, whether one likes it or not, whether one views it as an asset or as a problem.

Our Commission has always encouraged intercultural dialogue based on equality, tolerance and mutual respect. As constitutional lawyers, we can certainly make an important contribution to intercultural dialogue and peace. I remain convinced that an open exchange on democracy, human rights and the rule of law will gradually lead to a common understanding of these principles by all, majorities and minorities alike.

I am pleased to note that the "Romanian model" of protection of the rights of persons belonging to national minorities is today presented as one based on recognising and appreciating diversity, valuing inter-culturality and a means to develop a diverse but cohesive, integrated and peaceful society.

Thank you very much for your attention!

ARTICOLE/ARTICLES

Constitutional Landmarks and *de lege ferenda* Proposals on the Relationship between International Law and Domestic Law in Romania[1]

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Abstract: *An important part of a Constitution is represented by the relationship between international law and domestic law. The relevant provisions of the Constitution of Romania cover the status of international customs and treaties (depending on whether the latter regulate fundamental human rights or not), as well as the powers of the President concerning treaty conclusion. However, these constitutional provisions may require amendments in order to reflect the current trends in State practice, in order to avoid any divergent interpretations and ensuring respect for international law by all State authorities.*

Key-words: *Constitution; revision; primacy; monism; dualism; de lege ferenda; incorporation*

I. Introduction

The basis for fulfilling international obligations, according to international law, is good faith. Good faith is reflected in the well-known principle *pacta sunt servanda*,[2] considered the 'fundamental principle of the law of treaties',[3] even if it is, at the same time, a fundamental principle of international law as such. Given that the international legal system does not embody the existence of any compulsory

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[2] The *pacta sunt servanda* principle is codified in: Article 26 of the 1969 Vienna Convention on the Law of Treaties; the Charter of the United Nations, Article 2(2); the UN General Assembly Declaration 2625 (XXV)/1970 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, item 7; the principle was also recognised by the International Court of Justice in the *Case concerning rights of nationals of the United States of America in Morocco*, ICJ Reports, 1954, p. 212.

[3] 1966 Draft articles with commentaries, Yearbook of the International Law Commission, 1966, vol II, p. 211, para. (1).

jurisdictions or of any constraint mechanisms forcing States to perform international provisions, good faith remains the 'basic principle' governing the creation and performance of legal obligations, whatever their source.[4]

The effects of international law *within* a State's domestic legal system represent an essential part of the good faith observance of international legal provisions. In several situations, international law forces States to adopt a conduct which necessarily creates effects in their internal legal order. In all cases where individuals (or any private entities) are the addressees of international legal norms,[5] either by being granted rights or by being imposed obligations, a legal framework has to exist within domestic law in order for those norms to be applied. At the same time, there are situations where even the commitment to international obligations of a strictly external nature entails effects within the internal legal order to ensure their observance. From this perspective, the answer to whether international legal provisions have any effect within the national legal order is essential for the effective application thereof.

A hypothetical example may be represented by a bilateral treaty prohibiting the expropriation of the other Party's investors, without establishing an investor-State dispute settlement mechanism.[6] In the event that one State, in spite of the treaty provisions, expropriates the goods of one of the other Party's investors, the only jurisdiction that investor might have access to would be the national courts of the investment host State. Thus, the courts may act as liaison between the international legal order and the individuals' rights when State organs breach their duties. In such a situation, the national courts, which act completely independently and impartially, represent a link in the application of the rule of law at an international level.[7] An essential condition for the fulfilment of this role is represented by the effects of international law within domestic law.

The present paper aims at analysing the possible answers given by the Romanian constitutional system to questions such as: are international legal norms sources of domestic law, susceptible of being applied before a court of law? What would be the solution given by a national court in case of a conflict between international and national provisions? Furthermore, given that during 2013-2014 Romania witnessed a comprehensive project of constitutional revision, we consider utterly useful to draft several *de lege ferenda* proposals, able to improve the way Romania grants full effect within its domestic legal order to the provisions of international law.

The paper aims to discuss the relevance of the theoretical models which, undoubtedly, have made their mark upon the constitutional concepts regarding the relationship between international and national law (I), to (critically) analyse the current Romanian constitutional model (II) and to present *de lege ferenda* proposals in view of a constitutional revision (III).

II. The relevance of the theoretical models

II.1. The traditional dualism/monism distinction

[4] *Nuclear Tests* (New Zealand v. France), ICJ Reports, 1974, p. 473, para. 49.

[5] Ian Brownlie, *Principles of Public International Law*, 7th Ed., Oxford University Press, 2008, p. 519;

[6] Some examples can be mentioned in this sense: The Agreement between the Government of Romania and the Government of the People's Republic of China concerning the encouragement and mutual protection of investments, signed in Bucharest, on 12 July 1994, ratified by Law no. 8/1995, published in the Official Journal no. 7/17.01.1995 (the Agreement stipulates that a dispute between an investor and a State may be submitted to ICSID international arbitration 'if the parties to the dispute so agree', thus effectively granting a 'veto' right to the State Party to the dispute); The Agreement between the Government of the Socialist Republic of Romania and the Government of the Gabonese Republic concerning the encouragement, the promotion and the guarantee of investments, signed in Libreville, on 11 April 1979, ratified by Decree no. 418/1979, published in the Official Bulletin no. 97/08.12.1979.

[7] André Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, 2012, p. 6.

The concepts regarding the relationship between international law and national law have traditionally been based on two known theoretical models: dualism and monism, the latter having the following varieties: monism with the primacy of international law and monism with the primacy of domestic law. The origin of these theoretical models can be traced to the understandings of the two legal systems: the international and the domestic one. However, the theoretical models certainly have important consequences over the wording of the constitutional provisions concerning the relationship between international and domestic law.[8]

According to the dualist doctrine, the differences between the two systems lie in their sources of law, the field of their regulated relations and the substance of the regulations.[9] The two legal orders are therefore completely separated, independent, without influencing each other.[10] Consequently, the most important element of the dualist theory is that the substance of international law does not allow it to be applied within domestic law *per se*. From a conceptual point of view, two conditions must be met in order for international law to become part of domestic law: i) the existence of the Statal authority's decision regarding the *legal reception* of the norms into that State's national law (the basis of applying international law is not its value, but the State's decision) and ii) the existence of a conversion of the legal provision, by means of a domestic statute restating the content of the international provision, but having the changed nature of a domestic one. This statute thus modifies the provision's formal value, its addressees and its character, in order to adapt it to the particularities of domestic law.[11] As a consequence, the essential character of the dualist theory is that the international legal provision does not apply within a State's domestic legal order as an international provision: it needs to be captured and transformed or adapted by a source of national law.

Monism is the ideology according to which the legal order is a singular one, including both international and domestic law. Arguments brought in its favour include: i) the object of the regulations refers essentially to the conduct of individuals, whether expressed in Statal form or not,[12] as both international and national law have the same purpose: the well-being of individuals as a value in itself;[13] ii) the essence of the provision is the same, both systems being an expression of the legal order;[14] iii) the basis of the domestic legal order can be traced to international law, which stipulates State sovereignty. Thus, international law is the one determining the limits of State jurisdiction. The internal legal order cannot exist without a superior legal provision, identified within international law as either the sovereign equality of States[15] or Hans Kelsen's 'Basic Norm' ('the States ought to behave as they have customarily behaved').[16] The main consequence of the monist theory is that international law applies *per se* within the domestic legal system, with no adaptation required. The primacy of the international law, in case of conflict with the domestic legal order, is ensured by the superior character of the international legal provision.[17]

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[8] Ion Gâlea, *Analiză critică a normelor Constituţiei României referitoare la relaţia dintre dreptul internaţional şi dreptul intern*, The Annals of the University of Bucharest, no. I/2009, p. 22.

[9] Dionisio Anzilotti, *Cours de droit international,* Sirey, Paris, 1925, p. 62; H. Triepel, *Volkerrecht und Landesrecht,* 1899 ; H. Triepel, *Volkerrecht und Landesrecht*, Recueil des Cours de l'Academie de la Haye, vol. 1, 1923, p. 77-121.

[10] Ian Brownlie, *op. cit.*, p. 32.

[11] Dionisio Anzilotti, *op. cit.*, p. 63.

[12] Walz, *Das Wesen des Volkerrechts und Landesrechts,* Leipzig, 1968, p. 98.

[13] Hersch Lauterpacht, *International Human Rights,* Oxford, 1950, p. 29.

[14] Oppenheim, *International Law, A Treatise*, Longman, London, 1967, p. 47.

[15] Schwarzenberger, *Power Politics,* 2nd Ed., Oxford, 1951, p. 218-231; Wenzel, *Juristische Grundbegriffe,* 1920, p. 387.

[16] Hans Kelsen, *General Theory of Law and State,* London, 1945, p. 363.

[17] We point out that a number of authors, the representatives of the « Bonn School » – Kaufmann, *Volkerrecht und Landesrecht,* 1897, p. 69; Wenzel M., *op. cit.*, p. 20; Zonn, *Das Wesen des Volkerrechts,* 1891, p. 80 – have also argued for a monist theory with the primacy of domestic law, being based on the sovereignty of each State. We will not insist on this theory, as it is of few practical consequences.

II.2. The actual impact of the theoretical models. Practical trends

Do the 'monist' and 'dualist' models have any direct impact regarding the drafting of a State's Constitution in respect of the relationship between international and domestic law? Definitely, these models can influence the phrasing of a Constitution. For example, starting from the monist doctrine with the primacy of international law, certain Constitutions of European States provide that, in the event of an inconsistency between treaties and domestic laws, treaties shall prevail.[18] Moreover, the theoretical models are important as they can assist in the process of interpretation of a constitutional system when there are no explicit provisions therein: for example, in most common law systems customary international law is part of the domestic law on the basis of the incorporation doctrine, without the requirement of any 'reception', insofar as custom does not contravene any Acts of Parliament.[19]

The provisions of each Constitution must be analysed pragmatically through the perspective of the obtained result. Furthermore, a jurisprudential interpretation of the constitutional provisions – where the theoretical models may have a noteworthy influence – is essential in order to determine a general trend. As such, we believe all disagreements as to whether certain constitutional provisions reflect monism or dualism should be set aside,[20] as the analysis should necessarily focus on their actual effects.

However, we cannot ignore that, at international level, there are two trends established in State practice, trends which are not necessarily determined by the theoretical models, and yet may be 'influenced' by them. These trends or elements of State practice are developed from the idea that Public International Law does not impose a particular method of bringing domestic law in line with international law,[21] the only general duty States have being *to fulfil their international obligations in good faith*, backed by the impossibility of invoking municipal law as justification for the failure to perform international obligations.[22]

The first practice trend is that of 'automatic incorporation'. As such, a vast number of States adopt a domestic legal provision, most often a constitutional one, according to which the rules of international law are part of national law *without the requirement of any transposition or implementation legislation*. The mere existence of this constitutional norm ('reference provision') determines that international law is a part of domestic law and has effects before national courts.[23]

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[18] Bulgaria (Article 5 (4)), Cyprus (Article 169.3), the Czech Republic (Article 10), Greece (Article 28 (1)), Estonia (Article 123), France (Article 55), Poland (Article 91 (2)), Croatia (Article 134), Germany (Article 25 – a particular case, referring to the general rules of international law, and not to treaties); other Constitutions include provisions with similar effects: Spain (Article 96), Slovenia (Article 153 (2)); see Ion Gâlea, Bogdan Biriş, Irina Munteanu, Radu Şerbănescu, *Aplicarea tratatelor în dreptul intern al statelor membre ale Uniunii Europene. Studiu comparat al prevederilor constituţionale relevante*, in Cezar Manda, Cristina Nicolescu, Crina-Ramona Rădulescu (eds.), *Probleme actuale ale spaţiului politico-juridic al UE,* Romanian Journal of European Law Supplement, 2013, p. 117.

[19] Ian Brownlie, *op. cit.*, p. 41.

[20] For example, regarding the solution set forth by the Romanian Constitution, there have been arguments about it reflecting the monist theory – Ion Gâlea, *Analiză critică a normelor Constituţiei României referitoare la relaţia dintre dreptul internaţional şi dreptul intern*, p. 24; for arguments in favour of Article 11(2) expressing the dualist doctrine: Ioan Muraru, Simina-Elena Tănăsescu, *Drept constituţional şi instituţii politice*, vol. I, Ch. Beck, 2011, p. 32.

[21] André Nollkaemper, *op. cit.*, p. 68-70; *Interpretation of the Statute of the Memel Territory* (United Kingdom v France), PCIJ, Ser A/B, no. 49, p. 336-337.

[22] Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties; Ian Brownlie, *op. cit.*, p. 35; Oppenheim, *op. cit.*, p. 82-86.

[23] André Nollkaemper, *op. cit.*, p. 73-74: cites cases of constitutional and jurisprudential recognition in Benin (Article 147), Cape Verde (Article 11), China, Ivory Coast (Article 87), the Czech Republic (Article 10), the Dominican Republic (Article 3), Egypt (Article 151), Ethiopia (Article 9 (4)), France (Article 55), Japan, the Netherlands, Portugal (Article 8(2)), the Russian Federation (Article 15 (4)), Senegal (Article 91), Switzerland, Turkey (Article 90 (5)), the United States (Article VI); Ion Gâlea, Bogdan Biriş, Irina Munteanu, Radu Şerbănescu, *loc. cit.*, p. 116 – the following EU Member States

A second 'technique' used by States is the 'conversion' of the international duties into domestic law. In these cases, national courts may apply an international treaty only following the adoption of a municipal statute, even if an international legal provision – found within a treaty, for example – would be in force for that State.[24] An example in this sense is Ireland, where the national courts have only been able to apply the provisions of the European Convention of Human Rights from 2003 onwards, when the 'ECHR Act' was adopted incorporating the Conventional rights into the domestic system.

Starting from these trends, we propose a critical examination of the provisions of the Romanian Constitution, in order to identify the *de lege lata* solutions and to suggest new proposals for improvement.

III. A critical analysis of the provisions of the Romanian Constitution

III.1. The types of provisions

The Constitution of Romania may be analysed from the perspective of how it approaches the different sources of international law: particularly international customs and treaties. Moreover, the provisions regarding treaties may be classified taking into consideration their scope of regulation.

International custom is dealt with by the Constitution of Romania, in a general way, under Article 10.[25] Unlike other Constitutions[26], Article 10 does not represent an 'automatic incorporation' of international custom, as it only expressly refers to the application of 'principles and other generally recognised provisions of international law' into the domestic legal order. Insofar as international custom is concerned in Romania, we consider it has been incorporated into the national legal order through caselaw. The Supreme Court has directly applied customary international law provisions regarding, *e.g.*, State immunity, in order to declare actions brought against foreign States as inadmissible[27].

The Constitution of Romania deals with international treaties in Articles 11 and 20, regulating the legal status of *two categories of treaties*: i) the 'special' category, represented by the fundamental human rights treaties, the object of the constitutional regime expressed by Article 20, and ii) treaties subject to the 'general status' regulated by Article 11.[28]

In addition, Article 91(1) is relevant to the general legal status of treaties, as it regulates the powers of the President of Romania in the field of treaty conclusion, as well as the Parliament's power to ratify treaties concluded on behalf of Romania

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are mentioned: Bulgaria, the Czech Republic, Greece, Spain, Finland, Croatia, Hungary, Lithuania, Portugal, Poland, Romania.

[24] André Nollkaemper, *op. cit.*, p. 77, points to the following cases: Australia, Botswana, India, Israel, Italy (Article 10 of the Constitution referring exclusively to the norms of general international law, and not to treaties), Kenya, Malawi, Norway, Uganda, the United Kingdom, and Zambia.

[25] *Article 10 states: 'Romania fosters and develops peaceful relations with all the States and, in this context, good neighbourly relations, based on the principles and other generally recognised provisions of international law'.*

[26] The Basic Law of Germany states, in Article 25, that 'the general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'; The Constitution of Italy states in Article 10 that 'the Italian legal system conforms to the generally recognised principles of international law'.

[27] In its Decision no. 1292/2003, pronounced in case no. 1781/2002, the Court analysed an action for the annulment of a decision given by the Local Court for the First District of Bucharest, which set aside the termination of an employment contract between a citizen and the Canadian Embassy. The Court noted: « A foreign State's jurisdictional immunity expresses the principle *par in parem non habet juridictionem*. In other words, there is no jurisdiction amongst equals. *This rule has been recognised by the domestic courts of various States that have applied it as customary in nature. » (emphasis added).*

[28] We note the present paper does not analyse the relationship between European Union law and domestic law – which is regulated by Article 148(2) of the Constitution of Romania.

III.2. The general legal status of treaties

Insofar as treaties are concerned, the Constitution of Romania adopts the 'automatic incorporation' method, provided in Article 11(2) thereof: '*Treaties ratified by Parliament, according to the law, are part of national law*'. Pursuant to this constitutional provision, the Romanian judge applies the treaty, as source of national legal order, and not the ratification law, without causing the international norm to lose its international legal character. The ratification law does not « transform » the international norm into domestic law; rather it represents the act expressing the consent of the Romanian State and causing the international legal provision to be brought within the national legal order.

An issue arises regarding the interpretation of the *scope of application* of Article 11(2). Can one accept the opinion according to which *only* the treaties subjected to Parliamentary ratification (and not the ones in respect of which consent has been expressed through approval or signature, or those ratified by means of emergency Governmental Ordinances) are part of domestic law?[29] We consider that such an opinion would entail an unreasonable result. Article 11(2) must be broadly interpreted in the sense of referring to all the treaties Romania is a Party to.[30] In any event, 'subsidiary' to this, we may argue that *the legal basis for the automatic incorporation* of treaties, regardless of the manner of expressing consent, can be found *within the law*, in the provisions of Article 35 paragraphs (1) and (2) of Law no. 590/2003 on treaties.[31]

Such a solution, objectionable as it may be because the legal basis thereof is not found within a constitutional text, but rather within a law, would still be able to « cover » the legal gaps resulting from a narrow reading of Article 11(2). In any event, the mere fact of having to interpret this text draws attention to the necessity of drafting *de lege ferenda* proposals, in order to regulate « the treaties in force » – regardless of the way of expressing consent.

One of the most difficult issues is resolving a potential conflict between the provisions of a treaty and those of municipal law. The constitutional text offers two possible solutions: i) it may be inferred that treaties have a legal power equal to that of a law; arguments in this sense may be drawn from a *per a contrario* interpretation of Article 20(2) which offers precedence only to fundamental human rights treaties, as well as from the fact that, since treaties are ratified *through laws*, there is a presumption the treaty gains the same legal value as the ratification act;[32] ii) it may be inferred that, in the event of an inconsistency, treaties prevail over municipal law irrespective of their area of regulation and irrespective of the domestic law being anterior or posterior thereto, the solution being constitutionally based on the provisions of Article 11(1): '*The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to'*.

We contend the second interpretation is the correct one. Accepting the first one may lead, in the hypothetical event there is a contradiction between a treaty provision and a *subsequent* municipal law, to the treaty being left void of any effects within domestic law. Such a solution would not be in accordance with the general

[29] Opinion expressed by Ioan Muraru, Simina-Elena Tănăsescu, *op. cit.*, p. 32.

[30] Arguments in this sense might be the following: the first paragraph of Article 11 refers to the treaties Romania is a party to, without any distinction; secondly, it is noted Article 146(b) of the Constitution grants the Constitutional Court the power to adjudicate on the constitutionality of all treaties, irrespective of the manner of expressing consent – see Gheorghe Iancu, *Drept constituțional și instituții politice,* CH Beck 2011, p. 22.

[31] Published in the Official Journal, Part I, no. 23 of 12/01/2004. We hereby include the respective texts, because of their importance: '(1) The obligations provided by the treaties in force shall be fulfilled as such and in good faith. (2) The application and observance of the provisions of treaties in force represents a duty for all the authorities of the Romanian State, including the judiciary, as well as for all Romanian natural and legal persons or for those located on the territory of Romania'.

[32] Ioan Muraru, Simina Elena Tănăsescu, *op. cit.*, p. 33.

international law principle of *pacta sunt servanda* and would entail the Romanian State's international legal responsibility.

Several legal arguments can be brought in favour of the second opinion, that of an implicit primacy of international treaties, regardless of their object: i) Article 31(2) of Law no. 590/2003 stating that *'the application and observance of treaties in force represents a duty for all the authorities of the Romanian State, including the judiciary, as well as for all Romanian natural and legal persons or those located on the territory of Romania'*;[33] *ii)* Article 31(4) of Law no. 590/2003 stating that *'the provisions of treaties in force may not be modified, amended or repealed by means of domestic laws subsequent to their entry into force'; iii)* Article 31(5) of Law no. 590/2003 stating that *'internal legal provisions may not be invoked as justification for the failure to perform a treaty in force'; iv)* Article 21 of Law no. 24/2000 concerning legislative technique norms for legislation drafting, stating*: '(1) The legislative solutions envisioned by the new regulation must take into account the relevant European Union regulations, ensuring their compatibility thereto. (2) The provisions of paragraph (1) also apply, respectively, concerning the provisions of the international treaties Romania is a party to.'*[34]

The issue with these provisions, which, in any event, only apply the international law principle *pacta sunt servanda*, lies in the fact they are of a legal (statutary) character, and not of a constitutional one. As such, an inconsistent subsequent law might not be set aside for the reason of breaching the (legal as well) provisions mentioned above.[35] For this reason, we consider the value of these legal provisions is the fact they may represent an interpretation, a development of Article 11(1) of the Constitution. In effect, to 'fulfil as such and in good faith the treaties' (as provided by Article 11(1) of the Constitution) means not to modify their effect or not to leave a treaty void of any effects through legal provisions to the contrary (Article 31(4) of Law no. 590/2003).

The possibility of a jurisprudential interpretation of the primacy of international law, even in the absence of an explicit constitutional provision, has been accepted in other legal systems. For example, the Constitutional Court of Latvia set aside a 1998 law (The Code of Administrative Penalties) containing provisions contrary to the Convention on Facilitation of International Maritime Traffic, adopted at London on 9 April 1965 (in force for Latvia since 1997), on the basis of the State's international duty to observe its international obligations in good faith, even if the Constitution did not have any express provision regulating the primacy of treaties over domestic law.[36]

Consequently, pursuant to Article 11(1) of the Constitution, we consider the Constitutional Court may declare the unconstitutionality of a law contradicting an

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[33] It would have been desirable for Article 11 of the Constitution to provide that international treaties create rights and duties for individuals. However, the caselaw of the Supreme Court has noted this fact, which results implicitly from an interpretation of Article 11: The High Court decided that '*The international treaties ratified by the Parliament of Romania are an integral part of the domestic law, according to Article 11 of the Constitution of Romania, and they are thus also applicable to Romanian natural and legal persons.*' – Decision no. 331/2014, case no. 24165/3/2011, issued publicly on 31 January 2014.

[34] For a commentary on Article 31 of Law no. 590/2003 concerning treaties, see Irina Niţă, Bogdan Aurescu, *Comentariul Legii nr. 590/2003 privind tratatele (continuare – art. 25-34)*, Romanian Journal of International Law, no. 3 – July-December 2006, p. 219-222.

[35] In the Decision of the Constitutional Court no. 47/25.04.1996, published in the Official Journal no. 293/19.11.1996, the Constitutional Court stated the following, in relation with an alleged breach of Law no. 4/1991 (the law concerning the conclusion and ratification of treaties, repealed by Law no. 590/2003): '*in any event, that particular law, not having a constitutional character, may not be opposed to the lawmaker who, as a principle, has the power to derogate at any time it adopts a new law from the provisions of another one'*; see also the Decision of the Constitutional Court no. 94/1996 concerning the recourse declared by Panaitescu Edmond against the Decision of the Constitutional Court no. 47 of 25 April 1996.

[36] Linija v Latvia, Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review, Case No 2004-01-06, Latvian Herald, No 108, 3056, ILDC 189 (LV 2004), 7th July 2004 – available at http://opil.ouplaw.com/view/10.1093/law:ildc/189lv04.case.1/law-ildc-189lv04?rskey=zFoToi&result=5&prd=ORIL (subscriber), accessed 3 November 2014.

international treaty even if, hypothetically, that law would be subsequent.[37] The idea is confirmed by recent constitutional caselaw: in its Decision no. 2/2014,[38] the Constitutional Court relied on the United Nations Convention against Corruption[39] and on the Criminal Law Convention on Corruption[40] in order to declare the unconstitutionality of the provisions of the Law for amending the Criminal Code, provisions that would have narrowed down the scope of application for some acts of corruption. In this sense, the Court ruled:

'the privileged legal status granted to persons occupying the elected offices excepted from the scope of Article 147 of the current Criminal code and Article 175 of the new Criminal code also contradicts the provisions of Article 11(1) of the Constitution, according to which *'The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.'* As such, by ratifying or acceding to the above-mentioned international conventions, the Romanian State has assumed the duty to respect and transpose as such the international provisions into its domestic law, *i.e.* the duty to criminalise the active and passive corruption of the persons falling under the notions of '*public agent'/'member of the national public assemblies'/'national civil servant'/'public officer',* notions corresponding to the Romanian criminal law concepts of *'public civil servant'/'civil servant'*.'

Regarding the general legal status of treaties, the 2003 constitutional revision introduced the filter of an *ex ante* review by the Constitutional Court. By following the model of Article 54 of the Constitution of the French Republic, Article 11(3) was introduced, which states: *'If a treaty Romania is to become a party to comprise provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution*.' This text does not entail a superiority of treaties over the Constitution; it just ensures the application of a filter, a review before the ratification, in order to prevent a potential conflict between the treaty and the Constitution.[41] Indeed, this review is performed by the Constitutional Court pursuant to Article 146(b).[42]

III.3. The provisions concerning the powers of the President of Romania

A constitutional provision relevant for the general legal status of treaties is Article 91(1) of the Constitution, which states that '*The President shall, in the name of Romania, conclude international treaties negotiated by the Government, and then submit them to the Parliament for ratification, within a reasonable time limit. The other treaties and international agreements shall be concluded, approved, or ratified according to the procedure set up by law*'.

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[37] In its Decision no. 180/2000 of 10.10.2000, published in the Official Journal no. 642/08.12.2000, the Court analysed the application of a treaty in a field other than human rights, *i.e.* the Convention between the Government of Romania and the Government of the Republic of Korea for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, ratified by the Parliament of Romania through Law no. 18/1994, from the perspective of Article 11(1) of the Constitution, but, by interpreting the Convention, reached the conclusion the provisions of the contested law were not contrary to the Convention. Therefore, the Court accepted to examine the merits of the relationship between the law and the treaty.

[38] Decision no. 2 of 15 January 2014 regarding the unconstitutionality objection of Art.I pt.5 and Art.II pt.3 of the Law amending and supplementing certain normative acts and of the single Article of the Law amending Article 253^1 of the Criminal code, Published in the Official Journal no.71 of 29.01.2014.

[39] Adopted at New York on 31 October 2003, ratified by Romania by Law no. 365/2004, published in the Official Journal of Romania, Part I, no. 903 of 5 October 2004.

[40] Adopted by the Council of Europe on 27 January 1999, at Strasbourg, ratified by Romania through Law no. 27/2002, published in the Official Journal of Romania, Part I, no. 65 of 30 January 2002.

[41] Ioan Muraru, Simina Elena Tănăsescu, *op. cit.*, p. 33.

[42] Without detailing too much, we note that the proposal of amending the Constitution of Romania submitted to the Constitutional Court on 7 February 2014 discussed the amendment of Article 146(b), in order for the Court to be able to perform its review both *ex ante* and *ex officio*. We consider the *ex officio* review of the constitutionality of an international treaty may create supplementary difficulties. Besides, in its Decision no. 80/2014, published in the Official Journal, Part I, no. 246 of 07.04.2014, the Constitutional Court itself unanimously requested the rephrasing of Article 146(b).

Some explanations are required regarding the notion of 'treaties concluded in the name of Romania', related to 'the other treaties and international agreements'. The provision represents the constitutional basis for a *classification* of treaties, detailed by the special law: State-level treaties, Government-level treaties and department-level treaties.[43] As such, the Parliament's duty to ratify State treaties is a constitutional one, even if it also derives from Article 19(1)(a) and (3) of Law no. 590/2003 concerning treaties.

We stress that this classification only has effects within domestic law, and not within international law. Only the State is a subject of international law, therefore, irrespective of the 'level' the treaty is concluded at, it imposes duties upon the State, as subject of international law. Anthony Aust shows 'there is no difference in international law between treaties concluded on behalf of the State and those concluded on behalf of Governments, Ministries or agencies, because a treaty concluded by a Government, a Ministry or an agency obliges the State'.[44] Indeed, this classification appeared as a consequence of the State practice to conclude treaties having as 'parties' States, Governments or Ministries. Therefore, although in practice the importance of the area regulated by a treaty may influence the parties' decision upon choosing the 'level' of its conclusion, the option between a Statal, Governmental or (less often) departmental treaty is a strictly formal one (covering the manner of drafting the title, the preamble and the final clauses).

The issues raised by Article 91(1) relate to the phrasing according to which the President of Romania 'concludes' a treaty. The notion may entail certain difficulties, being mentioned in the very definition of a treaty offered by the 1969 Vienna Convention on the Law of Treaties ('*international agreement concluded between States*'). At a first glance, one might be tempted to consider the 'conclusion' of a treaty equivalent to the signing thereof, opinion expressed by the first Rapporteur of the International Law Commission, James Brierly.[45] However, the conclusion of a treaty must correctly be seen as comprised of a series of steps and procedures leading to a treaty 'coming into existence', *i.e.* becoming binding.[46] A treaty is 'concluded' when it enters into force. For this reason, the phrasing according to which the President concludes treaties does not appear to be strictly correct, taking into account that *consent is expressed* by Parliament, through a law. (It is true that, in the international legal order, the ratification is materialised through the deposit of an *instrument of ratification* with a depositary or through an exchange of instruments.[47] In Romania, the instruments of ratification are signed by the President[48] and countersigned by the Minister of Foreign Affairs. However, it is not always that the treaties subject to ratification also entail a deposit or an exchange of instruments of ratification. Most often, in the case of bilateral treaties, the fulfilment of the ratification procedure is notified by means of a diplomatic note issued by the Ministry of Foreign Affairs.)[49]

The term of 'conclusion' also creates difficulties regarding the second part of Article 91(1). As the 'conclusion' of a treaty implies a series of steps finalised with the entry into force of said treaty, the usage of the term associated with *only two* ways of expressing consent (ratification and approval) seems inadequate.[50] Also, the text seems

[43] The classification is developed by Article 1(1) and Article 2 of Law no. 590/2003 concerning treaties.

[44] Anthony Aust, *Modern Law and Treaty Practice*, Oxford University Press, 2009, p. 58; Oppenheim, *op. cit.*, p. 346-348.

[45] Second Report of the Special Rapporteur J. Brierly, A/CN.4/43, Yearbook of the International Law Commission, 1951, vol. II, p. 70.

[46] Mark E. Villiger, *Commentary to the Vienna Convention on the Law of Treaties*, Martinus Nijhoff, 2009, p. 78.

[47] Anthony Aust, *op. cit.*, p. 103.

[48] Article 25(4) of Law 590/2003 concerning treaties; Irina Niţă, Bogdan Aurescu, *loc. cit.*, p. 209;

[49] Article 25(2) and (3) of Law 590/2003 concerning treaties; Irina Niţă, Bogdan Aurescu, *loc.cit.*, p. 208 – for examples of clauses regarding the entry into force.

[50] In general international law, the ways of expressing consent are ratification, approval, accession, acceptance, signing, exchange of instruments (notes, letters).

to use this term as referring to the signature, which is only one phase in the conclusion of the treaty. Consequently, one might feel the need for proposals to improve the text.

III.4. Fundamental human rights treaties

The Constitution of Romania provides for two rules regarding fundamental human rights treaties: the rule of consistent interpretation (Article 20(1)) and the rule of primacy of international law over domestic law in the field of human rights (Article 20(2)).[51] Paragraph (1) stipulates the mandatory interpretation of the constitutional provisions in accordance with the Universal Declaration of Human Rights and the relevant international treaties Romania is a party to. We believe the most important provision is that of paragraph (2), which states: *'Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions'*. We shall not insist on this provision, which we consider clear and welcome.

When the Constitution was amended in 2003, the text of Article 20(2) was supplemented with the phrase '*unless the Constitution or national laws comprise more favourable provisions*'. We consider the added value of this provision is minimal from the perspective of our discussion. It is very possible national laws might contain more favourable provisions, though these would not generate any 'inconsistencies' with international law insofar as human rights are concerned. In the field of human rights, international law provides for the duty of States to grant *a minimum level of protection*. A higher level of human rights protection within domestic law will never generate any 'inconsistencies' with international law.[52]

IV. *De lege ferenda* proposals

IV.1. The context of and the approach towards the *de lege ferenda* proposals

The drafting of *de lege ferenda* proposals must take into account the context of the constitutional amendment process they are presented in. Such a process started in 2012, as a consequence of, *inter alia*, the recommendations of the Venice Commision expressed in opinion no. 685/17 December 2012.[53] Parliament Decision no. 17/2013 created the *Common Commission of the Chamber of Deputies and of the Senate for the development of the draft law amending the Constitution of Romania*, whose structure

[51] We hereby include the provisions of Article 20(2): *'Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions'*. The text has been interpreted by the High Court as expressing 'the principle of primacy of international law over domestic law insofar as human rights are concerned' – Decision no. 1011/2012, case 2496/115/2010, issued publicly on 16 February 2012.

[52] Some relevant provisions of related international treaties may be: The European Convention on Human Rights, whose Article 53 states: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party […]'; The Framework Convention for the Protection of National Minorities states in Article 22: 'Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party […]'.

[53] Opinion no. 685/17 December 2012 on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency Ordinance on amendment to the Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency Ordinance on amending and completing the Law No. 3/2000 regarding the organisation of a referendum of Romania, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), para. 77-82.

was modified through later decisions (24/2013,[54] 35/2013[55] and 49/2013[56]). On 4 February 2014, the *Common Commission of the Chamber of Deputies and of the Senate for the development of the draft law amending the Constitution of Romania* completed the text of the revisional draft law, which was submitted to the Constitutional Court pursuant to the provisions of the second phrase of Article 146(a) of the Constitution. In addition, on 7 February 2014, the English version of the draft law on the review the Constitution of Romania was submitted, through a letter sent by the Prime Minister of Romania, to the European Commission for Democracy through Law (the Venice Commission), in order for it to issue an opinion. The text of the constitutional revisional proposal was extensive from the point of view of the number of amendments (128 amendments being proposed). The Venice Commission issued its opinion on 24 March 2014,[57] remarking both critical and appreciative elements in respect of the project. Furthermore, prior to the opinion of the Venice Commission, the Constitutional Court adopted Decision no. 80/2014 on the draft law reviewing the Constitution of Romania.[58] In this decision, the Court noted that 26 revisional proposals were inconsistent with the limits of constitutional revision stated by Article 152. At the same time, the Court expressed a significant number of suggestions amending or repealing certain articles of the revisional draft law.

Given the conditions of the Venice Commission opinion of 24 March 2014 and the Decisions of the Constitutional Court no. 80/2014, the constitutional revisional process seems to be a long and complex one. We also note that, even though a number of proposals regarding the relationship between international law and domestic law had been drafted during the initial interinstitutional consultation process initiated by the Common Commision of the Chamber of Deputies and of the Senate, the draft law on the review of the Constitution brought no amendments to Articles 11, 20 or 91.[59]

In these circumstances, the *de lege ferenda* proposals should follow a pragmatic and realistic approach. On the one hand, an 'ideal solution' might be identified – resulted from a comparative study of the Constitutions of different States and the identification of a *new* model, answering as much as possible to the necessity of ensuring as much compliance with international law as possible. On the other hand, aware of the very large number of amendments drafted during the revisional proposal, as well as of the complex character of the reviewing process, a pragmatic and realistic approach would be based on a *'de minimis'* solution: reaching the target – guaranteeing the primacy of international law over domestic law in case of any inconsistencies – through as few amendments as possible in the given *de lege lata* situation. Furthermore, the *de minimis* approach might also encompass the proposal of inserting within the Constitutional text certain provisions already existing at legal level – using the 'accepted language' should facilitate their acceptance.

Based on a preliminary analysis, an 'ideal solution' would be characterised by the following elements: a) regulating the primacy of international law over domestic law in respect of all areas, not just human rights; b) regulating the fact that international treaties create rights and duties for subjects of domestic law; c) providing that all 'treaties in force' for the Romanian State are part of its national law, in order to remove the difficulties related to the interpretation of the notion 'ratified by Parliament'; d) providing that 'the principles and other generally recognised provisions of international law' – customary international law, respectively, are part of domestic law; e) keeping a constitutional provision related to international human rights treaties – relevant especially for interpreting domestic law and for identifying a

[54] Published in the Official Journal no. 111/26 February 2013.
[55] Published in the Official Journal no. 237/24 April 2013.
[56] Published in the Official Journal no. 364/19 June 2013.
[57] Opinion no. 731/2013 on the Draft Law on the Review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).
[58] Published in the Official Journal no. 246/7 April 2014.
[59] As mentioned above, the only relevant amendment referred to Article 146(b), granting the Constitutional Court the possibility of examining the constitutionality of a treaty *ex officio*, through an *ex ante* constitutional review.

constitutionally – expressed message of attachment towards the fundamental values of human rights.

However, we suggest choosing a 'pragmatic solution', considering its greater chances of being accepted by the factors involved in the constitutional reviewing process. We present below the text of this proposal, mentioning that it focuses on the most significant provisions which raise the greatest issues of interpretation.

IV.*2.* The text of the *de lege ferenda* proposals

a. Rephrasing paragraph 2 of Article 11 as follows:

'(2) Treaties *consented to by the Romanian side*, according to the law, are part of national law *from the moment they enter into force*.'[60]

Arguments:

The amendment is required in order to remove the interpretation issues which exist in respect of the scope of application of Article 11(2). As shown above, there are opinions according to which *only* the treaties ratified by the Parliament are part of national law – which leaves outside of the 'automatic incorporation' technique those treaties in respect of which the Romanian side has expressed its consent through other means provided by international law, especially through approval, signature, exchange of notes or letters. The exclusion of those treaties from automatic incorporation into domestic law *on the basis of a constitutional provision* does not represent a normal situation.

The suggested phrase of 'consented to by the Romanian side' is meant to cover, in a broad way, all forms of expressing consent. Moreover, the notion 'the Romanian side' is a wide one, intended to surpass the difficulties related to the classification of treaties into State-level, Government-level or department-level: thus, all treaties imposing any duties upon the Romanian State, regardless of their level, must fall under the scope of Article 11(2).

Currently, Law no. 590/2003 on treaties stipulates, in an express and exhaustive way, the treaties in respect of which consent must be given through ratification by Parliament. Article 19 includes all treaties concluded on behalf of Romania, regardless of the domain they regulate, as well as a number of Governmental treaties the importance of which requires them to be ratified by Parliament.[61] Article 20 of Law no. 590/2003 concerning treaties provides that 'Government level treaties not falling under the scope of Article 19, as well as department level treaties are submitted to the Government for approval through a decision'.

The mere express of consent by the Romanian side, regardless of its form (ratification, accession, approval, acceptance, signature, exchange of notes or letters) is not always enough in order for the treaty to have legal effects in international law. As such, the treaty needs to be 'in force' in accordance with its provisions. This is the reason why it has been suggested to supplement Article 11(2) with the phrase '*from the moment they enter into force*'.

b. Supplementing Article 11 with two new paragraphs, (4) and (5), with the following content:

'(4) *The provisions of treaties in force may not be amended, supplemented or repealed except in accordance with the provisions thereof or through the agreement of the parties.*

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[60] '(2) Tratatele *cu privire la care partea română şi-a exprimat consimţământul*, în condiţiile legii, fac parte din dreptul intern *din momentul intrării lor în vigoare*.'

[61] The areas for which Government-level treaties must be ratified are, pursuant to Article 19(1)(b) – (h): political cooperation, military cooperation, the legal status of the State border, the areas upon which Romania exercises sovereign rights and jurisdiction, treaties related to the status of individuals and fundamental human rights and freedoms, those referring to the membership of international intergovernmental organisations, treaties referring to the undertaking of a financial commitment, those whose provisions require, for the application thereof, the adoption of new norms of legal power or new laws, or the amendment of existing laws.

(5) *The provisions of the domestic law may not be invoked as justification for the failure to perform a treaty in force for the Romanian side.'*[62]

Arguments:

The phrasing of paragraph (4) is a direct consequence of the international law principle *pacta sunt servanda* as stated by paragraph (1), ensuring its observance, *i.e.* the prohibition of amending, supplementing or repealing treaties by means of domestic laws, which would equate to a unilateral amendment or supplementing of a treaty.

The impossibility of invoking domestic legislation as justification for the non-performance of the provisions of a treaty – paragraph (5) – represents a rule established in international law, codified in Article 27 of the 1969 Vienna Convention on the Law of Treaties.

Furthermore, the two paragraphs acknowledge international rules recognised by a constant international jurisprudence: the *Alabama Claims arbitration*, [63] the case of *Certain German Interests in Polish Upper Silesia*,[64] the *Factory at Chorzow* case,[65] the Advisory Opinion concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*. [66]

The pragmatic and realistic approach is applied through the fact that the two proposed paragraphs are identical to existing legal norms: paragraphs (4) and (5) of Article 31 of Law no. 590/2003 on treaties.

The direct consequence of the two paragraphs will be to ensure an explicit primacy of treaties over inconsistent domestic laws, regardless of their area of regulation and regardless of the national law being prior or subsequent. We also mention that the constitutional solution would be similar to that provided by Article 96 of the Spanish Constitution.[67]

c. Rephrasing Article 91(1) as follows:

'(1) The President *shall approve the signing of international treaties* at State level, negotiated by the Government, and then submit them to the Parliament for ratification, within a reasonable time limit. *The procedure required for negotiating, signing and expressing consent in respect of treaties, regardless of their level, shall be regulated by law.*'[68]

Arguments:

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[62] '(4) Dispoziţiile tratatelor în vigoare nu pot fi modificate, completate sau scoase din vigoare decât în conformitate cu dispoziţiile acestora sau prin acordul părţilor.
(5) Prevederile legislative interne nu pot fi invocate pentru a justifica neexecutarea dispoziţiilor unui tratat în vigoare pentru partea română.'

[63] *The Alabama Claims* (1872), Moore Arbitrations, p. 653.

[64] PCIJ Ser. A, 1928, p. 16.

[65] PCIJ Ser. A, no. 17, 1928, p. 33.

[66] ICJ Reports 1989, p. 177.

[67] Taking these proposals into account, Article 11 would have the following content:
'(1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving the treaties it is a party to.
(2) Treaties consented to by the Romanian side, according to the law, are part of national law from the moment they enter into force.
(3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.
(4) The provisions of treaties in force may not be modified, supplemented or repealed except in accordance with the provisions thereof or through the agreement of the parties.
(5) The provisions of the domestic law may not be invoked as justification for the failure to perform a treaty in force for the Romanian side.'
We mention that Article 96 of the Spanish Constitution states: 'Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law'.

[68] '(1) Preşedintele *aprobă semnarea tratatelor* internaţionale la nivel de stat, negociate de Guvern, şi le supune spre ratificare Parlamentului, într-un termen rezonabil. *Prin lege se reglementează procedura necesară pentru negocierea, semnarea şi exprimarea consimţământului cu privire la tratate, indiferent de nivelul acestora.*'

The proposal is intended to exclude from the text certain phrases which are not strictly representative of the legal reality.

Firstly, as already shown, the term 'conclusion' is not used correctly from a legal point of view. The 'conclusion' of a treaty represents a series of steps and procedures, ending with the entry into force of the treaty. For this reason, we consider it necessary to use the phrase 'approve the signing' – taking into account the President's constitutional power, and 'negotiating, signing and expressing consent' regarding the elements to be regulated by law.

Secondly, the phrase 'treaties and agreements' is not strictly correct, because the notion of 'treaty' must be used in a general way in order to designate « *an international agreement concluded between States [or other subjects of international law] in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation* » (the 1969 Vienna Convention on the Law of Treaties, Article 2(1)(a)).

Thirdly, the phrase 'ratification or approval' does not comprise all forms of expressing consent provided by international law. Consequently, we propose to use the term 'expressing consent', thus covering all forms allowed by international law.

Fourthly, the phrase 'the *other* treaties and agreements' may generate confusion, which is why we suggested the phrase 'regardless of their level' in order to reflect the classification of treaties into State level, Governmental level and departmental level (Articles 1(a) and 2 of Law no. 590/2003 concerning treaties).

V. Conclusions

The current system created by the Constitution of Romania has the advantage of allowing a jurisprudential interpretation of the primacy of international law over domestic law, regardless of the area of regulation. The interaction between Articles 11 and 20 of the Romanian Constitution in force determines a solution based on two categories of treaties: human rights treaties, in respect of which there is no doubt regarding their primacy over domestic provisions, as well as treaties regulating other areas (than human rights), in respect of which some interpretation difficulties might arise. These difficulties might concern, on the one hand, the scope of application of the 'automatic incorporation' within domestic law (two opinions have been argued regarding the interpretation of the phrase 'treaties ratified by Parliament […] are a part of national law') and, on the other hand, the legal force treaties have over domestic provisions. Obviously, in order to avoid different interpretations, it would be desirable for Article 11 to be clearly drafted in the sense of the primacy of international law over national law. This interpretation does not always seem obvious.

Because of this, we have drafted a *de lege ferenda* proposal amending Article 11 as little as possible, but intended to reach the main objective: removing any doubts as to the interpretation that international legal provisions, regardless of their field, prevail over domestic laws in the event of any inconsistencies. Furthermore, we have suggested the removal of any doubts over the scope of application of Article 11, in the sense of encompassing all treaties creating rights and duties for the Romanian State, regardless of the way of expressing consent. In addition, we have proposed technical amendments to Article 91, in order to remove all drawbacks caused by the inaccurate usage of terms.

These proposals fit within a trend of strengthening the observance of international law, both for the executive and legislative authorities and for the judiciary. Given that respect for international law is one of the main coordinates of Romania's foreign policy,[69] it is only natural to reflect this trend at domestic level through a broad application of the international legal provisions within the national legal order.

[69] Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Ed. Hamangiu, Bucharest, 2014, Foreword by the Editor, p. 1.

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JUS COGENS – Developments in International Law

Dr. Ion DIACONU [*]

***Abstract*:** *National and international courts, regional and specialized tribunals, all have used in their decisions, at first cautiously and with numerous explanations (related to Public International Law, fundamental rules of general interest or rules creating erga omnes obligations) and subsequently more boldly, the concept of peremptory rules and have come up with examples of such norms. Almost without exception, the doctrine has accepted the existence of peremptory rules (jus cogens) in International Law. The evolution of international practice, especially over the last decade, has led both to the recognition of the existence of peremptory rules and also to the clarification of numerous consequences resulting from the application of this concept in various fields of international law outside the law of treaties. Thus, in this context, the study of the developments in international law with regard to jus cogens norms it is a must.*

***Key-words**: international practice, jus cogens norms, erga omnes opposability, ICC.*

I. Introduction

As we have previously shown, the evolution of human rights norms has led to the definitive establishment of the concept of peremptory norms in international law.

In recent years, international bodies, State representatives, national and international tribunals have referred to the existence of peremptory norms in international law,[70] have come up with examples of such peremptory rules and have based their decisions on this concept and on norms that are perceived as being peremptory in nature.

As we well know, the first rules on this subject were incorporated in the 1969 Vienna Convention on the Law of Treaties, drafted by the International Law Commission (ILC), as part of its mission to codify and progressively develop international law, and subsequently adopted at the 1967 and 1969 Diplomatic Conferences held in Vienna. Peremptory norms were defined in articles 53 and 64 as rules accepted and recognized by the international community of states as a whole, from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The Convention also states that any treaty which, at the moment of its conclusion, conflicts with a peremptory rule is void, and any treaty in force which contradicts a new peremptory norm becomes void and is terminated. The Vienna Convention does not provide examples of peremptory norms, nor does it provide a list of criteria for distinguishing them from other rules of international law. In its Comments to the Draft Articles, the ILC presented as examples of peremptory norms the prohibition of using force or the threat of using force.

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[70] The first paper on this subject was written, on the basis of documents available in the 1960's, by a young Romanian PhD candidate at the Graduate Institute of International Studies in Geneva, under the direction of professors Paul Guggenheim, Michel Virally, Khristina Marek and Denise Bindchedler, it was presented in 1971 and published in Romanian in 1997, at the Romanian Academy Press. More papers followed, especially after 1990, taking into account the evolutions in international practice.

The 1969 Convention analyzes peremptory norms solely from the perspective of treaties and regulates their effects only in relation to existing or future treaties that may come into conflict with such rules. Other subsequent instruments of international law, adopted as a consequence of codification efforts undertaken by the ILC, address the effects of peremptory rules towards unilateral acts of States and the international responsibility of States and international organizations. Additionally, in many cases that have been examined by national courts, the relationship between peremptory norms and State immunity from jurisdiction has been discussed when analyzing cases concerning the civil responsibility of a State for damages caused to nationals of other States in the context of armed conflicts or outside such events.

The nullity of conventions that violate imperative rules is therefore not the only consequence of recognizing and enforcing peremptory norms. Whereas in the case of treaties contrary to such norms, the concept of *jus cogens* is mostly a preventive weapon (because in practice there are no known examples of treaties that derogate from such rules, and States are more likely to resort to unilateral acts of violation rather than treaties which would generate a strong opposition from most States), practice shows us that there are breaches of peremptory norms brought about by unilateral acts of some States, and also by illicit acts that generate international responsibility.

National and international courts, regional and specialized tribunals, all have used in their decisions, at first cautiously and with numerous explanations (related to public international law, fundamental rules of general interest or rules creating *erga omnes* obligations) and subsequently more boldly, the concept of peremptory rules and have come up with examples of such norms. The issue of jurisdictional competence was also debated, in cases concerning disputes between States on the application of rules seen as peremptory, with the aim of expanding the non-derogatory effect of peremptory rules to clauses of compulsory jurisdiction in cases involving the application of such rules.

II. On the Existence of Peremptory Norms in International Law

Almost without exception, the doctrine has accepted the existence of peremptory rules (*jus cogens*) in international law.[71] Even authors that have expressed doubts about the concept of *jus cogens* have accepted the fact that the prohibition of the use of force and the threat of the use of force is an imperative rule from which States cannot derogate in their mutual relations and that *jus cogens* applies not just to treaties but also to unilateral acts that violate such rules[72].

In decisions prior to the adoption of the 1969 Convention and also afterwards, the International Court of Justice has recognized the existence of such rules, even though some decisions used different formulations. Already in the Corfu Channel Case, the Court referred to obligations of the parties to take into account "elementary considerations of humanity, which are even more absolute in times of peace than in times of war".[73] In its Advisory Opinion on the Reservations made to the International Convention on the Prevention and Punishment of the Crime of Genocide, the Court argues that the "principles underlying the Convention … are recognized by civilized nations as binding for all States, even in the absence of any conventional

[71] Among many studies on this subject, we mention Grigore Geamănu, *Jus cogens en droit international contemporain*, published in the Revue roumaine d'etudes internationales, 1967, p. 87 and Ion Diaconu, *Normele imperative în dreptul internațional*, Academiei Press, 1977, Antonio Gomez Robledo, *Le Jus Cogens international, sa genese, sa nature, ses fonctions*, published in RCADI, 1981, volume 72; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, L. Kustannus Press, Helsinki, 1988, Maurizio Ragazzi, *The concept of international obligations Erga Omnes*, Clarendon Oxford Press, 1997; An opinion against peremptory rules, rather isolated, comes from Michael J. Glennon, *De l'absurdite du droit imperatif (jus cogens)*, published in RGDIP, 2006, no. 3.

[72] Olivier Deleau, *La position francaise à la Conference de Vienne sur le droit des traites*, published in AFDI, 1969, p. 7-23.

[73] CIJ Recueil 1949, p. 22.

relationship".[74] We find a clearer formulation of this position in the Court's decision taken in the "*Barcelona Traction*" Case where, after distinguishing between the duties of a State towards another State and the obligations towards the international community (which the Court sees as *erga omnes* obligations), the ICJ refers to "obligations that, in contemporary international law, derive for example from the prohibition of acts of aggression and genocide, and also from the principles and rules concerning the fundamental rights of individuals, such as the protection against slavery and racial discrimination".[75]

More recently, in the "Diplomatic and consular personnel of the US Embassy in Tehran" Case, the Court invoked the "fundamental character of the inviolability of the person of the diplomatic agent and the location of a diplomatic mission".[76]

After 1990, in a context where regional and national courts were faced more and more with the task of applying or respecting rules of international law, these courts have given more attention to the concept of peremptory rules in international law, either by acknowledging its effects in their legal order or by admitting the imperative nature of some rules.

Therefore, the European Court of Human Rights (ECHR) has examined a civil action against a foreign State accused of torture. A Kuwaiti national, Al-Adsani, sent an application to the ECHR, arguing against the decision of the United Kingdom judiciary, which rejected his action for claiming damages caused by acts of torture committed by Kuwaiti agents on grounds of the jurisdictional immunity enjoyed by the State of Kuwait. The claimant argued that State immunity, which was upheld in his case, violated the prohibition of torture, which is a peremptory rule of international law. The European Court of Human Rights recognized without any ambiguity the imperative character of the prohibition of torture, as a fundamentally important rule, with the value of a jus *cogens norm,*[77] quoting decisions by the Criminal Tribunal for the Former Yugoslavia and a decision of the UK Chamber of Lords in the Pinochet case. Nevertheless, the ECHR admitted the exception of immunity, considering that it does not concern the criminal responsibility of a person for acts of torture, but only a civil action for damages caused by torture committed on the territory of Kuwait. In a 2007 case, the ECHR stated that, in accordance with article 1 of the Convention on Genocide, the parties to that convention are obliged *erga omnes* to prevent and punish genocide, whose prohibition is a part of *jus cogens*" and that "national courts, taking into account the aim of the Convention... expressed particularly by this article, should not exclude their jurisdiction for punishing the crime of genocide in States that have laws establishing the principle of extraterritoriality… but (this action) must be considered reasonable and rather convincing".[78]

Independently, the Inter-American Human Rights Court, in its Advisory Opinion no.18 of September 17, 2003 on the legal status and rights of illegal migrant workers, assessed that the rule of equality under the law, enshrined in the Civil and Political Rights Covenant, creates *erga omnes* obligations for States towards migrant workers and has the nature of a jus *cogens norm*. The Inter-American Court states that *jus cogens* is not limited to treaty law, but also encompasses all legal acts and even the fundaments of international law.[79]

According to the Court opinion, the principle of equality and non-discrimination can be seen as a peremptory rule of international law, "because it applies to all States, regardless of them being parties to a treaty or not and generates effects towards third parties, including individuals". Consequently, "States… cannot

[74] CIJ, Recueil, 1951, p. 32.
[75] CIJ Recueil 1970, p. 32.
[76] CIJ Recueil 1980, §.86 and 91.
[77] ECHR, decision of November 21st 2001, §. 26.
[78] *Jorgic Case, Decision of July* 12th 2007, §. 68.
[79] *Advisory Opinion no.* 18, September 17th 2003, §. 99.

act contrary to the principle of equality and non-discrimination in a manner that causes damage to a defined group of individuals".[80]

In several of its decisions, the International Criminal Court for the Former Yugoslavia (created by Resolution no.827/05.05.1993, by the UN Security Council) has recognized as crimes of genocide, according to the 1950 Convention and the Tribunal's own statute, acts perpetrated against ethnic groups in Bosnia or Kosovo.[81] In the Furundzija Case, a chamber of the Tribunal had to decide whether acts carried out mostly against Bosnian women (threats, violent attacks and rapes) by a §military group involving at least one person who was a civil servant or acted as a *de facto* State organ (as provided by the Tribunal's statute) were acts of torture.

Establishing the existence of elements that constitute the crime of torture, just as in the Tadic and Celebic cases, the Tribunal condemned the accused for acts of torture and violations of dignity, including rape, as breaches of the laws and customs of war. In its motivation, the Court stated that the prohibition of torture imposes an *erga omnes* obligation on States and has gained the status of a peremptory rule of international law (*jus cogens*).[82]

In a similar fashion, the International Criminal Tribunal for Rwanda has tried crimes of violence, including sexual acts against women belonging to the Tutsi population (perceived as forming a distinct, stable and permanent ethnic group, despite sharing the same language and culture as the majority of the Rwandan population), and qualified such acts as genocide.

The Tribunal for Rwanda convicted Akayesu for genocide, including sexual violence, as part of a process of destroying the Tutsi ethnic group. The Court also acknowledged the fact that rape and other forms of sexual violence are themselves crimes against humanity[83] and that many of these acts are in fact acts of torture, using intimidation, degradation, humiliation, punishment, control and the destruction of a person.[84]

In a decision adopted on September 21, 2005, the General Court of the European Union (former Court of First Instance) had to determine the legality of an EU Council Regulation adopted in the implementation of a UN Security Council Resolution which asked States to take measures in order to freeze the assets and funds of individuals and organizations linked to Al-Qaeda and the Taliban Movement. The claimants, Kadi and the Al Barakaat International Foundation, affirmed that their fundamental human rights, and particularly their procedural rights to recourse and the right of ownership, had been breached by the EU. Although it declined its competence to control the legality of the regulation from the point of view of the general principles of EU law pertaining to human rights, the General Court nevertheless admitted that it was authorized to "incidentally control the legality of Security Council Resolutions from the perspective of *jus cogens*, seen as an international public order which is imposed on all subjects of international law, including UN organs, and from which no derogation is possible".[85]

The General Court exerted its control on the matter of respecting the prohibition of inhumane and degrading treatments and of the respect of the right of ownership and concluded that no fundamental *jus cogens* rights were breached.

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[80] Ibid, §. 100. We mentioned this advisory opinion because of the position taken in relation to the existence of peremptory norms in principle, without sharing the Inter-American Court's opinion on any of the rules it sees as being peremptory in its opinion.

[81] *Krstic Case* (Srebrenica), Decision of April 19, 2004.

[82] *Furundzija Case*, Decision of December 10th 1998, §. 151, 153; more information on the jurisprudence of the International Tribunal for the Former Yugoslavia can be found in: Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, published in AJIL, 1999, vol. 93, p. 57-97.

[83] *Akayesu*, ICTR No. 96/4, Decision of February 13, 1996, §. 733-736.

[84] .Ibid., §. 689; More information can be found in: Diane Marie Amman, *International decisions*, published in AJIL, vol. 93, 1999, p. 195-199. 5/3.Petitions no.T-306/01 and T-315/01, Decision of September 21, 2005, §. 277.

[85] Decisions no. 306/1, §. 277, 320, 339 and 344 and T 315/01, §. 226, 274, 284 and 289, restated in the *Decision concerning Ayadi and Hassan* of April 12, 2006, no. T 253/02 and T 49/04.

Nevertheless, the Court stated that, in relation to the UN Charter provisions, "the international law allows us to consider that there is a limit to the principle of compulsory effect of UN Security Council Resolutions; these acts have to respect the fundamental peremptory norms of *jus cogens*. Otherwise, as unlikely as it would seem, such acts would not be binding for the UN member States and for the European Community".[86] In its considerations, the Court formulates, just like the Inter-American Court of Human Rights (in the Caesar v. Trinidad and Tobago Case), the concept that the prohibition of inhumane and degrading treatments is a peremptory rule, and goes even further than the ECHR, which only considered the prohibition of torture as an imperative rule (the Al-Adsani Case).

Although the General Court's decision was overturned by the European Court of Justice after an appeal, which led to the repeal of the Council regulation as being in breach of fundamental human rights recognized by the EU (without exerting a direct control on the UN Security Council Resolutions and without making reference to peremptory norms), this decision is a clear statement on the existence of peremptory rules and, together with decisions by other regional tribunals, opened the way for judiciary control over the acts of States and other political organs, on the basis of rules seen as peremptory.

With regards to national courts, we note the fact that, in 1998, when judging the extradition of Augusto Pinochet, a panel of the House of Lords in the United Kingdom affirmed that the prohibition of the international crime of torture is a *jus cogens* rule of international law, subjected to universal jurisdiction. The existence of peremptory norms has been invoked in numerous situations, in order to reject claims of State immunity in cases where individuals have asked for damages from States in civil actions. Thus, the Italian Court of Cassation, in a number of cases (particularly the Ferrini Case of March 11, 2004) where damages from the German State were sought in relation to crimes committed by the German army at the end of World War II against Italian nationals, has rejected the exception of jurisdictional immunity of a State on the grounds of its inapplicability in the case of crimes against humanity, due to the preeminence of rules belonging to *jus cogens*, deemed to be superior.[87]

Greek courts have followed a similar judgment in cases such as the Voiotia Prefecture v Germany or the Distomo Prefecture v Germany,[88] where the *jus cogens* nature of the rules annexed to the Fourth Geneva Convention on the protection of victims of armed conflict was invoked. The New Zealand Supreme Court, while accepting the imperative character of the prohibition of torture, nevertheless refused to include among its constituting elements the prohibition of non-refoulement.[89]

Answering this evolution in the "Armed Activities on the Territory of the Congo" Case (D.R. of Congo v Rwanda), where the Congo tried to convince the Court that it is legally competent to apply the Convention (in order to reject the reservation of Rwanda to the article of the Convention that provided for the jurisdiction of the ICJ on disputes related to its applications), the International Court of Justice made a distinction between the peremptory rules of international law in general (*jus cogens*) and rules pertaining to its competence. The Court affirmed that the prohibition of genocide clearly has the character of an imperative rule, an aspect agreed upon by both parties, whereas its jurisdictional competence is based on the consent of the parties, which did not exist due to the reservation made by Rwanda[90]. This is the moment when it is considered that the ICJ explicitly and definitively recognized the existence of peremptory norms in international law.[91]

In other cases, the Court upheld the *erga omnes* opposability of the right of people to self-determination, remembering the fact that this principle is enshrined in

[86] Ibid, §. 281.
[87] Analysis by Carlo Focarelli in *Immunite des Etats et Jus Cogens*, published in RGDIP, 2008, no. 4, p.761-793.
[88] Described in AJIL, vol. 95, 2001, p. 198-201.
[89] Ibid, p. 779.
[90] .CIJ Recueil, 2006, §. 64.
[91] Phillippe Weckel, Guillaume Areou, *Chronique de jurisprudence internationale, Cour Internationale de Justice*, published in RGDIP no. 3/2006, p. 487-494.

the UN Charter and in the International Covenant on Civil and Political Rights from 1966.[92]

In the Advisory Opinion on "The Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory", the Court further stated that "this construction, which adds to measures previously taken, raises … a grave obstacle for the exercise by the Palestinian people of its right to self-determination and thus breaches Israel's obligation to respect this right".[93] Determining that the construction of the wall also violates human rights enshrined in the 1966 Covenant, the Court highlighted the fact that "Israel must abide by its obligation to respect the right to self-determination of the Palestinian people and its obligations under international humanitarian law and international human rights law".[94]

It is generally accepted nowadays that there are peremptory rules in international law, although there is no consensus on the norms that have such a nature, on the criteria for determining them or on the effects of such rules in various fields and institutions of international law.

As we have seen so far, international and national courts recognize the existence of *jus cogens* norms and provide several examples – such as, most frequently, the prohibition of genocide, torture or, less often, slavery and racial discrimination, the prohibition of the use of force or the threat of using force and the right of people to self-determination or violations of the norms of international humanitarian law – without justifying their choices and, sometimes incidentally, without establishing the consequences of these norms or arriving at different conclusions on the subject of these consequences.

In the context of analyzing the methods that could be used for distinguishing peremptory norms and their effects, one author addresses the deductive approach (without basing it on international practice), the semi-deductive approach (where some aspects of *jus cogens* are proven on the basis of international practice whereas other are deduced logically) and the inductive, empirical method, founded on the analysis of international practice. The author chooses the inductive approach, considering that the imperative character of a norm must be established on the basis of international practice and its recognition and acceptance by States, organs and international institutions as a rule from which States cannot derogate in their mutual relationships.[95]

He expands this method to the consequences of peremptory norms in various fields of international law.[96] By using this method, the author reaches the conclusion that peremptory norms are indistinguishable from customary rules, which are also established by examining international practice. In our opinion, the use of the same methods for determining the existence, content and effects of peremptory norms, based on evaluating international practice, is not an argument that should lead to the abovementioned conclusion, because the issue here is essentially to establish the imperative character of a rule that is already customary and/or conventional.

According to the definition found in article 53 of the Vienna Convention on the Law of Treaties, such a norm must be accepted and recognized by the international community as a whole as a rule from which States cannot derogate; the acceptance and recognition lead us directly towards international practice on the imperative nature of the norm, from which no derogation is possible and thus towards the inductive, empirical method. This does not mean that peremptory rules cannot be distinguished

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[92] *Advisory Opinion on the Namibia and Western Sahara*; the decision in the *Case of Western Timor, between Portugal and Australi*a, Recueil CIJ, 1995, §. 88.

[93] CIJ, Recueil 2004, §. 122; More details are provided by Phillippe Weckel, *Chronique de jurisprudence internationale*, published in RGDIP, no. 4/2004, p. 1017-1036.

[94] Ibid, §. 149.

[95] This method was proposed in 1971, in a PhD thesis presented before the Graduate Institute of International Studies in Geneva, and then reiterated by Ion Diaconu in his work, *Peremptory Norms in International Law*, which examines, as examples of such norms on the basis of international practice, the prohibition of the use of force and the threat of using force and the prohibition of slavery.

[96] Carlo Focarelli, in an article quoted above, p.780-785.

from other customary norms, from which States can derogate in their relationships with each other.

III. Jus Cogens and the Issue of Treaty Reservations

The concept of peremptory norms has been established in the process of codifying treaty law, which culminated with the adoption of the 1969 Vienna Convention on the Law of Treaties. This concept is defined by the Vienna Convention in relation to treaties that may derogate from peremptory norms, meaning that treaties contrary to imperative rules are void or cease their applicability once a new peremptory norm contrary to their provisions appears.

The convention does not discuss the relationship between reservations to multilateral treaties and peremptory rules. A treaty reservation is a unilateral declaration through which a State becoming party to an agreement aims to exclude or to modify in relation to itself the legal effects of certain treaty provisions. With regards to the institution of reservations, the 1969 Convention states that (in the case of treaties where reservations are not explicitly or implicitly prohibited) a reservation must not contradict the object and purpose of a treaty; in addition, it is provided that other States can accept a reservation or they can object to it (articles 20 and 21); if a State objects to a reservation, the clauses that form the object of the reservation and the change it creates shall not apply between the State that made the reservation and the one that objected; the objecting State can declare that the treaty shall not apply in its relations with the State that made a reservation. If all the States parties to a treaty object to a reservation, the State that made it shall not become party to that treaty.

From the point of view of peremptory norms, keeping in mind their importance and the fact that they are accepted and recognized as such by the international community, it is difficult to envisage that they could fall outside the object and purpose of a treaty. A reservation concerning a provision in a multilateral treaty expressing a peremptory norm would therefore be incompatible with the aim and purpose of a treaty, according to the fundamental norm. Thus, the Human Rights Committee affirms in its General Comment no.24, of 1994, that "the provisions of the Covenant that represent customary international law (and even more so the provisions that are imperative) cannot form the object of reservations.[97]

This conclusion is obvious due to the fact that, in itself, the formulation of a reservation aims to limit or exclude the application of a norm in relationships between States party to a treaty, and the acceptance of a reservation or the absence of an objection would mean the creation of a bilateral relationship contrary to peremptory norms between the State that made the reservation and the State or States that accepted or did not object to the reservation.[98]

Difficulties appeared because in various treaties and in international law in general there are no accepted procedures for establishing in an authoritative manner which reservations contradict the object and purpose of a treaty. The method of relying on objections does not solve this problem, as we have seen. The most important difficulties were encountered in the case of treaties concerning human rights, because the principle of the universality of human rights and freedoms is opposed to reservations that restrict the benefit of certain rights and liberties due to a unilateral decision adopted by a State. The central concern was, and still is, that more and more States need to respect these rights and liberties; therefore, the objections to reservations, very numerous in this field, do not aim to exclude the applicability of treaties in relation to States that make reservations, but to determine these States to reexamine and withdraw their reservations.

The Human Rights Committee affirms, in its general Observations, that a State cannot reserve the right to practice slavery or torture, or the right to subject people to

[97] Human Rights Committee, General Comment no. 24/1994, doc. HRI/GEN/1/Rev. 9(vol. I), p.249.
[98] See also Su Wei, *Reservations to treaties and some practical issues*, published in the Asian Yearbook of International Law, vol. 7, 1999, p. 133.

treatments or punishments that are cruel, inhumane or degrading, cannot arbitrarily deprive people of their right to life, nor can it arrest or detain them in an arbitrary manner, cannot deny their freedom of thought, conscience or religion and so on. The Committee recognizes nevertheless that not all of these rights (not even all the rights listed in article 4 of the Covenant) can be excluded from derogations, and that there is no automatic correlation between reservations that can affect the object and purpose of a treaty and reservations related to norms from which States cannot derogate, which are peremptory, and expressly adds that the prohibition of torture and the arbitrary violations of the right to life are peremptory norms.[99] Thus, it is not possible to confuse customary rules, as a whole, with *jus cogens* norms, far less numerous according to the definition given by the 1969 Vienna Convention and international practice.

Some regional courts (such as the ECHR), have the competence to appreciate the validity of reservations to treaties whose application they monitor, and can reject those reservations they deem unacceptable. Such competences are not recognized by other international treaties in this domain. Several committees created in order to supervise the application of treaties (the Human Rights Committee for the Covenant on Civil and Political Rights, for example, followed by other similar committees) have considered that their attributions to examine the application of treaties by States also include the evaluation of the validity of reservations made in relation to these treaties, and have ignored some reservations, considering the States that formulated them as being bound by all the provisions of the agreements concerned.

This conception has not been accepted by some State parties and by the International Law Commission. In a series of reports,[100] the ILC affirmed that a treaty reservation is an integral part of the ratification by the State making the reservation; an organ created for enforcing the application of human rights, created by that treaty, can assess if a reservation respects the object and purpose of the treaty, but its opinion on the matter has the same value as its conclusions on the respect of the treaty by the said State. Therefore, if that organ is competent to adopt binding decisions on the violation of the treaty by a State, then it also has the competence to declare as void a reservation and to ignore it (the case of the ECHR); if such an organ can only adopt opinions or recommendations concerning the respect of the treaty, then its conclusions on reservations will have the same legal value.

In 2011, the Commission adopted a Guide to Practice on Reservations to Treaties, which was presented in front of the UN General Assembly,[101] where it maintains its position expressed in the Preliminary Report. After stating the general rule of the inadmissibility of reservations that are incompatible with the object and purpose of a treaty, or that impact on an essential element of the treaty that is necessary for its proper functioning, thus affecting its *raison d'être*, the Guide affirms that a reservation to a provision that reflects an imperative rule of international law (*jus cogens*) will not affect the binding character of that rule, which will continue to apply between the State or organization that made the reservation and other States or international organizations.

Furthermore, a reservation cannot eliminate or modify the legal effects of a treaty in a way that contradicts an imperative norm. Although reservations to customary rules included in treaties are allowed, it is not possible to make reservations to provisions concerning rights from which no derogation is possible under any circumstance, except for the case when a reservation is compatible with the essential rights and obligations that result from the treaty.

A reservation that does not fulfill the conditions of form and admissibility is void and lacks any effects. Without questioning the place of peremptory norms in the

[99] General Comment 24/1994, doc. HRI/GEN/1/Rev. 9, vol. I, p. 250.

[100] The first such report was *Preliminary Conclusions on Reservations to Multilateral Normative Treaties, Including those concerning Human Rights*, Ass. Gen. Doc. Fifty-second session, Suppl. No. 10(A/52/10); the most recent was doc. A/CN.4/647 of May 26th 2011, presented in front of the UN General Assembly under Suppl. 10(A/66/10).

[101] Commission Report, presented in front of the UN General Assembly (doc. Suppl. 10(A/66/10)).

context of treaty reservations, the Guide clearly states that provisions containing peremptory norms cannot form the object of an admissible reservation.

On the subject of admissibility with regards to treaty reservations, the Guide envisages that treaty monitoring organs, in the exercise of their attributions, can carry out such an evaluation, but its value is that of the act that embodies the evaluation (that is, if the evaluation of the validity takes the form of a recommendation, then it will have the value of a recommendation). It provides that States which formulate reservations must pay attention to these evaluations. The Commission thus maintained its previous opinion that organs charged with surveying the application of treaties concerning human rights are not competent to repeal a reservation, if the documents that they can adopt have only the value of recommendations.

Both court decisions and the doctrine have intensely debated the validity of reservations to rules that provide for the compulsory jurisdiction of the ICJ or for the competence of other organs to receive and solve certain individual complaints concerning violations of human rights, particularly when there are also allegations of breaching peremptory rules.[102]

From a European perspective, in the Belios Case, the ECHR has established, in the name of European public order, the lack of validity of the Swiss reservation, seen as contrary to the 1950 Convention, and in 1995, in the Loisidou Case, the ECHR also repealed the *ratione loci* and *ratione materiae* restrictions adopted by Turkey with regards to the application of the Convention on the Northern Cyprus.[103]

The Human Rights Committee examined the Kennedy v Trinidad and Tobago Case, where the State formulated a reservation to Protocol no.1 of the International Covenant on Civil and Political Rights and rejected the right of the Committee to examine complaints originating from detainees sentenced to death. The Committee declared that this reservation was incompatible with the object and purpose of the Protocol and se§ted it from the ratification act, and then proceeded to examine the substance of the complaint.[104]

In the same general direction, the Inter-American Human Rights Court, in the Ivcher Bronstein Case, refused to approve the withdrawal of the acceptance of the optional clause concerning the jurisdiction of the Court, based on the authority of treaties on human rights, which imply the adhesion of States to common and superior values that would entail a special regime for clauses on jurisdiction, clauses that cannot be subsequently affected by unilateral acts of States.[105]

A different solution was given by the ICJ in the "Armed Activities on the territory of the Congo" Case, where Rwanda invoked its reservation concerning the clause imposing the compulsory jurisdiction of ICJ for disputes related to the Genocide Convention, and the Congo rejected this reservation, claiming it was contrary to *jus cogens* norms. The Court maintained its position in the 1951 Advisory Opinion on the reservations to the Genocide Convention, which was that these reservations are not incompatible with the object and purpose of treaties, and therefore has not addressed the relationship between compulsory jurisdiction and the application of peremptory norms incorporated in treaties.[106]

On this matter, the Guide o Practice to Reservations on Treaties, adopted by the International Law Commission, establishes that reservations on provisions that establish mechanisms of dispute settlement or for monitoring treaty application are not automatically incompatible with the object and purpose of a treaty, except for cases when these exceptions aim to exclude and modify the legal effects of an essential

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[102] More details on this subject can be found in Gerard Cohen-Jonathan, *Les réserves dans les traites institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux*, published in RGDIP, 1996, no. 4, p. 915-948.

[103] The *Belios Case*, Decision of April 29th 1988, presented by Vincent Berger, ECHR Case Law,4th edition, 2002, IRDO, p. 182-185; the *Loisidou Case,* Decision of March 23, 1995, A series, no. 310.

[104] Communication no. 845/1999, CCPR/C67/D/845/1999-31-12-1999

[105] Decision of September 24th 1999 on competence; C series, no. 54.

[106] On this subject: Ph. Weckel and G. Areou, *Chronique de jurisprudence internationale*, published in RGDIP, 2006, no. 3, p. 487-497.

provision for a treaty's *raison d'être*, or aim to eliminate the application of a settlement or surveillance mechanism that is the objet itself of a treaty.

IV. The Relationship between Unilateral Acts and Peremptory Norms

The problem of unilateral acts was addressed by the activities of the ILC in 1996.

The result was that in international law, there are clearly numerous unilateral acts that intervene in the process of concluding, applying, suspending or terminating a treaty (or, for example, in the process of establishing the extent of the territorial sea, up to a distance of 12 nautical miles); these acts are analyzed in the context of the law of treaties, as provided by the 1969 Vienna Convention. Naturally, reservations made in relation to multilateral treaties are still unilateral acts, but we approached to them from the standpoint of their relationship with imperative norms.

The breaches of peremptory rules by actions or omissions of States or international organizations (as a manifestation of their behavior) can also be classified in the general concept of unilateral acts, but the relationship between them, as illicit acts, and peremptory rules is treated as an aspect pertaining to the issue of international responsibility. Other unilateral acts are the public declarations by which States (as a manifestation of their will), express their obligations that can be in contradiction with peremptory norms.

Taking into account the different views and the complexity of this subject, the ILC decided in 2004 to prioritize the study of unilateral acts taking the form of public declarations as an expression of the will to assume obligations in accordance with international law. Consequently, the Commission adopted in 2006 the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which were presented in 2007 before the UN General Assembly. The adopted document states from the beginning that public declarations through which a State manifests its will to be bound by an obligation have the effect of creating a legal obligation.[107] After a brief presentation of the formal conditions for a unilateral act, the Guiding Principles affirm that a unilateral declaration which comes into conflict with an imperative norm of international law is void. In the "Armed Activities on the Territory of the Congo" Case, the ICJ did not exclude the possibility that a unilateral declaration by Rwanda could be invalidated because it violated a peremptory norm, but it appreciated that it was not the case.[108]

V. Peremptory Norms and the State's Immunity from jurisdiction

Several national and international jurisdictions have been faced with solving cases where peremptory or customary international law rules were violated, in order to obtain civil re§tions for damages suffered by individuals. The accused States invoked their immunity from jurisdiction. Some courts gave rejected this exception, as being contrary to the peremptory norm invoked by the claimants; others have accepted it, and limited themselves to discussions on procedural admissibility, without entering the substance of the case.

Greek courts were the first to adopt a restrictive view on immunity, denying Germany its immunity for acts committed by the German army during World War II. Thus, in the Voiotia Prefecture v Germany Case of 2000,[109] the Greek Supreme Court

[107] The Commission started from the ICJ's *obiter dictum* in the *Nuclear Tests Case of 1974*, where it retained the official declaration of the French President on the cessation of atmospheric nuclear tests, and also the Egyptian declaration on the Suez Canal, from 1957.

[108] *R.D. Congo c. Rwanda*, Jurisdiction and Admissibility, Recueil 2002, §. 69.

[109] *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 11/2000, decision of May 4, 2000, presented in International Decisions, AJIL, vol. 93, 2001, p. 198-204; A critical approach by Carlo Focarelli can be found in an article previously quoted, p. 766-780 and in Christian Tomuschat,

judged a petition by the German State against a decision adopted by the Livadia district court, which granted monetary compensation for the atrocities committed by German occupying forces in the village of Distomo in June 1944. The Supreme Court invoked the European Convention on State Immunity of 1972, according to which a State cannot pretend immunity for acts that cause damage to the physical integrity of individuals or private property, and referred to decisions of US courts on the basis of a 1996 amendment to the 1976 Foreign Sovereign Immunities Act, which denied immunity for States in cases when an individual tried to obtain monetary compensation for damages provoked by torture (the *Letelier v. Chile* and *Liu v. the People's Republic of China* cases).[110]

The Greek court considered that the acts perpetrated by Germany amounted to crimes against humanity and were in breach of peremptory norms of international law, and therefore could not be covered by State immunity. Furthermore, the Italian Court of Cassation reaffirmed in 2008 the conclusion it reached in a preliminary decision back in 2004 in the Ferrini Case (a complaint of an Italian national deported to Germany during World War II and forced to work in a weapons factory while being subjected to inhumane treatment), that a State which has committed an international crime does not have the right to immunity from jurisdiction, and affirms the preeminence of peremptory norms over other norms of international law.[111]

On the contrary, in the *Al-Adsani v. the United Kingdom* Case, after British courts rejected a request by a Kuwaiti national to receive compensation for acts of torture he endured in Kuwait for reasons of State immunity, the ECHR recognized the imperative character of the prohibition of torture, but refused to remove the immunity from jurisdiction of a State in the case of a civil action in front of a court of a State other than the one where the crimes took place. The Court considered that there is no rule of international law on the waiver of State immunity in the case of civil actions.[112] Furthermore, in the *Jones* Case, the House of Lords (the Supreme Court in the United Kingdom) excluded the waiver of immunity of the plaintiff State as an effect of the imperative character of the prohibition of torture.[113]

In the Yerodia Case ("*Arrest Warrant Case* of April 11, 2000, *D.R. of Congo v. Belgium*), where Belgium invoked the involvement of the Congolese foreign affairs minister in the perpetration of war crimes and crimes against humanity, in violation of peremptory norms and the Democratic Republic of Congo relied upon the immunity of jurisdiction of its minister, the International Court of Justice accepted the existence of a full immunity from jurisdiction for the minister of foreign affairs, resulting from his mission as a representative of the State. In their opinions, some judges rejected this thesis and claimed that the minister's immunity from jurisdiction is not an imperative rule.[114]

VI. Peremptory Norms and International Responsibility

As a result of accepting and recognizing peremptory norms as rules from which States cannot derogate in their relations with one another, these rules have different effects in the context of State responsibility for illicit acts.

We are also referring to the responsibility of international organizations, as subjects of international law, when they commit illicit acts. Of course, the illicit act is

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L'immunite des Etats en cas de violation grave des droits de l'homme, published in RGDIP, 2005/1, p. 51-73.

[110] Quoted in AJIL, vol. 93, 2001, p. 199.

[111] Presented by Carlo Focarelli, in the article previously quoted. p. 765-773.

[112] Decision of November 21st 2001, detailed and criticized in *Chronique de jurisprudence internatinale*, published in RGDIP, 2002, p. 178-182; Judges supporting the minority opinion claimed that peremptory rules eliminate the application of rules on jurisdictional immunity, voiding it of legal effects.

[113] *Jones c. Ministry of Interior of the Kingdom of Saudi Arabia*, presented in AJIL, vol. 100, 2006, p. 910-908.

[114] Presented in AJIL vol. 96/2002, p. 677-684.

defined in the same manner when it comes to the violation of a prescriptive rule or in the case of a peremptory rule, that is the act must constitute a behavior attributable to a State (or international organization) in accordance with international law and it must represent a breach of an international obligation assumed by the said subject. The codification of rules on international responsibility carried out by the ILC[115] has led to the conclusion that the consequences of an illicit act are different when a peremptory norm is breached, due to the importance of these rules as provisions from which no derogation is allowed.

Therefore, if an act is in contradiction with an imperative rule of international law, its illicit character cannot be eliminated through the consent of the victim State, by invoking self defense, by describing the act as a countermeasure towards an illicit act carried out by another State, by invoking *force majeure*, a calamity or a state of necessity. It is obvious that, by invoking such causes, it would be possible to derogate from peremptory rules, which contradicts their very nature.

The rules drafted by the ILC as a result of its codifying and progressive development efforts in the field of international law include a chapter on grave breaches of peremptory norms, which presents the special consequences brought about by such illicit acts. These grave breaches are described as flagrant or systematic failures of States to fulfill their obligations.

Special consequences result from such violations:

- The obligation of States to cooperate in order to put an end through legal means to any such grave breach.
- The obligation of States not to recognize as legal a situation created by a grave violation, nor to help or assist the perpetuation of such a situation.

Additionally, the responsibility of a State can be invoked by any other State for breaching an obligation towards the international community as a whole in the case of a peremptory norm.

Rules of responsibility for international organizations are not different from those described above, but are formulated in more concise terms, by taking into account their specificity as derived subjects of international law.

With regards to countermeasures as actions in reaction to an illicit act, existing norms provide that these countermeasures cannot affect: the obligation of States to refrain from resorting to the use of force, the obligations concerning the protection of fundamental human rights, the humanitarian obligations that prohibit reprisals and other duties derived from peremptory international law rules. Without mentioning the obligations pertaining to the protection of human rights or the humanitarian law obligations that prohibit reprisals, the adopted rules do not exclude countermeasures that breach such rules as a consequence of peremptory norms, but do not limit the sphere of these rules to the ones stated previously. Therefore, even if an illicit act represents a violation of peremptory rules, countermeasures that derogate from peremptory rules themselves are not allowed.

VII. Conclusions

The evolution of international practice, especially over the last decade, has led both to the recognition of the existence of peremptory rules and also to the clarification of numerous consequences resulting from the application of this concept in various fields of international law outside the law of treaties. Of course, not all aspects derived from various documents and decisions meet the necessary degree of consensus or are uncontested, but this is the road towards the crystallization of an international practice and the adoption of international law rules.

[115] ILC Report on the responsibility of states, doc. Suppl. No. 10(A/56/10), rules adopted through Resolution no.56/83 of the UN General Assembly of December 12th 2001; Report on the international responsibility of international organizations, doc. Suppl. No. 10(A/66/10), adopted by the UN General Assembly through Resolution no. 66/10 of December 9, 2011.

The nullity of international treaties contrary to peremptory norms is generally acknowledged; a number of rules have been recognized as peremptory; for other norms cited in this study, opinion is divided and international practice is not uniform. In addition, international practice varies on the consequences of peremptory rules, usually not in relation to their effects on contrary norms, concerning their content, but mostly in the relationship between imperative norms and other rules with which they may compete, such as rules on the competence of international tribunals with compulsory jurisdiction or treaty monitoring organs, and also rules on State immunity from jurisdiction in the case of States committing breaches of norms considered to be peremptory in nature.

Clearer are the consequences of peremptory rules regarding unilateral acts, as manifestations of intention through which States assume certain international obligations, which are void if they breach imperative rules, and also regarding the international responsibility of States, where a State's responsibility cannot be exonerated for violations of peremptory rules and countermeasures cannot be applied when they represent a violation of imperative rules. Procedurally, any State can invoke international responsibility and the obligation to cooperate for eliminating the consequences of breaching a peremptory norm, and there is also an obligation of abstaining from recognizing as legal the consequences of such a breach.

Also these domains contain rules that have been created in the context of the recent codification of international law, and these rules have yet to pass the test of international practice.

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Legal Consequences for Disregard of the World Court's Decision and the Continuing Construction of a Wall in the Occupied Palestinian Territory

Gbenga ODUNTAN[*]

Abstract: *A decade after the delivery of the Advisory Opinion of the International Court of Justice (ICJ) in the case Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion) popular opinion appears to be that the advisory opinion has not produced any appreciable and positive outcome for and in the interest of the Palestinian people. This article discusses the issues surrounding the legal validity, authoritativeness and bindingness of advisory opinions and notes that although advisory opinions are not judgments but "merely opinions and merely advisory" they do carry a recognisable authority and are generally persuasive and followed by UN member States and even States that are not yet members as exemplified by Israel in relation to the Conditions of Admission of a State to Membership in The United Nations [1948].* [1] *The article considers the impact the wall has had over the last 11 years evaluates attempts to give effectiveness to the advisory opinion and makes suggestions as to the future. The article thus, lays the ground for the conclusion that the opinion in the case under discussion ought to be followed by Israel; that Israel bears international responsibility and liability for its action in defiance of the position of international law and particularly for large scale abuse of the rights of individuals and communities in Palestine as a result of the wall policy; and that all UN bodies particularly the Security Council should seek all ways to bring about the implementation of the Courts decision in this case. The reception of the opinion by various key stakeholders are evaluated and the major steps taken by the General Assembly to encourage compliance and to impose liability on the State of Israel are discussed along with suggestions on how to ensure that the legal opinion in this case is finally used as a basis to bring down the much criticised and illegal, approximately 700 km structure, which is a clog in the wheel of the general resolution of the problems surrounding the occupation of Palestinian territories and the law and politics of the Israeli-Palestinian issue in international relations.*

Key-words*: Palestinian territory, occupation, United Nations, advisory opinion*

"With great power comes great responsibility"
(Peter Parker's Uncle Ben in Spiderman)

I. Introduction

A decade after the delivery of the advisory opinion of the International Court of Justice (ICJ) in the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Request for advisory opinion) popular opinion appears to be that the advisory opinion has not produced any appreciable and positive outcome for and in the interest of the Palestinian people.[2] The outcome of the case has been

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[1] [1948] ICJ Reports 57. Hereinafter referred to as the *Admissions Opinion.*

[2] ICJ Reports 2004, 136.Cases and other legal materials of the International Court of Justice are available at http://www.icj-cij.org/homepage/index.php, accessed 07 December 2014. Hereinafter referred to as the *Legal Consequences of Wall* case.

rejected and then ignored by the State of Israel and successive governments in Tel Aviv. Israel has adopted the stance of 'real politick' and refused blatantly to obey the legal courses of action indicated by the principal judicial organ of the UN. Indeed, recent years has witnessed a full-blown return by Israel to what Avi Shlaim terms the iron wall approach based on unilateralism not only in relation to the Palestinians but to the whole Arab world.[3] This policy is at its starkest in relation to the wall especially with the increasing resort to violence to increase and maintain it.

The question, thus, arises what are the legal implications of the continuous disregard of this important advisory opinion. Indeed what are the continuing consequences of the maintenance of the constructed wall in the occupied territories. The answer to that question necessarily arises from the question submitted to the World Court by the General Assembly as set forth in its resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session.

The direct question implored of the Court was the following:[4]

"What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

After readily founding jurisdiction to provide an answer in the case the Court's responses were unambiguous and unequivocal:

- Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem and to dismantle forthwith the structure therein situated;
- Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;
- All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.
- The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

The Palestinian question is for all intents and purposes one of the apparently 'intractable' disputes of our time and one for which several life times of academic publishing can be sustained. Adding to the inherent analytic difficulties of the pertinent issues are the dangers of labelling that may attach to scholars that venture into discourse around this difficult topic. Just as M. Litinov fearfully declared of the cold war era that, it was necessary to face the fact that there was not one world and "...only an angel could be unbiased in judging Russian affairs",[5] any commentator on aspects of the Palestinian-Israeli relations and their international effects must be alert to the

[3] Avi Shlaim, "The Iron Wall Revisited" *Journal of Palestine Studies* Vol. 41, No. 2 (Winter 2012) p. 80.

[4] Thus, Article 96 of the U.N. Charter provides: 1. "The General Assembly or Security Council may request the International Court of Justice to give an advisory opinion on any legal question. The founding of jurisdiction was based upon a two pronged consideration (a) whether the Court has jurisdiction to give the opinion requested to the organisation requesting it –the General Assembly and perhaps in this particular case more importantly (b) whether, there is any reason why it should decline to exercise any such jurisdiction."

[5] T. A. Taraconzio, *The Soviet Union and International Law* (New York: Macmillan Co., 1985) p. 296.

possibility of being labelled and pigeonholed. Despite this reality, it is important to ask the questions that we find imperative in this Article. One of the main questions that arose following the decision of the Court concerned the legal effect of its ruling under the advisory jurisdiction of the Court. This of course is tied to the more general question - what are the legal effects of advisory opinions of the World Court? What are the consequences of a continuous disregard of the Court's decision after it had so openly and clearly indicated that the existence of the wall was illegal and had to be brought to an end? The preceding queries are important legal questions and they can be satisfactorily answered despite the political aspects of the legal question and the political or social implications of any such intellectual effort. This article, however, limits itself to the consequences arising out of the existence of the wall rather than the entire 'Palestinian question' or indeed the occupation itself.

II. Legal Effect of the Advisory Opinion

The term 'advisory opinion' has not been defined anywhere either in the League of Nations Covenant,[6] Charter of the United Nations,[7] PCIJ Statute[8] or the Statute of the ICJ.[9] However, advisory opinions have been considered by States as well as the international organisations to be authoritative statements of law. Ian Brownlie, defines Advisory Opinions from a functional point of view. He wrote: "The uses of the advisory jurisdiction are to assist the political organs in settling disputes and to provide authoritative guidance on points of law arising from the functions of organs and specialised agencies."[10] The Court itself in the *Certain Expenses case* as if in comparison with the term 'judgment.' noted that "the opinion which the Court is in course of rendering is an *advisory opinion*" (italics added).[11]

Advisory opinions are indeed not judgments but as older authorities on the Court like Prataap" have bluntly put it "... opinions are therefore, 'precisely what they purport to be; they are advisory… they are merely opinions and merely advisory".[12] Thus, it is clear that advisory opinions have slightly different judicial characteristics from judgments in the contentious jurisdiction of the Court. The main difference from the procedural point of view, between the two is that in the advisory jurisdiction of the Court there are technically no "parties" and there are no binding "decisions." The individual State's role in advisory cases is essentially that of supplying "information" as may be required by the Court, and also under *amicus curiae* functions so to speak.[13]

It appears, therefore, that the reasonable view is that an advisory opinion is an authoritative statement of law and fact, given by the ICJ in response to a request from an authorised body on specific issues.[14] It is worthy of note that the Court has

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[6] League of Nations, Covenant of the League of Nations, 28 April 1919, available at: http://www.refworld.org/docid/3dd8b9854.html, accessed 27 December 2014.

[7] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html, accessed 27 December 2014.

[8] League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920, available at: http://www.refworld.org/docid/40421d5e4.html, accessed 27 December 2014. Amended by the Protocol of 14 September 1929.

[9] The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The Court's seat is at the Peace Palace in The Hague (Netherlands). It began work in 1946, when it replaced the Permanent Court of International Justice (PCIJ) which had functioned in the Peace Palace since 1922. It operates under a Statute largely similar to that of its predecessor, which is an integral part of the Charter of the United Nations. Website: http://www.un.org/en/documents/charter/.

[10] Ian Brownlie, *Principles of Public International Law*, Third ed. (Oxford: E.Q.B.S., 1979) p. 728.

[11] ICJ Reports (1962), p. 168.

[12] See also Dharma Prataap, *The Advisory Jurisdiction of the International Court* (Oxford: Claredon Press, 1972) pp. 230, 231.

[13] Shabtai Rosenne, *The World Court: What it is and How It Works*, (New York: A.W. Sithjoff - Leiden Oceana Publication Inc. 1973) p. 81.

[14] Gbenga Oduntan, *Law and Practice of the International Court of Justice a Critique of the Contentious and Advisory Jurisdictions* (Enugu, Nigeria: Fourth Dimension Publications, 1999) p. 133; Aaron Korman & Giselle Barcia, "Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion", Vol. 37 *The Yale Journal of International Law* (2012) pp. 36, 39, 42;

assimilated its advisory procedure to its contentious procedure as closely as practicable.[15] This is because the origins of many requests are in actuality disputes, and the very nature of the judicial function, has given a somewhat contentious aspect to advisory proceedings.[16]

III. The Reception of the Opinion

Upon its issuance, this Advisory Opinion was given a mixed reception. Certainly, a mixed reception was to be expected; the Opinion attempted to resolve an issue at the heart of a political maelstrom, and represented an early foray into controversial debates about the obligations of occupying powers and the self-defence entitlements of States in the face of terrorist activity; the Opinion precipitates a number of exciting developments in international humanitarian and human rights law, and leaves no lingering uncertainty as to the Court's vision for these developments. Irrespective of any remaining weaknesses, this newfound authoritativeness ought to be welcomed.[17]

In terms of formal or diplomatic reception of the opinion rendered by the court it has to be pointed out that, although it will be very unusual to do so, there is no legal obligation either on the part of the organ requesting the opinion or of the States which may be concerned to accept and give effect to the opinion in practice. They usually may be favourably received but they may even be disregarded. In considering the reception of the opinion, regard must be given to the practice that opinions directly requested by the General Assembly or Security Council are formally received and taken note of by these primary organs of the UN. If requested by another 'authorised body' within the UN, the Secretary-General simply communicates it to the organisation concerned; or he/she may be directed by the Assembly or the Council to communicate it to the administrative head of any concerned bodies or subsidiary organs.

In the vast majority of cases it may, however, be satisfactorily noted that the Court's opinion has been accepted by the body which requested them, namely by the General Assembly and other specialised agencies such as I.L.O., U.N.E.S.C.O. and I.M.C.O without any controversies. The acceptance of the opinion can usually be seen in the resolutions they adopt in the aftermaths of the rendering of the opinion. In other words there is evidence of a next-step practice or doctrine of 'conforming resolutions' which acknowledge the opinion of the Court in a manner that suggests that the emergent and clarified legal position will be made to affect the pertinent situation. For instance, in accepting the opinion in the *Admissions Opinion,* the General Assembly in its resolution passed a recommendation that each member of the Security Council and General Assembly should act in accordance with the opinion. Further in the same resolution, the General Assembly "noted" the opinion and asked the Security Council to reconsider the previous application for membership. In its resolution in the *Reparation Case*,[18] the General Assembly, "having regard to" the opinion, authorised the Secretary-General to bring international proceedings against any State with the view to receive reparation for damage to the United Nations or to the individual in the service of the organisation. Indeed early writers on the advisory jurisdiction were quick

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Mahasen Mohammad Aljaghoub, *The Advisory Function of the International Court of Justice 1946 – 2005* (Berlin: Springer-Verlag, 2006) pp. 8, 153, 253.

[15] J. Sloan, "*Advisor, Jurisdiction of the International Court of Justice*", 38 *California Law Review* (1950) p. 848.

[16] Thus, Article 68 of the Statute makes applicable to advisory procedure the provisions of the Statute relating to contentious cases `to the extent to which it recognises them to be applicable.' Article 102 of the 1978 Rules constitutes a corresponding provision that enables the application of the contentious procedure. Brownlie, *op. cit.*, p. 729.

[17] Leah Friedman, "*Case Notes: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), International Court of Justice"*, 9 July 2004, Vol. 27 *Sydney Law Review* p. 715.

[18] *Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, [1949] ICJ Rep 174 *supra* note 1.

to acknowledge that these sorts of resolutions indicate implied acceptance of the Advisory Opinions.[19] Another case in point is the *I.L.O. Administrative Tribunal Case*.[20] The case was submitted to the Court for advisory opinion at the request of the General Assembly of the United Nations. The question was whether the Assembly had the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. The Court replied in the negative and said the General Assembly could not refuse the award. It was contended on behalf of the General Assembly that it has no legal power under the Charter to establish a tribunal competent to render judgments binding on the United Nations. In point of fact, authority may exist for the conclusion that respect for the Court's decision may be conferred by others under basis other than the Charter and the Statute. This is because following the Court's decision in this case the Executive Board of U.N.E.S.C.O. took note of the opinion and authorised the Director-General to pay the sum awarded by the tribunal.

Despite this reality it must be conceded that the view of UN member States as to the authority of the opinions has not been one of uncritical acceptance. In the shadow of the Cold War, the Soviet Union and other communist countries, not only regularly objected to requests for advisory opinions, but after opinions had been given, often asserted that the Court was not competent to give the opinion or that the opinion should be ignored, or that it was contrary to the Charter. Delegates of other countries on the other hand, would typically state that they would accept "unreservedly" the advisory opinion of the Court. Sir G. Fitzmaurice, the United Kingdom delegate, on one occasion said that it could not be argued that the opinion of the Court was wrong from the legal standpoint or that the Assembly did not argue with the Court in its finding, because the Assembly could only accept or reject the opinion.[21]

Criticism of ICJ advisory opinions and opposition to their adoption by the General Assembly have not been limited to representatives of communist countries, but sometimes also emanate from other States when the opinions or the nature of the question posed to the Court have not been in tune with their national views or interests.

With regard to the action of the State concerned, there have been some opinions of the ICJ in respect of which states concern were expected to take action individually. In over half of the 26 advisory cases handled by the Court some States have opposed the resolutions requesting the opinion and/or consequently refused to implement them. In the *Peace Treaties Case*[22] the three States that were mainly concerned - Bulgaria, Hungary, and Romania - declared in advance that they would not be bound by the opinion, and continued to maintain the same attitude even after its delivery. Romania contended that the Court in assuming jurisdiction in the case had acted in violation of international law because it had taken upon itself the right to express an opinion on the question, without the Romanian government's consent. Similar views were expressed by Bulgaria and Hungary.[23]

Also on the celebrated South West Africa case,[24] the South African government expressly refused to accept the opinions and had consistently maintained the position that the mandate over the territory had lapsed; that the United Nations has no Jurisdiction over the former mandated territory; that it was under no obligation to submit information under Article 73(e) of the Charter; and that the mandate for the territory had been created by the Allied and Associated powers of the first World War. South Africa would accordingly negotiate a settlement with the remaining principal Allied and Associated powers.[25]

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[19] Renouff, "*Reception of Advisory Opinion by the General Assembly of the United Nations*", 28 *Canadian Bar Review* (1950) pp. 424-5.
[20] *UN Administrative Tribunal case* (1954), ICJ 47.
[21] Prataap, *op. cit*., p. 245.
[22] *Interpretation of Peace Treaties case* [1950] ICJ 65; 17 ILR 331.
[23] M. O. Hudson, "*The Twenty-Ninth Year of the World Court*", in *British Yearbook of Int. Law,*, (1958) p. 10.
[24] *International Status of South West Africa*, Advisory Opinion, [1950] l.C.J. Rep. 128,
[25] Prataap, op.cit. pp. 245-6.

IV. (Non) binding but Authoritative and Persuasive Effects of the Opinion

Although it is argued below that the opinion of the World Court may be akin to a declaratory judgment on the issue, we must be very careful to point out *ab initio* the fact that the opinion itself is not binding. The law and practice of the advisory jurisdiction should in this respect be contrasted with certain provisions of the Charter and Statute relating to the Court's contentious jurisdiction. As to the bindingness of the judgments of the court in its contentious jurisdiction there is no doubt whatsoever.

For instance, Article 94 paragraph I provides as follows:

"Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Likewise, Article 59 of the Statute states:

"The decision of the Court has no binding force except between the parties and in respect of that particular case."

The important thing to garner here, therefore, is that judgments awarded by the Court to parties are binding at least in respect of that case and in relation to the parties before the Court. But then that is true only as per "judgments" passed on "parties", and only then in respect of contentious cases. How about "advisory opinions" given to "authorised bodies."?

As stated earlier advisory opinions are in fact devoid of any binding force. The Court itself has explicitly stated this in the *Peace Treaties Case*[26] in the *South West Africa Cases*[27] and others.[28] In the *Peace Treaties Case* it pronounced: "The Court's reply is only of an advisory character as such it has no binding force."[29] It would seem writers too, have agreed on this point.[30]

In fact there is no obligation on the body requesting the opinions to give effect to them. Still less are the States likely to be affected legally bound to implement them in action. The opinions are not binding upon the States individually even if accepted by the requesting body. This would seem clear from the reception of the opinions in the *South West Africa* Cases by the General Assembly and by the Union of South West Africa.[31]

Opinions of the Court are not binding in the sense of *res judicata* (that is, following the principle that an issue decided by a court should not be reopened); neither are they binding *stare decisis* (that is following the principle that a tribunal should follow its own previous decisions and those of other tribunals of equal or greater authority).

However, there is a persuasive argument put forward in various quarters that the Court's Opinions are binding in a negative sense. As noted by Gore-Booth

"... Advisory Opinions may be negatively binding in the sense that if the Court were to indicate that a certain course of action would be definitely illegal or that, of various courses of actions proposed only one would be legal, it would be difficult in practice for the organ requesting the opinion not to follow the course advocated by the Court."[32]

It would appear, that even though there is no automatic prohibitive force attaching to advisory opinions, it is astute from an international policy point of view that concerned persons and authorities must refrain from adopting any prohibited course indicated in the Courts reasoning and advice. However, it is very unlikely that

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[26] *Peace Treaties Case* (Advisory Opinion) ICJ *Reports* (1949), p. 109.
[27] *South West Africa Cases* (Preliminary Objections) ICJ *Reports* (1962), p. 337.
[28] E.g. *I.L.O. Administrative Tribunal Case* ICJ Reports, (1956), p. 47.
[29] *Western Sahara Advisory Opinion*, ICJ Reps, 1975, 12 at 24, para.31.
[30] On this issue, see the following; Prataap, *op. cit*., p. 227; Rosenne, (1973) ICJ, *op. cit.*, p. 441; The World Court, *op. cit*., p. 83; Hans Kelsen, *The Law of the United Nations; A Critical Analysis of Its Fundamental Problems* (New York: Frederick A. Praeger, Inc. 1950, p. 486; Gore-Booth ed. *Sir Ernest Satow Guide to Diplomatic Practice* (London: Longman 1979), p. 367.
[31] Prataap *op. cit*., p. 367.
[32] Gore-Booth, *op. cit*., p. 367.

States and international organisations will adopt such a course for reason of the undisputable judicial and authoritative character of the opinions.[33]

Although the opinions are merely advisory they cannot be regarded as legal advice in the ordinary sense. They are not like views expressed by counsel for guidance of clients, but are judicial pronouncements. The Court has repeatedly stated that it is a judicial body and that in rendering advisory opinions it performs a judicial function.[34] Underlying this assertion is the fact that the Court has "... assimilated its advisory procedure to its contentious procedure as closely as practicable.[35]

V. The Persuasive Force of Advisory Opinions

Again, one should note that though the advisory opinions are not binding, "their persuasive character and substantive authority is great."[36] This is because they are judicial pronouncements of the highest international tribunal and the statements of law contained in them are of the same high quality as of those contained in the judgments.[37] Their moral and legal weight and influence, therefore, is great.[38] The 1978 Rules of Court also states that "[t]he advisory opinion shall contain … a statement as to the text of the opinion which is authoritative". This the Court has done in paragraph 163 of the opinion of 9 July 2004.

An advisory opinion is no less law on any issue than a judgment. The Court itself has always treated the opinions as being of equal authority with the judgments. For instance, the P.C.I.J. recognised that answering the questions put to it in the *Eastern Carelia Case* would be "... substantially equivalent to deciding the dispute between the parties."[39] Prataap also points out that the way in which the Court cites its opinions in subsequent decisions - whether opinions or judgments, clearly shows that it regards them as equally authoritative. It makes no distinction between the two in this connection.[40]

The bodies requesting opinions from the ICJ usually regard such opinion as authoritative expressions of law. Moreover, the opinions are "authoritative in the sense that their legal correctness cannot be officially or formally questioned by the organ to which they are rendered acting in its corporate capacity."[41]

On the similarities that exist between Advisory Opinions and Declarative Judgments Prataap correctly posits as follows:

"The advisory opinions have been considered so authoritative by jurists as to be likened to declaratory judgments. The declaratory judgments on the other hand have been thought to be an indirect method of obtaining advisory opinions by States. In fact, there is hardly any distinction in substance and effect of the opinions and the judgments whether declaratory or otherwise. There are however formal differences between the two. The non-binding character of the opinions is an important difference, but too much emphasis must not be placed on the aspect. For although judgments are formally binding, their execution is not automatic and there is no certainty that they will be executed at all. There is no machinery in international law for enforcing them directly."[42]

Advisory opinions with binding force do exist. This developed as a form of 'advisory arbitration' under the League of Nations, where some organisations were authorised to request advisory opinions, in case of disputes in which the organisation is

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[33] Prataap, *op. cit*., p. 230.
[34] See Paul Reuter, *International Institutions*, (London: Allen & Unwin, 1958) p. 274.
[35] Prataap *op. cit*., p. 230.
[36] Ibid., p. 231. See also G. Fitzmaurice "*The Law and Procedure of the International Court of Justice: International Organs and Tribunals*", 29 *B.Y.I.L.*, (1952), p. 55.
[37] S. Rosenne, *The International Court of Justice*. (2d ed. 1961) p. 113.
[38] Prataap, *op. cit.*, p. 231.
[39] P.C.I.J. Series B., No. 5, p. 29.
[40] *Op. cit.*
[41] Fitzmaurice, *op. cit.*, p. 54.
[42] Prataap, *op. cit*., pp. 232-233.

one party and a State the other. In such instances the parties to the dispute are required to accept the opinion as binding. Furthermore in the UN era, this type of provision may be contained in a convention, bilateral or multilateral treaty or a constituent instrument drawn up to regulate relations between States and international bodies. Thus, Article VIII, Section 30 of the General Convention on the Privileges and Immunities of the United Nations[43] provides as follows:

"If a difference arises between the United Nations on the one hand and a member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

This system of advisory arbitration is seen in certain quarters as "... an attempt to overcome the procedural incapacity of international organisations to appear before the Court in disputes with States."[44]

The strong attitudes and *a priori* policies that States may have with respect to a question before the advisory jurisdiction of the court may not turn them into parties in a case brought before the Court. Bringing these principles home in respect of the *Legal Consequences of Wall* case, it is necessary to point out that the opinion is both authoritative and persuasive in relation to the pertinent issues discussed under it and applies in effect to all concerned States and affected persons *instanter* upon its pronouncement by the Court. It is important to note that in this case the Court observed that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In this sense there were no parties capable of interfering with the Court's jurisdiction in the case in question. Similarly the Court did not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it was the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations in general and the General Assembly in particular.[45]

Perhaps nothing does more to acknowledge the moral and legal value of the advisory opinion in this particular case than the wordings of the defence in the Israel domestic *Alian case.*[46] The Supreme Court had urged the State of Israel to address it specifically on the potential implications that the ICJ advisory opinion may have for the *Alian* proceedings. Although the response reiterated the non-bindingness of ICJ advisory opinions, it refrained from relying upon this formality as a ground for dismissing its legal significance altogether. Instead, it acknowledged that:

The Court's stature attributes considerable weight to interpretations of international law it renders. Israel is committed to respect international law. Hence, even if the advisory opinion is non-binding, one should investigate the status of the legal findings it includes, as far as they interpret international law.[47]

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[43] Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946 adopted by the General Assembly on 13 February 1946, by Res. 22 A(I); it went into force on 17 September 1946. 1. U.N.T.S. 15.

[44] See Rosenne (1961), *op. cit*., p. 452; H. Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, (New York: Frederick A. Praeger, 1964). p. 486; Prataap, *op. cit*., pp. 47-8.

[45] See Para 50 where the court noted that "The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute."

[46] In this case the petitioners challenged the lawfulness of the route of the separation barrier running in proximity to- Boudrous and Shukba -two West Bank Palestinian villages (located roughly 20 km north-west of Ramallah). The argument was raised that the construction of the barrier in this area will cut off agricultural land and deprives local residents of their source of livelihood. Hence, to the degree that the route deviates from the Green Line and traverses into the West Bank it is both unnecessary and disproportional. See Shany op.cit., pp. 4-5.

[47] *Alian v. Prime Minister*, H.C.J. 4825/04, Written Response, 23 February 2005, at para. 266 (unofficial translation) cited in Yuval Shany, "Head Against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories" Vol. 7, *Yearbook of International Humanitarian Law*, 2004.

Clearly, therefore, there is evidence that Israel is aware of the legal validity that attached to the Court's opinion in the *Legal Consequence of the Construction of a wall* case and its authoritative value as regards principles of international law as applied in the case.

VI. The Declaratory and Law Making Effect of Advisory Opinions

As is the case with the ICJ's contentious jurisdiction, the primary and immediate effect of an advisory opinion lies in the resolution of the legal issues put before it. At the same time, however, it is true that there are also other long-range effects that necessarily flow from the authoritative character of the World Court's opinions, one of which is the progressive development of international law.[48] It is also true that "in applying general rules of law to the particular cases, it is inevitable that the Court would by so doing perform a law making function."[49] Like many other international courts, the ICJ, both in its contentious and advisory jurisdictions, performs a law making function. As one writer correctly notes "one could say that international judicial law-making is not only beyond dispute in the sense of being an undeniable facet of global governance, but also in terms of being removed from politico-legislative processes and from challenge in the court of public opinion".[50]

Despite these considerations, the fact that the issuance of an opinion does not immediately result in compliance with the Court's views under the Statute and the Charter has fuelled a perception, echoed by early scholars, that the effect of the opinions given by the Court has been negligible. For instance, Pratapp notes that the first opinion on the *Admissions Opinion* had no influence on the final resolution of the problem at hand. The essential question posed to the Court was whether UN members when voting on admission of a State to membership in the United Nations, could make their consent dependent on conditions not expressly provided the Charter such as the admission to membership of certain other States. Since it rejected the Soviet Union's argument that the UN was entitled to subordinate the admission of certain States to the condition of the simultaneous admission of certain other States, the Opinion in that case did not have the slightest chance of being adopted and put into effect by the Security Council.[51]

If, as it was thought, the aim of those requesting the opinion was to obtain a ruling regarding admission of new members that would have compelled the Soviet Union to conform to a view more amenable to the interests of Western States then that intention largely failed as in the end it was a "package deal" that was negotiated to solve the impasse. By a resolution of December 14, 1953, sixteen new members were admitted into the UN. The Court had dutifully said in its opinion that the provisions of Article 4 were exhaustive, and if a member State made its consent to the admission of a new State dependent on the admission of others, it would be introducing extraneous conditions in violation of the Charter. The prevailing view of the period, therefore, was that the opinion contributed little towards resolving the political problem of the admission of new members because the problem "did not originate in the explanations given for the negative vote, but in the underlying political situation in which these votes were merely an expression."[52] It would appear that there is no good reason not to believe that the existence of the *Admissions Opinion* did not actually assist both the West and the USSR to achieve the political solutions that eventually resolved the

[48] Prataap, *op. cit.*, p. 246.
[49] *Ibid.*
[50] Armin von Bogdandy & Ingo Venzke, "*Beyond Dispute: International Judicial Institutions as Lawmakers*" Vol. 12 *German Law Journal* No. 05 (2011) p. 980; See further Karin Oellers-Frahm, *Lawmaking through Advisory Opinions?*, in this issue. For elaboration of the impact of each opinion, see Robert Howse & Ruti Teitel, Delphic Dictum: *How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?*, 11 *German Law Journal* 841 (2010); *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 *AJIL* 1 (2005).
[51] 1948 I.C.J. 57 p. 58; Prataap op.cit., p. 250.
[52] *Ibid.*, p. 250.

admissions to the UN controversies. Having set out the relevant international law on the matter, the opinion would necessarily have factored into the necessary compromises that removed the political impasse.

Significantly, the second advisory opinion rendered by the Court *the Reparations Case* concerned the State of Israel and by all accounts this opinion was certainly effective because the Secretary-General was successful in recovering the United Nations claim for pecuniary reparation from the government of Israel.[53] The case concerned the murder of a Swedish national, Count Bernadotte, the United Nations' mediator in Palestine who was assassinated while serving as the UN in the city of Jerusalem then under Israel's control. The strict question of law was whether the UN could itself claim for reparations against Israel in respect of the Count's death. It has been said that Israel at that time was in a difficult position. That it paid the reparation because it could not have afforded to be recalcitrant to resolutions of the organisation that created it. Israel's obedience in this case was even more remarkable given that it was not at the material time even a member of the United Nations.[54] Other States concerned did not pay, contesting the basis for the calculation for damages.[55] Again this is a pointer to the fact that Israel as a State does understand the authoritative value of ICJ advisory opinions and their legal validity.

Other significant effects of advisory opinions lie in their disguised but effective treatment as precedents in all but name. Under the Statute of the ICJ, the Court has complete discretion not to treat its own judgments as precedent. Nevertheless, in several instances the Court has demonstrated that it follows the law it has laid down in earlier judgments. For instance, the Court's findings in the *Nuclear Weapons* case,[56] that there are 'intransgressible principles of international customary law' helped shed some light on the understanding of the *erga omnes* nature of breaches identified in the latter *Legality of the Construction of Wall Opinion*. The Court also refers to its previous opinions as basis for its conclusions in subsequent advisory and contentious cases and makes no difference for this purpose between advisory opinions and judgments. In this manner advisory opinions also help make international law.

The emerging conclusions, therefore, are that: (a) advisory opinions are formally non-binding; (b) they nevertheless have a clarifying, authoritative, persuasive and even declaratory effect upon legal situations; (c) refusal to abide by advisory opinions if this leads to further or consequential legal harm would create legal responsibility under international law for which legal persons whose rights and interests are injured may seek redress under law and under the principle *ubi jus ibi remedium*.[57] At first glance, these conclusions may appear to be contradictory, but they in fact are not. An advisory opinion may have a declaratory effect, which can affirm international responsibility and, therefore, trigger relevant international legal consequences, including damages and compensation.

Perhaps a bit more needs to be said about the declaratory effect of the opinion on at least two of these constituencies. With regards to the first group the international community -all States were found to be under "an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction"; Furthermore all States parties to the Fourth Geneva Convention of 1949 are as a result of the opinion obligated to "ensure compliance by Israel with international humanitarian law as embodied in that Convention".[58] The UN on its part was as a result tasked with

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[53] Karin Oellers-Frahm, "*Lawmaking Through Advisory Opinions*?" Vol. 12 *German Law Journal* No. 05 (2011) p. 1042.

[54] J. Craig Barker, *International Law and International Relations (International Relations for the 21st Century* (New York: Continnuum-3PL, 2000) pp. 46, 68.

[55] *Prataap*, op.cit., p. 251.

[56] *Legality of the threat or use of nuclear weapons advisory opinion* [1996] I ICJ Rep 226,at para. 157.

[57] The Latin legal maxim *ubi jus ibi remedium* expresses the principle that "where there is a right, there must be a remedy".

[58] The clear majority of the Court apart from Judges Higgins and Kooijmans, maintained the view that the consequences for other States flows from the *erga omnes* character of the obligations breached.

considering what further action was required "to bring to an end the illegal situation resulting from the construction of the wall and the associated régime".

On the part of Israel there are at least two immediate effects. First, it is now to be deemed that Israel from the day of the rendering of the Opinion of 9 July 2004 has knowledge of the illegality of its actions under international law even though it may have reasons that it considers binding upon it not to give effect to the imperatives of the opinion. Israel can, thus, no longer claim that it is not aware of the legal consequences of its actions in relation to the building and maintenance of the wall in the occupied territories. Second, the refusal of Israel to comply with the imperatives of the opinion gives rise to international responsibility. It is also of significance that the writings of highly qualified jurists are considered a source of Public International Law, have also accorded respect to advisory opinions. James Crawford, Special Rapporteur on State Responsibility from 1997–2001 has indicated in no uncertain terms that "States are responsible for acting in accordance with international law, despite the formally non-binding nature of the Advisory Opinion".[59]

VII. Reception and Continuing Legal Effects of the Opinion of 9 July 2004

The reception of the Court's opinion may be analysed from a multiple stakeholder perspective and they all come together to paint a picture of authority, importance and significance for all concerned even from those quarters that were highly critical of the Court's decision to exercise jurisdiction over the case. The more immediate stakeholders here include the Palestinian people, the State of Israel, The United States of America, the General Assembly, the Security Council and then of course the general international community.

a) Palestinian authorities

With respect to the Palestinian people it is quite recognisable that because of the existential threat to the very survival of many Palestinian communities that the wall represents there has been before and after the Opinion, various forms of popular resistance to the wall by Palestinians living in the occupied territories. Cases have been brought up in Israeli courts; and externally by aggrieved persons and political activists. Hundreds of demonstrations against the wall have occurred since 2002. These events have been mostly designed to attract local and international media attention to the wall and its consequences despite the fear of repressions and adverse repercussions.[60] In response to many of these demonstrations and acts of rebellion, the Israeli military's has been routinely forceful and harsh, including the use of armed raids, shooting of unarmed protesters with live ammunition, curfews, and mass arrests leading to deaths and injuries. As Suhail Khalilieh, head of the Urbanization Monitoring Department at the Applied Research Institute–Jerusalem (ARIJ) has pointed out: "at the end of the day, the West Bank is governed by the Israeli army and the civil administration, so it's

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Obligations like these that are confirmed as owed *erga omnes* in previous case law include respect for the right of self-determination, and certain sacrosanct rules of International Humanitarian Law. *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep102 at 29. See also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep at 79.

[59] James Crawford SC, *Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories* (July, 2012) p. 6, available at http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf, accessed 14 December 2014; Clifford J. Hynning, "*Sources of International Law*" Vol. 34 *Chicago-Kent Law Review*, Issue 2 (1956) p. 129.

[60] As an activist put it Palestinians find it difficult to demonstrate about the wall, "because they don't want to be in trouble with the occupation." See Ben White, *Five Years After ICJ Ruling, Israel Expands Its Illegal Wall Onto More Palestinian Land*, Washington Report on Middle East Affairs, July 2009 available at https://www.globalpolicy.org/international-justice/the-international-court-of-justice/48068-five-years-after-icj-ruling-israel-expands-its-illegal-wall-onto-more-palestinian-land.html, accessed on 17 December 2014.

subject to military law. The Israeli army can simply override any court decision by saying they are doing it for military or security purposes."[61]

Despite this harsh reality there appears to be a lack of coherent strategy by successive Palestinian leaders to exploit the Opinion rendered by the Court as a specific legal basis for seeking the destruction of the wall and reversal of the damage caused to the Palestinian people as a result of its introduction. Even supporters of the Palestinian cause have concluded that the Palestinian leadership has largely failed to meaningfully capitalise upon what is a significant legal endorsement of the Palestinian position.[62]

b) Israel's Reaction

As stated earlier, Israel not only rejected the Court's jurisdiction as well as the decision reached but it has embarked upon a brutal campaign of forceful actions to continue construction of the wall. It refrained from attempts at asking the court for appointment of an *ad hoc* judge – a fact that Judge Owada correctly noted would have greatly enhanced the task of "the Court in maintaining the essential requirement for fairness in the administration of justice".[63] It declined to participate at the oral stage of the proceedings. Its written pleadings addressed only the jurisdictional aspects of the advisory procedure (with some allusions to few substantive arguments).[64]

It will, however, appear that after the Opinion was rendered by the Court Israel varied the direction and location of the wall in ways it (unilaterally) regarded as reducing the severity of the effects of the wall on the Palestinians.

As an observer of the Israeli policy on the wall put it:

"The ICJ's opinion stated that the barrier will de facto annex 16.6 percent of the territory of the West Bank – home to 237,000 Palestinians – and will limit the movement of 160,000 additional Palestinians. At the same time, 320,000 Israeli settlers would be situated west of the barrier. However, as a result of changes in the route of the barrier, introduced mainly after the decision of the HCJ in Beit Sourik, the swathe of West Bank land severed by the barrier has decreased to eight percent of the area, in which no more than 30,000 Palestinians reside (excluding East Jerusalem residents and territory). Furthermore, the military announced its intention to improve passage through the numerous gates spread along the route of the barrier.[65]

Since the general attitude of the State of Israel to the Opinion is that of rejection and refusal to give effect to it, it is difficult to see how much credit if any can be given to it for attempting to give effect to the opinion. Israel indeed advised its Supreme Court that the 'advisory opinion has no bearing upon the claims at hand, and the claims should be adjudicated in accordance with the factual and normative framework designed by the Supreme Court, prior to the request for the opinion as manifested in the domestic *Beit Sourik case*.[66] The refusal to grant substantive recognition to the Court's opinion is indeed recognisably in line with the modern character of Israel as a State with a determinably obtuse relationship with international laws. As a writer attests: "The decision of Israel to reject the relevance of the Advisory Opinion for domestic law purposes perhaps comes as no surprise to observers of Israel's ambivalent attitude towards international bodies".[67] At any rate the wall still

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[61] Quoted in ibid.

[62] This is a view even held by senior figures within the Palestinian Authority suh as Sameeh al-Naser, erstwhile deputy governor of Qalqilya. ibid.

[63] Separate Opinion of Judge Owada, para 19.

[64] As Shany explains: "This limited cooperation approach was designed to reconcile a few conflicting policies: the political futility of ignoring the proceedings altogether and the need to exercise damage control, on the one hand, and the reluctance to legitimate the outcome of the proceedings by way of active engagement, on the other hand" Shany op.cit., pp. 3-4.

[65] Ibid p. 7.

[66] *Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04, 2004(2) Takdin- Supreme 3035.

[67] Shany *op.cit*., p. 1; *Cf.* J. Dugard, '*The Implications for the Legal profession of conflicts between international law and national law'*, 46 *South Texas LR* (2005) pp. 579-594, at p. 586.

stands and more portions are still being added to it even as at time of this publication.[68] It remains considerably intrusive and continues to have very serious humanitarian and territorial implications as outlined above. The refusal to recognise the Opinion for domestic purposes (the only place where it really matters) is most devastating to the Palestinians. Indeed the only genuine and enduring value of the Opinion ought to be in the lives and properties it saves and/or enriches 'on the ground' and in the occupied territories.

c) Security Council

Despite complaints from the representatives of the Palestinian peoples and other concerned governments and States since the very beginnings of the creation of the wall[69] and annually since the advisory opinion was rendered,[70] the Security Council has being largely paralyzed by the politics of things. The Security Council has done nothing meaningful to bring about compliance with the advice given by the court whereas it is the very body charged with the primary responsibility for the maintenance of international peace and security (Article 24, UN Charter). The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security (Article 34, UN Charter). Accordingly the Security Council may, at any stage of a dispute recommend appropriate procedures or methods of adjustment. When acting in this manner, the Security Council is expected to take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties (Article 36). Although in this particular case the dispute was not sent for judicial consideration by 'parties', the only appropriate and reasonable view is that the Security Council ought to take into account the procedure adopted by the General assembly by way of the request for advisory opinion which had been granted.

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[68] Peter Beaumont, "*Israel Resumes Work on Controversial Separation Wall in Cremisan Valley*", *Guardian,* Tuesday 18 August 2015, available at http://www.theguardian.com/world/2015/aug/18/israel-resumes-work-controversial-separation-wall-cremisan-valley, accessed 05 September 2015.

[69] International opinion coalesced quite quickly against plans for the wall. The Chairman of the Arab Group, the Non-Aligned Group, the Islamic Republic of Iran and the Organization of the Islamic Conference respectively requested an urgent meeting of the Council to discuss the Israeli decision to construct a wall in the occupied Palestinian territory in letters as far back as October 2003 (S/2003/974 and S/2003/977, S/2003/973, S/2003/973); See Security Council, Chapter X Consideration of the provisions of Chapter VI of the Charter pp. 848-849, available at http://www.un.org/en/sc/repertoire/2000-2003/00-03_10.pdf, accessed 19 December 2014.

[70] A full decade after the ICJ deemed illegal the situation arising from Israel's construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, the Palestinian Rights Committee, at a special meeting, reaffirmed the Court's findings and made a call on Israel to immediately dismantle its system of walls and fences and to compensate aggrieved Palestinians that had sustained damages as a result of its actions. General Assembly, "Israelis, Palestinians Must Find Path to Peace 'Before Hope and Time Run Out', Says Secretary-General at Meeting to Observe Day of Solidarity Committee on the Inalienable Rights of the Palestinian People" 367th Meeting 24 November 2014 GA/PAL/1320. Similarly the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, in 2014 noted that the Special Committee was appalled by the humanitarian impact of recent escalation of violence. It pointed out again that the ongoing construction of the wall was illegal See "Palestinian Rights Committee Members Urge Removal of Barrier Wall Creating Situation Deemed Illegal 10 Years Ago by International Court of Justice" 9 July 2014 GA/PAL/1308 available at http://www.un.org/press/en/2014/gapal1320.doc.htm, accessed 25 December 2014; Note also references to the illegal wall during other discussions at the General Assembly "Flouting International Law, Racism Pervades All Countries, Third Committee Hears at Start of Debate" Sixty-ninth session, General Assembly 37th & 38th Meetings 3 November 2014 GA/SHC/4115, available at http://www.un.org/press/en/2014/gashc4115.doc.htm, accessed 27 December 2014; See further the following S/PV.6363, p. 6; S/PV.6623, pp. 3-5 Part I Repertoire of the Practice of the Security Council 17th Supplement 2010-2011 Department of Political Affairs - Security Council Affairs Division Security Council Practices and Charter Research Branch. Available at http://www.un.org/en/sc/repertoire/2010-2011/Part%20I/2010-2011_palestine_rev.pdf, accessed 19 December 2014.

It is obviously reasonable to expect the Security Council to do much more given the legal duties placed on it under the Charter and given that Article 36 (3) of the Charter crucially provides that the Security Council "should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court". In discharging the duties of the Security Council it is expected to act in accordance with the purposes and principles of the United Nations, one of which surely is giving and according respect to the decisions of the decisions of the World Court.[71]

Thus, despite the opportunity provided by the opinion rendered in this case, the Security Council has done little of importance to grapple with the grave situation posed by the Israel-Palestine conflict since Resolutions 242[72] and 338.[73] To explain these incongruous situations, we may need to consider the influence of the United States of America on the entire Israel-Palestinian process and of course its own peculiar reception of the opinion in this case. It is generally recognised that the US has generally kept the issue off the Security Council's agenda.[74] Whenever Council members have introduced resolutions, responding to periodic crises, the US has repeatedly applied considerable diplomatic pressure to prevent progress on the matter in the one avenue where it matters most. This of course brings us to the need to briefly also consider the reactions of the United States to the Opinion of the Court in this case.

d) United States of America

It is pertinent to note that the US and Israel and only 6 other States out of the then 191 members of the UN voted against the General Assembly resolution that requested the Advisory Opinion in this particular case in the first place. The US indeed exercised its veto in the Security Council when a resolution on construction of the wall was introduced. This resolution (sponsored by Syria, Pakistan, Malaysia and Guinea on 14 October 2003), the operative paragraph of which simply wanted the Security Council to decide "that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed".[75] If of course the Security Council had allowed this proposed resolution to pass in a meaningful sense, there would have been very little need if any for the ICJ to render an opinion on the legal issues.

The US expressed the view that the draft resolution as put forward was unbalanced and did not condemn terrorism in explicit terms. After the Opinion was rendered, reactions emanating from the US government and politicians of both the Republican and Democratic parties[76] were of rejection of the opinion. The US House

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[71] This is a general principle of UN practice as the ICJ is the principal judicial organ of the UN. See also generally Dapo Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations*? Vol. 46, *International and Comparative Law Quarterly*, (1997) *et.seq*.

[72] S/RES/242 (1967) 22 November 1967.This resolution demanded *inter alia*: (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

[73] Adopted at the 1747th meeting by 14 votes to none. S/RES/338 (1973) 22 October 1973. This resolution given in 1973 essentially only reiterated the duty upon the parties concerned to immediately start implementation of Security Council resolution 242 (1967) in all of its parts.

[74] GPF, "Israel, Palestine and the Occupied Territories" Global Policy Forum https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories.html, accessed December 2014.

[75] The resolution was supported by 10 out of the 15 members of the Security Council. This includes the sponsors and Angola, Chile, China, France, Russia and Spain. Although only the US opposed and exercised the veto, the UK abstained, along with Bulgaria, Cameroon and Germany. David Morrison, "Wall illegal, says ICJ" *Labour & Trade Union Review* August 2004 available at http://www.david-morrison.org.uk/palestine/wall-illegal.htm, accessed on 26 December 2014.

[76] The day the ICJ Opinion was pronounced New York's two senators, Democrats Hillary Clinton and Charles Schumer, joined Israel's UN Ambassador, Danny Gillerman, at a press conference in front of UN headquarters in New York to denounce it. Clinton was of the view that: "It makes no sense for

of Representatives on 15 July passed a resolution clearly criticising the ICJ decision by a 361-45 majority. The majority commended "the President and the Secretary of State for their leadership in marshalling opposition to the misuse of the ICJ in this case".[77] The resolution deplored "the misuse of the International Court of Justice (ICJ) by a majority of members of the UN General Assembly for the narrow political purpose of advancing the Palestinian position" and went on to warn that States "risk a strongly negative impact on their relationship with the people and government of the United States should they use the ICJ's advisory judgment as an excuse to interfere in the Roadmap process".[78] The US went ahead to make written statements submitted to the Court asking to the court not to not to follow the requests by the UN General Assembly to render advisory opinions on the *Legality of the Construction of Wall Opinion*.[79] It is, a curious but significant fact, however, that before the Opinion was given by the Court, the erstwhile President of the US, George Bush had admitted that: "I think the wall is a problem, and I have discussed this with Ariel Sharon. It is very difficult to develop confidence between the Palestinians and the Israelis … with a wall snaking through the West Bank."[80]

The US Senate soon thereafter introduced an even more biased resolution on 20 July when it announced that it was in support of the construction by Israel of a security fence and condemned "… the decision of the International Court of Justice on the legality of the security fence, and urging no further action by the United Nations to delay or prevent the construction of the security fence".[81]

e) The General Assembly

From an international perspective there was an enthusiastic reception of the advisory opinion in this case as would be expected. The first reaction of the General Assembly was in the form of the adoption of Resolution ES-10/15 on 2 August 2004.[82] The 150 States that voted in favour of UN General Assembly resolution ES-10/15 had certainly by implication acknowledged the duty of Israel and all UN Member States to "comply with their legal obligations as mentioned in the advisory opinion."[83] This resolution achieved a number of important things *inter alia*, it: (a) reaffirmed the right of the Palestinian people to self-determination (preambular provision) (b) specifically acknowledged the opinion rendered by the court (para. 1); (c) demanded, that Israel comply with its legal obligations as had been enumerated by the Court (Para 2);[84] (d) called upon Member States to comply with obligations that the Court had pronounced were incumbent upon them; (e) identified the duty imposed upon all States party to the Geneva Convention IV to ensure that Israel respect the provisions of the Convention (para. 7); (f) invited Switzerland, the depository State of the Geneva Conventions, to immediately engage in consultations on this matter and report back to the General Assembly (para. 7); and (g) requested the Secretary-General to establish a register of

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the United Nations to vehemently oppose a fence which is a non-violent response to terrorism rather than opposing terrorism itself". Senator John Kerry in similar vein stated: "I am deeply disappointed by today's International Court of Justice ruling related to Israel's security fence. Israel's fence is a legitimate response to terror that only exists in response to the wave of terror attacks against Israel. The fence is an important tool in Israel's fight against terrorism. It is not a matter for the ICJ". See Morrison, *op.cit*.

[77] Quoted in ibid.

[78] U.S. House of Representatives, House Resolution 713, 108th Congress, 2nd Session. Accessed at: www.israelisgorges.org/hres713.html;

[79] Written Statement of the Government of the United States of America, 20 June 1995 at 3-4 available at http://www.icj-cij.org, accessed 05 September 2015.

[80] K Gajendra Singh, "*Middle East Commentary: Treating the Symptoms Instead of the Cause*", available at http://www.atimes.com/atimes/Middle_East/EG31Ak02.html, accessed on 27 December 2014; also quoted in ibid.

[81] Quoted in ibid.

[82] 31 UN Doc.A/RES/ES-10/15 (2 Aug. 2004).

[83] Mondoweiss Editors, "*10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action*" on July 9, 2014; Available at at: http://mondoweiss.net/2014/07/occupied-palestine-concrete#sthash.fr2n8UIR.dpuf, accessed 1 December 2014.

[84] Supra note 82, operative para. 2.

damage caused to all natural or legal persons as the result of the construction of the wall.

The establishment of the register of damage deserves special attention as a matter of fact and law and because of its future financial ramifications to the State of Israel and its value as precedent. Within 6 months of the mandate received under Resolution ES-10/15 of 2 August 2004, the General Assembly in another resolution A/RES/ES-10/17 of January 2007 created the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD).[85]

Subsequent legal analysis of Israeli violations and their consequences for Palestinian human rights have reaffirmed and complemented the ICJ Advisory Opinion in response to the particular question that the General Assembly put to it. The ICJ Advisory Opinion already had underlined the fact that the Wall was a component of the wider Israeli annexation and settlement enterprise that systematically violates Palestinians' human rights. Indeed consecutive UN Special Rapporteurs on the situation of human rights in the occupied Palestinian territory have concluded that Israel's occupation and regime, to the extent that it integrates the settler colonies and the Wall, has resulted in institutionalized discrimination, segregation and systematic and severe violation of Palestinians' human rights. They have indeed characterized this Israeli regime as one "of prolonged occupation with features of colonialism and apartheid."[86] UN treaty bodies such as the UN Committee on the Elimination of Racial Discrimination (CERD) and independent legal studies have supported these findings. It follows that these Israeli violations trigger not only State responsibility, but also individual criminal liability under the Rome Statute of the ICC[87] and other standards of international criminal law.

In terms of the overall question of the rights of the Palestinian peoples to self-determination the advisory opinion also has effects. The view of the General Assembly has been that the Court considered the breaches of Israel in building the wall as affecting negatively the right of peoples to self-determination, which is a right *erga omnes* (Advisory Opinion, para. 88 and para. 122.). The General Assembly has since the opinion also expressed the firm belief that Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, through the construction of the wall along with measures previously taken, severely impedes the right of the Palestinian people to self-determination.[88] This is a view shared unequivocally by the current chief executive of the United Nations itself in the person of the Secretary General of the United Nations -Ban Ki-moon. At a special meeting to mark the 10th anniversary of the delivery of the advisory ruling declaring Israel's construction of a separation wall in the West Bank as illegal, Secretary General reminded all Member States to comply with international law and emphasised that the wall increased settlement activity and has been fuelling tensions. He correctly pointed out that "[t]he implications of the wall go far beyond its legality… The wall severely restricts Palestinian movement and access throughout the West Bank, cuts off land and access to resources needed for Palestinian development, and continues to undermine agricultural and rural livelihoods throughout the West Bank…"[89]

Despite the impressive array of legal responses by the General assembly discussed above progress in giving effect to the opinion has been slow if not negligible. Some writers have tried to show that the General Assembly has not done enough to create the desirable changes especially in view of the crucial finding of the Court that the violation of the Palestinian right to self-determination by Israel is in the nature of rights and obligations that are indeed *erga omnes*. Scobbie laments:

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[85] Discussed below.
[86] Mondoweiss Editors, *op. cit*.
[87] 1998 Rome Statute of the International Criminal Court 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15.
[88] Sixty-eighth session Third Committee Agenda item 68 The right of the Palestinian people to self-determination (A/C.3/68/L.68)- Vote: 165 Yes, 6 No, 3 Abstain.
[89] UN News Centre, op.cit.

Despite this classification of the norms which were at the heart of the proceedings and central to the question of Israeli responsibility, the General Assembly only called upon States to discharge the responsibilities identified as incumbent upon them by the Opinion. Can it be said that this adequately addresses the findings of the International Court and the responsibility placed upon the General Assembly to 'consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion'?[90]

VIII. Impact of the Wall: Sealing in and *Bantuization* of Palestine

Few observers of Israel's Palestinian policy would have any problem identifying the construction of the wall as a deliberate mechanism of furthering the occupation of Palestine along with a choking control of its borders, air space, and territorial waters.[91] It was clear from the early stages that Israel intended to use domestic quasi-legal techniques to acquire large amounts of land along the path of the barrier.[92] More than one-third of West Bank settlements were built on private Palestinian land that was 'temporarily' seized by military order for "security purposes," according to a report by Israel's own Civil Administration.[93] Independent assessment from Western diplomatic sources appear to confirm that Israel's apparent aim is to annex the Arab area of Jerusalem, using illegal Jewish settlement construction and the vast West Bank barrier.

It has for instance been correctly observed that:

"Israeli activities in Jerusalem are in violation of both its Roadmap (peace plan) obligations and international law…. This de facto annexation of Palestinian land will be irreversible without very large-scale forced evacuations of settlers and the re-routing of the barrier…. When the barrier is completed, Israel will control all access to East Jerusalem, cutting off its Palestinian satellite cities of Bethlehem and Ramallah, and the West Bank beyond. This will have serious ... consequences for the Palestinians…. Israel's main motivation is almost certainly demographic ... the Jerusalem master plan has an explicit goal to keep the proportion of Palestinian Jerusalemites at no more than 30% of the total."[94]

Indeed as the years go by it becomes clear that the thrust of Israeli boundary policy is designed to prevent Jerusalem from becoming a Palestinian capital, particularly settlement expansion in and around the city. Israel was not in fact very successful in peddling its claim that the wall was always about security. The objective

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[90] Iain Scobbie, "Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine" Vol. 16 *The European Journal of International Law* no.5 (2006) p. 949; See also *Legality of the Construction of Wall Opinion* at paras160 and 163.3.E.

[91] Cf. Richard Falk, *Statement on the situation in the Gaza Strip*, Geneva, 9 January2009 (excerpts). *Journal of Palestine Studies*, Vol. 38, No. 3 (Spring 2009), p. 341.

[92] Greg Myre,"*Israel Confirms Plan to Seize West Bank Land for Barrier*", *New York Times* August 25, 2005. The cloak of legality through domestic law is not only attempted as a matter of constitutional legality but as a matter of pragmatism to resolve diligent opposition and appeals by affected persons and families. Israel's courts and even its Supreme Court have had to order the state to redraw the route of its West Bank separation barrier near Palestinian villages. See Associated Press, Israel Court: Redraw Route Barrier September 5, 2007 available at https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/38243.html, accessed on 03 September 2015. Cf. Shany, *op.cit.*, p. 7.

[93] See Meron Rapoport, "*A Third of Settlements on Land Taken for "Security Purposes*", *Haaretz*, (February 17, 2008).

[94] Extracts from a document, drawn up by the British consulate in East Jerusalem as part of the UK's presidency of the EU, in 2005 quoted in Chris McGreal, "Secret British Document Accuses Israel:, FO Paper Says International Laws Are Being Violated and Peace Jeopardized" *Guardian*, November 25, 2005; Also available at https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/38324.html, accessed 03 September 2015.

reality created by the existence of the wall was captured most incisively in the following words:

The Palestinian State will effectively become a series of unstable pockets, completely surrounded lest they expand, within a Zionist body-politic that will cover all the territory between the Mediterranean sea and the Jordan river. The archipelago of isolated territories around the Palestinian cities that remain, initially under IDF control, will gradually turn into what will become the "Palestinian State within its temporary borders" – the one the "roadmap" has as its objective. The Green Line, which the Palestinian government would like to see as its border with Israel, is 350 kilometres long, but the total length of barriers projected to be constructed between Israel and the Palestinians stretch to more than 1,200 kilometres. In this geographic arrangement, the Palestinians are simultaneously inside and outside: landlocked inside a complete territorial envelopment, without any border save the very long and fragmented one to Israel, but – recalling the apartheid-era South African Bantustans – outside the Israeli State system.[95]

A 2008 map made by the UN Office for the Coordination of Humanitarian Affairs revealed that the separation wall has already trapped a quarter million Palestinians in enclaves to the east and west of the main barrier and isolated approximately 500,000 Palestinians who live in East Jerusalem from the rest of the West Bank. It currently separates over 90 Palestinian communities from their agricultural land. A further consequence of the wall is that at certain portions of its length it impinges on Catholic-owned lands and this has been the subject of separate negotiations with the Vatican.[96]

Indeed the refusal of Israel to give effects to the Advisory Opinion and its policy of continuation of building and modifying the wall has had proven and devastating effects on Palestinian individuals, businesses, villages and communities. The United Nations Relief and Works Agency (UNRWA) has for many years carefully documented and highlighted the hardship brought on several families in relation to the wall.[97] The case of the Nijim family, for instance, is very instructive. This family has lived for over four decades in the village of Qatanna, northwest of Jerusalem, where construction of the Barrier was completed in 2009 (after the Legal Consequences of Wall case). Every member of the Nijim family has been required to obtain permits from the Israeli authorities in order to reside in their own home. Access to their home has been severely restricted and monitored by several electronic monitoring equipment Entry and exit from their property is controlled remotely by the Israeli Border Police and on many occasions, the family has been denied entry to their home for hours. The situation has affected not only family finances but religious and personal rights as no visitors are allowed to their home. The family head admits “My home has become a group prison for me and my family, but we are not going anywhere.”

In this area alone the wall has had tragic consequences for the economic survival of entire Palestinian communities. This is more so as it diverges significantly from the Green Line around the Gush Etzion settlement bloc. Its potential effect on up to 22000 Palestinian residents of Al walaja include the isolation of up to seven Palestinian villages between the Barrier and the Green Line. It has created enclaves of Palestinian settlements away from their own people, separated farmers from their agricultural land, leaving them with occasional access via ‘agricultural gates’ and witnessed destruction of hundreds of economic trees such as almond, olive, apricot and grapes vital to the survival of the victim communities and their livelihood.[98]

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[95], Eyal Weizman, “*Ariel Sharon and the Geometry of Occupation: Temporary Permanence*”, Open Democracy, September 5, 2007, available at https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/38244.html, accessed 03 September 2015.

[96] René Backmann, *A Wall in Palestine* A. Kaiser trans. (New York: Macmillan, 2010) pp. 24, 64.

[97] UNRWA, “*The International Court of Justice Advisory Opinion on the Wall - Nine Years Later” 10 July 2013”*, 10 July 2013. Available at http://www.unrwa.org/newsroom/features/international-court-justice-advisory-opinion-wall-nine-years-later?id=1819, accessed on 02 September 2015.

[98] UNRWA West Bank Public Information Office, “Mini profile: Al walaja Bethlehem Governorate” (2013) pp. 1-4, available at www.unrwa.org, accessed 02 September 2015.

One of the other areas in which construction of the wall has wrecked serious havoc on Palestinian lives is the 'Biddu enclave'. This newly created enclave is located 10 kilometres northwest of Jerusalem and consists of a cluster of eight Palestinian villages in the West Bank with more than 30000 people. The UNRWA recognises that landowners in Biddu, Beit Ijza and Beit Surik have lost direct access to 31-38 per cent of the total area of their communities and around 20 per cent of their original agricultural lands in the West Bank. Punitive systems of agricultural gates and permit regimes have had devastating impact on farmers' livelihoods.[99]

Based on these proven violations UNRWA has correctly demanded that:

As the occupying power, Israel must take all measures to fulfil its obligations under international law, including: comply with the findings of the ICJ Advisory Opinion, namely cease the construction of the wall in the oPt, including East Jerusalem; dismantle the structure therein situated; rescind all legislative and regulatory acts relating to the wall; and make reparations for all damage caused by the construction of the wall.[100]

IX. UNRoD and the Application of the Principles of State Responsibility to the Wall

As Green Hackworth a delegate of the US to The Hague Conference for the Codification of International Law identified nearly a hundred years ago "[t]here is perhaps no subject of international law so constantly and so actively before the nations, nor one which so virtually affects them as, as that of the Responsibility of States".[101] The responsibility of States for damage caused in their territory to the person or property of foreigners involves principles that underlie the whole fabric of public international law.

Israel bears international responsibility for its actions in relation to the construction of the wall and the economic and other damage caused to Palestinians and others affected by their actions. This conclusion is consistent with the interpretation of State responsibility decided by the ICJ in the *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) (1979-1981). Many of Israel's action also fall within the definition of aggression committed against the people of Palestine for which it also bears international responsibility.[102]

The responsibility of Israel is dictated first and foremost by international law as attested to by the unequivocal advisory opinion of the ICJ. That responsibility is further aggravated by the continuous and egregious nature of the breaches carried out by further construction and maintenance of the wall as well as its direct effect on the right of self-determination of the Palestinian people (para 122 of the Opinion). One of the key commendable features of international reaction to the intransigence displayed by Israel over the years has been the introduction of UNRoD. This unique body was created as a subsidiary organ of the General Assembly of the United Nations and operates under the administrative authority of the Secretary-General at the site of the

[99]UNRWA West Bank Public Information Office, "Mini profile: Biddu Enclave Jerusalem Governorate" (2013) pp. 1-4, available at www.unrwa.org, accessed on 02 September 2015.

[100] UNRWA (2013) Ibid. As a minimum set of measures UNRWA has insisted that Israel must provide unrestricted access for Palestinians separated from their lands by the Barrier. And that such access should only be restricted for reasons of absolute military necessity. In the event of absolute military necessity UNRWA correctly indicates that, the relevant Israeli authorities must take all measures to ensure that a well-functioning system is established whereby Palestinians can continue to access their lands at all times, together with all required agricultural equipment, inputs and labour. This is to ensure that communities may be able to continue proper maintenance, cultivation, harvesting and transportation of crops from their land. See UNRWA West Bank Public Information Office, "Mini profile: Biddu Enclave Jerusalem Governorate" p. 4.

[101] Green H. Hackworth. *"Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners*", *24 Am. J. Int'l L.* 500 (1930) p. 500.

[102] Palestine UNGA Resolution on the Definition of Aggression (GA Res 3314 (XXIX) 1974).

United Nations Office at Vienna (UNOV). UNRoD's mandate and activities has been to serve as an authoritative record of documentary evidence, relating to the damage caused to all natural and legal persons concerned as a result of the construction of the Wall including in and around East Jerusalem. Very significantly it has been receiving processes and reviewing claims from natural and legal persons who have sustained material damage or loss as a result of the construction of the Wall in the Occupied Palestinian Territory. As a result as at November 2014, more than 43,850 claims have been reported and between 650,000 to 1.1 million supporting documents have been supplied to UNRoD with respect to the Occupied Palestinian Territory.[103]

Claim intake activities have been completed in six out of nine affected governorates - Tubas, Jenin, Tulkarem, Qalqiliya, Salfit, and Hebron - and are nearly completed in Ramallah and ongoing in Bethlehem. As of December 2014, a total number of 15,798 of the collected claims have been reviewed by the Board of UNRoD for its inclusion in the Register.

The introduction of UNRoD and its meticulous gathering of data and evidence is very much in line with two key principles –one customary and the other recently emergent. The first is the general principle of customary international law that provides that there is an obligation of reparation for acts of damage for which sovereign States have responsibility in law. The ICJ's predecessor, the Permanent Court of International Justice, had occasion to express this customary principle in the *Chorzów Factory* case when it stated that:

"It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation … Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."[104]

The formidable position of customary international law on the issue has been further strengthened by the 2005 General Assembly acclamation of "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". As Iain Scobbie correctly identifies, this important mechanism was expressly created in relation to Israel's obligation to make reparation declared in paragraphs 152–153 of the Advisory Opinion.

The second principle is the recognition of the individual as a direct recipient of rights under international law. Leah Friedman, correctly notes that this opinion has increased:

"… the extent to which relief procedures available under international human rights instruments will now be seen to apply in the context of armed conflict. Mechanisms of individual redress, available under human rights instruments, support the view confirmed recently by Justice Michael Kirby, that a State's obligations under human rights law are owed to individuals, rather than to other States."[105]

There is, therefore, the reasonable conclusion that it is beyond doubt that the Court's decision established Israel's responsibility for redress in respect of the Palestinian people and affected legal persons (See para. 163 of the decision). It is in fact argued here that this responsibility for redress extends beyond the Palestinian people to include responsibility for wilful damage to the interests of other States who may be harmed as a result of a reasonable and viable attempt to put an end to the illegality of the wall in question. There are two levels of understanding of the liabilities

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[103] UN News Centre, "*Ban says Israel's Construction of West Bank Wall Violates International Law, fuels Mid-East Tensions*", available at http://www.un.org/apps/news/story.asp?NewsID=48236#.VJxvODpDY, accessed 25 December 2014; UN, "*About UNROD*", http://www.unrod.org/http://www.unrod.org/, accessed 26 December 2014.

[104] *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) para 73. The Permanent Court of International Justice (PCIJ) cases are available at http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm, accessed 08 December 2014.

[105] *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 688.

involved here. They are; liability for wrongful actions and damage caused since the inception and execution of its plans to build the wall and liability for wrongful actions and damage caused since the decision in the *Legal Consequences of Wall* case rendered on 9 July 2004.

X. Israel's Responsibility to other States

One of the reasons why accession to the Rome Treaty and the assimilation of Palestine into the brotherhood of States is significant and definitely not in the imperialistic interests of Israel is that it increases the number of States that may legitimately come to Palestine's aid. Israeli aggression and egregious actions in relation to the occupied territories may be challenged by other contract States and on an increasing number of legal basis. Furthermore when other States are acting legitimately to bring the illegal situation to an end, resistance by the government of Israel may create further burden of responsibility and liability on their State.

Article 48(1) of the Draft Articles on State Responsibility from 2001 provides that States other than the injured State may invoke the responsibility of another State if (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole.'[106]

The idea of Palestinian statehood has for long enjoyed international support. The treatment of the Palestinian people by Israel and more recently the wall policy are two related issues that have earned Israel a lot of opprobrium in the international community.[107] It is indeed arguable that with the current support the Palestine enjoys in the General Assembly today continuous illegal and egregious acts against the territory and the people by Israel would constitute breaches of obligations owed to the international community as a whole. Further illegal Israeli actions with respect to the wall and indeed other areas of its illegal occupation may, therefore, constitute breaches of the peace owed to the international community as a whole. Other States may also, therefore, invoke the responsibility of Israel for its actions to the Palestine or to themselves in their protective actions in favour of Palestine.

The responsibility borne by Israel for its actions in relation to the wall is no way displaced by the excuse that they are necessary on grounds of security. Note could also be taken of the unsatisfactory practice of certain States (notably by Israel, the United States and erstwhile apartheid South Africa) to use excessive force in self-defence in response to attacks, by indiscriminately targeting terrorist bases in the alleged host country. Such negative action cannot be said to be part of State practice or a reflection of custom to the extent that majority of States did not share let alone approve this view. As confirmed by the *Nicaraguan case*, armed reprisals or repressive and oppressive actions in response to small-scale use of force short of an 'armed attack' proper, have been regarded as unlawful both against States and against terrorist organisations.[108]

At any rate the security argument for the wall's existence continues to wear thin as the years go by, Perhaps no better way of dispelling the security justification

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[106] UNGA Res 56/83 (12 December 2001) A/RES/56/83 art 48(1). See also International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (UN, 2001) http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed 30 October 2009.

[107] Recently the Pope visited and prayed at the wall in what has been described by a Vatican spokesperson Father Federico Lombardi as "a very significant way to demonstrate his participation in suffering … It was a profound spiritual moment in front of a symbol of division." Peter Beaumont, "Pope Francis Offers Prayers at Israeli separation wall in Bethlehem, *Guardian*, available at http://www.theguardian.com/world/2014/may/25/pope-francis-israeli-separation-wall-bethlehem, accessed on 05 September 2015.

[108] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); I.C.J. Reports 1986, p. 14.

exist other than making reference to the conclusions of Richard Falk as UN Special Rapporteur on the Situation of Human Rights in the Palestinian Occupied Territories. He drew attention to the clear connections between Israeli security concerns and the Palestinian right of self- determination. He wrote:

As long as Palestinian basic rights continue to be denied, the Palestinian right of resistance to occupation within the confines of international law and in accord with the Palestinian right of self- determination is bound to collide with the pursuit of security by Israel under conditions of prolonged occupation. In this respect, a durable end to violence on both sides requires an intensification of diplomacy with a sense of urgency, and far greater resolve by all parties to respect international law, particularly as it bears on the occupation as set forth in the Fourth Geneva Convention.[109]

XI. Alternative Futures: Dealing with the Refusal to Implement the Decision within International Law and Diplomacy

Further Exploration of the Judicial Route

It is interesting that some of the frustration of commentators on the continuing nuisance and illegality of the wall has again been directed towards the Court.[110] It is as though the World Court is somehow responsible for the intransigence of Israel or the inability of the international community to force Israel to give effect to the legal imperative of tearing the wall down. Such views are, however, based upon inconclusive reasoning about the constitutionalism of the United Nations Organisation and of international law generally. As in municipal situations it is not for a court to bother about the enforcement of its judgments or the acceptance of its opinions beyond the satisfaction of its own judicial competences before it becomes *functus officio*.

It may be argued that by giving a definitive and clear response in this case, the Court indeed placed an obligation on the United Nations as a whole to introduce measures to bring all parties to the path of legality. Ultimately this would involve three things. First, doing all that is necessary to ensure cessation of the Israel-Palestine conflict. Second indicating specific measures leading to 'a just and lasting peace in the region' and third assisting in the establishment of an independent Palestinian State.[111] The Court traditionally loathes to dictate courses of conduct to litigant States when the methods of compliance with its rulings are essentially at the parties' discretion.[112]

It expressly stated in the *Haya de la Torre* case that even where the parties so desire it is not for the Court to indicate how an illegal or invalid situation should be terminated. The Court will not indicate a particular line of action where there are choices to be made between a set of actions which "to a very large extent, the Parties are alone in a position to appreciate."[113] This is more so when "[a] choice amongst them could not be based on legal considerations, but only on conditions of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice"[114]

Scobbie also usefully argues that:

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[109] UN Special Rapporteur on the Situation of Human Rights in the Palestinian Occupied Territories, Richard Falk, Report to the Human Rights Council, Geneva, 17 March 2009 (excerpts) *Journal of Palestine Studies*, Vol. 38, No. 4 (Summer 2009), p. 204.

[110] Berlins considers the ICJ as the least effective body within the UN and writes in very critical terms about the Court especially after the *Legality of the Construction of Wall Opinion*: "The rejection by Israel of the international court of justice's opinion on the wall in Palestine is not the first time the court's view has been rubbished, and will be ignored, by the losing party". Marcel Berlins, "The ICJ is the UN's least effective body", *Guardian* (Tuesday 13 July, 2004), available at http://www.theguardian.com/world/2004/jul/13/law.features11, accessed on 04 September 2015; See also criticism about the Court's ineffectiveness and States' failure to comply with its judgements in Mustafa Karakaya, "*The Jurisdiction of the International Court of Justice: How Effective is it*?" *Law & Justice Review*, Volume: IV, Issue: 2, December 2013.

[111] Paragraph 161 *Legality of the Construction of Wall Opinion*.

[112] Scobbie, *op.cit*., p. 947.

[113] *Haya de la Torre* case [1951] ICJ Rep 79.

[114] Ibid.

"No doubt the particular circumstances of implementing its advice in terms of alternative possible strategies and alternative measures could not be foreseen by the Court. The consequence is, however, that the United Nations' responsibilities are left abstract and detached: an affirmation of an amorphous obligation which appears to be more an exhortation to action than a delineation of the precise content of that duty.[115]

Haya de la Torre was essentially an attempt by the parties to the earlier *Asylum case*[116] to obtain guidance as to how that judgment should be best implemented. The refusal of the ICJ to so oblige shows that it would hardly be a useful exercise for any authorised body within the UN to approach the ICJ again to ask for an opinion on how to give effect to the *Legal Consequence of the Construction of a Wall* case or which of any set of action would best achieve implementation of the courts to decision.

There is, however, one further opportunity in which the jurisdiction of the ICJ may be invoked again against Israel. This would be in the circumstances that a concerned member of the United Nations takes coercive actions against Israel in order to bring the illegal occupation in Palestine or the situation caused by the Wall to an end and this is resisted by Israel. In such a theoretical circumstance both the state(s) taking the contentious actions and Israel may approach the court to resolve the dispute. This scenario is not as remote as it may at first appear given the increasing determination of the international community to bring the Palestinian occupation to an end and the fact that the Security Council has more or less been paralysed by power politics.[117] Israel, however, is not one of the 72 States that are parties to the Optional Clause of the ICJ.[118] Founding jurisdiction in contentious cases involving Israel would therefore require its consent.

XII. The ICC Route: Assimilation of Palestine into the International System

In the face of the severe economic challenges and abuse as well as violations of rights and liberties suffered by the Palestinian people it is arguably a quite positive fact that Palestine recently acceded to the Rome Statute on 2 January 2015. The International Criminal Court (ICC) on 1 April 2015 welcomed the Palestine as the 123rd State Party to its founding Rome Statute. Palestine, thus, acquired all the rights as well as responsibilities that come with being a State Party to the Statute.[119] Very importantly the ICC now has jurisdiction 'over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.'

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[115] Scobbie, *op.cit.*, p. 948.

[116] Asylum case [1950] ICJ Rep 266.

[117] The most recent effort (on 30 December 2014) by the members of the Security Council to make the body prescribe an end date for the Israeli occupation in accordance with International law again failed largely again as a result of lack of support by vet wielding US government. An Arab coalition led by Jordan had bid for the creation of a Palestinian State and an end to Israeli "occupation" in the draft resolution. The veto power US and Australia voted against the move with 5 abstentions. The draft resolution gathered only 8 votes in favour, and as such was automatically defeated. The US, however, emphatically still exercised its veto power and voted against the resolution. The UK, along with Lithuania, Nigeria, Korea and Rwanda abstained from the vote. Russia Today, "Palestinian statehood bid fails at UN Security Council as US, Australia Vote Against", Russia Today Website, available at http://rt.com/news/217975-unsc-palestine-statehood-vote/, accessed 31 December 2014; Rajini Vaidyanathan, "UN Security Council Rejects Palestinian Resolution" BBC Website 31 December 2014, available at http://www.bbc.co.uk/news/world-middle-east-30639764, accessed 31 December 2014.

[118] For the Declarations Recognizing the Jurisdiction of the Court as Compulsory see the website of the ICJ. Supra note 2.

[119] UN News Centre, "*International Criminal Court welcomes Palestine as State Party to the Rome Statute*", available at http://www.un.org/apps/news/story.asp?NewsID=50477#.Veafe7eFPOo, accessed 02 September 2015; BBC News, "Will ICC membership help or hinder the Palestinians' cause? 1 April 2015.

It is notable that both Israel, and the US, share an aversion towards becoming a member of the Rome Statute. Indeed In accordance with Article 25 of the Rome Statute, individual responsibility for prohibited crimes is framed very widely. It includes criminal responsibility and liability for punishment for crimes committed within the jurisdiction of the Court. Israel as a State is thus, very much aware of the theoretical possibility that any of its nationals may in the future be tried by the ICC for alleged crimes committed on Palestinian territory.[120] The Office of the Prosecutor of the International Criminal Court, has already opened a preliminary examination of the situation in Palestine in January 2015.[121]

Although strongly opposed by Israel, the general assimilation of Palestine into the mainstream of International relations is bound to have a positive effect on the general resolution of the Palestinian question.[122] Palestine has been recognized as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies.[123] It is plausible that these developments will also affect the providence of the Israeli wall.[124] Apart from gaining membership of the ICC, the Palestinian leadership have expressed readiness to return "again and again" to the UN Security Council seeking support for a resolution that sets a deadline for the creation of an independent Palestinian State. Already the recognition granted to Palestine on 29 November 2012 by the General Assembly as a 'non-member observer State' at the United Nations, carries significance in terms of the recognition of the 1967 borders[125] which itself carries implications as regards East Jerusalem and settlements that are over the green line.[126]

There has always been the narrow possibility of the ICC exercising jurisdiction over crimes if its jurisdiction is authorized by the United Nations Security Council. The threat of veto power being used by certain permanent members States always made the possibility of that happening very remote indeed.

With accession of Palestine to the Rome treaty, however, there is now the strong possibility that the ICC may be eventually *seised* of a viable case against Israel with respect to its actions in the occupied territories. Despite Israel's rhetoric and pre-emptive sanctions the threat a possible exercise of jurisdiction by the ICC would in time act as a gentle civiliser of Israel. There are signs that this is already the case. Israel

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[120] BBC News, ibid.

[121] Office of the Prosecutor, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine" Press Release: 16/01/2015 ICC-OTP-20150116-PR1083 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx, accessed 02 September 2015.

[122] The Israeli Prime Minister Benjamin Netanyahu responded to the Palestinian application to join the ICC by saying they had chosen "a path of confrontation" and that Israel would "not sit idly by". Israeli immediate punitive move was to stop the transfer of about $400m (£270m) in tax revenues collected on behalf of the Palestinian Authority (PA) between January and March 2015. It is also feared that the US as the biggest donor to the Palestinian Authority after the European Union, may cut up to $400m (£265m) each year if the Palestinians press claims against Israel at the ICC. BBC News *op.cit*.

[123] The Office of the Prosecutor, "Situation in Palestine" p.2, available at http://www.icc-cpi.int/fr_menus/icc/structure of the court/office of the prosecutor/comm and ref/pe-ongoing/palestine/Pages/update on situation on palestine.aspx, accessed 03 September 2015

[124] This trend has been accelerating. On 29 November 2012, the UN General Assembly (UNGA) adopted Resolution 67/19 granting Palestine "non-member observer State" status in the UN with a majority of 138 votes in favour, 9 votes against and a total of 41 abstentions.

[125] Chuck Holmes, "*Background: Israel's Pre-1967 Boundaries*" *NPR* May 20, 2011, accessed on 10 September 2015.

[126] UN Centre, "*General Assembly grants Palestine non-member observer State status at UN*" (29 November 2012), available at http://www.un.org/apps/news/story.asp?NewsID=43640#.VejrXbeFPOo, accessed 04 September 2015 ; Benjamin Macqueen, "*Explainer: The Upcoming UN Palestinian Sovereignty Vote*" (August 9, 2011), available at https://theconversation.com/explainer-the-upcoming-un-palestinian-sovereignty-vote-2768, accessed 03 September 2015; On 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. The Office of the Prosecutor, *op.cit*., pp. 1-2.

pays attention to the ICC's actions and statements about its conduct. Following the Flotilla incident submitted by Comorros on 14 May 2013, the office of the prosecutor declined to initiate an investigation stating that "considering the scale, impact and manner of the alleged crimes, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court's mandate" (para. 142).[127] Despite this outcome the Prime Minister of Israel still responded to the court accusing it of choosing to deal with Israel for 'cynical political reasons'.[128]

Israel ratified the Fourth Geneva Convention in 1951. Furthermore, Article 35 of Israeli Military Proclamation No. 3 provided that Israeli military courts and officers were bound by the provisions of the conventions. Unfortunately attempts were made to reverse the situation, on October 22, 1967, when the proclamation was purportedly amended and Article 35 was cancelled by Military Order No. 144. Israel has, thus taken the view that the convention is no longer applicable to the Occupied Palestinian Territories (OPT).[129] This position is completely insufficient given the clear indication by the international community of the status of the territories as occupied within the meaning of the Fourth Geneva Convention. This has been reiterated as recently as 2014 when the participating High Contracting Parties called on the Israeli State as Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem. They also reminded the Occupying Power of its obligation to administer the Occupied Palestinian Territory in a way which fully takes into account the needs of the civilian population while safeguarding its own security, and notably preserve its demographic characteristics.[130]

Perhaps most strikingly the Conference declared as follows:

The participating High Contracting Parties express their deep concern about the impact of the continued occupation of the Occupied Palestinian Territory. They recall that, according to the advisory opinion of the International Court of Justice of 9 July 2004, the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, at least insofar as it deviates from the Green Line, and its associated regime, are contrary to international humanitarian law.[131]

Furthermore, UNSC Resolution 799, of December 18, 1992 clearly reaffirms the applicability of the Fourth Geneva Convention of 12 August 1949 to all the Palestinian territories occupied by Israel since 1967, including Jerusalem. The ICJ opinion in this case is further proof of the correct position.

XIII. Self Help and/or Coercive Action by Concerned States

Given the abundance of evidence of the difficulties and human rights abuses occasioned on ordinary Palestinians and the economy of Palestine it is possible to argue that the wall, therefore, constitutes legitimate target of destructive force by Palestinians and concerned States. The wall is clearly illegal and it is good international policy that illegal situations be brought to an end. Over a full decade of waiting for Israel to do the correct thing by bringing the wall down in accordance with international law as confirmed by the *Legality of the Construction of Wall Opinion* the

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[127] *Situation On The Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia* No. ICC-01/13 16 July 2015 Original: English No.: ICC-01 ... available at www.icc-cpi.int/iccdocs/doc/doc2015869.pdf, accessed 03 September 2015.

[128] Prime Minister Media Adviser, "PM Netanyahu responds to ICC decision", 16 Jul 2015, available at the website of the Israel Ministry of Foreign Affairs http://mfa.gov.il/MFA/PressRoom/2015/Pages/PM-Netanyahu-responds-to-ICC-decision-16-Jul-2015.aspx, accessed 03 September 2015.

[129] Linda Bevis, *The Applicability of International Humanitarian Law to the Occupied Palestinian Territories* (Ramallah: Al Haq West Bank Affiliates to the International Commission of Jurists: 2003), pp. 8-11.

[130] See Declaration of 17 December 2014 by the Conference of High Contracting Parties to the Fourth Geneva Convention. Declaration, available at http://unispal.un.org/UNISPAL.NSF/0/E7B8432A312475D385257DB100568AE8#sthash.kV7hLSnn.dpuf, accessed 04 2015.

[131] Ibid see Paragraph 8.

Palestinian people have an inherent right to bring the illegal situation represented by the wall down by self-help. An author captures this argument beautifully when he wrote: [i]n the body of general law and practice concerning enforcement of international rules the principle of self-help remains prominent.[132]

Although self-help is a broad and somewhat imprecise term that according to Schachter "covers a range of actions (other than armed force)" which may be taken by a State injured by a violation of legal obligations owed to it; the imperative argument raised here is that robust actions taken by Palestinians to remove, flatten or obliterate this illegal construction must be within their right to self-help.[133] Such actions must be seen as legitimate under international law especially where they target the wall solely and avoid the loss of human lives. An example of legitimate self-help actions would be the way hundreds of Palestinian people of the Cremisan valley recently gathered to protest and tear down one of the gates of the Israeli apartheid infrastructure that segregates the Palestinian people from their lands and from each other.[134]

Furthermore other independent States may come to the aid of Palestine to help remove this illegal wall which gives exemplary expression to Israel's apartheid policies with respect to the Palestinian occupied territories. Theoretically, therefore, if a drone operated from a concerned State infiltrates Palestinian airspace and obliterates portions of the illegal wall such an action will not only be legal but will be within the purview of the decision of the World Court. This is more so given the unequivocal refusal of Israel to comply with international law and its flagrant actions of escalating illegality through rampant human rights abuses and by continuously extending the wall. It appears to be inevitable that some states will end up using coercive means to bring Israel into a situation of compliance with its legal obligations. Features like walls, fences, dams and dikes can and have been legitimate targets from either a military, resistance or law of war standpoint.[135]

It will however, be necessary that any State(s) willing to take such actions against the wall should avoid loss of live and damage to property other than the wall itself. It is also important to bear in mind that use of force will only truly ripen under customary law, as well as the Charter of the UN, Article 2, paragraph 4 (interpreted in the light of Article 1, paragraph 1), as a last resort after the exhaustion of diplomatic remedies and peaceful alternatives.[136]

XIV. Imposition of Trade and other Sanctions

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[132] Attila Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" Vol. 6 *European Journal of International Law* No. 1 (1995) p. 539.

[133] See O. Schachter, "United Nations Law", *AJIL* 88 (1994), 14.

[134] Palestinian Grassroots Anti-apartheid Wall Campaign, "Cremisan: People tear down the gates of the Wall", https://www.stopthewall.org/2015/08/24/cremisan-people-tear-down-gates-wall, 05 September 2015; Beaumont, op.cit.

[135] Such successful campaigns by the Royal Air Force Bomber Command and the USAAF Eighth Air Force were registered against key points in the Dortmund-Ems and Mittleland canals as part of the attack on German lines of communication in late 1944. W. Hays Parks, "*Rolling Thunder and the Law of War*", *Air University Review*, (January-February 1982), available at http://www.airpower.maxwell.af.mil/airchronicles/aureview/1982/jan-feb/parks.html, accessed 19 December 2014; Webster and Frankland, vol. III, pp. 244-48. Military targets generally sit at the intersection of law, morality strategy and policy. Military targeting also in various ways relies on the jurisprudence of courts and the interaction of military needs and events in the legal theatre of courts both national and international. Cf. 45 Amos N. Guiora, "Targeted Killing: When Proportionality Gets All out of Proportion", Vol. 5 *Case Western Reserve. Journal of Int'l L*. (2012-2013) pp. 235, 248. Israel itself is not new to quite liberal determination of what may constitute legitimate targets in Palestinian territory, Iran, Iraq, Syria, Lebanon and even Uganda among others. As put it "the Lebanese government was supposed to rein in Hezbollah while Israel was bombing its cities, destroying its roads and bridges, blocading it by sea, targeting its armed forces, and rendering its airport unusable" Stuart Elden, *Terror and Territory: The Spatial Extent of Sovereignty* (Minneapolis: University of Minnesota Press, 2009) p. 88.

[136] Note the advice of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Occupied Territories, Richard Falk, Report to the Human Rights Council, Geneva, 17 March 2009 (excerpts), *Journal of Palestine Studies*, Vol. 38, No. 4 (Summer 2009), pp. 204.

Israeli authors and respected US political figures are in agreement as to a common desire to see the advisory opinion has no effect.[137] On the other hand, Israel's recalcitrance over the wall and its occupation of Palestine has understandably been a source of concern to the majority of States. Trade, professional and diplomatic sanctions do have a special place in the annals of international relations in bringing illegal situations to an deserved end. There are already a raft of hard hitting sanctions levied by States, corporations and even universities. Activist movements soliciting sanctions against Israel have been increasingly successful.

French corporation Veolia withdrew participation from the Jerusalem Light Rail (JLR), a rail system built to facilitate the growth and expansion of Israeli colonial settlements on occupied Palestinian territory[138] 42 Similarly two French firms, Safege and Puma pulled out from a cable car project earmarked for Jerusalem[139] The *Stop the wall* campaign succeeded in convincing Norway's Government Pension Fund, one of the largest pension funds in the world, to divest from Elbit Systems, an Israeli security company involved in the construction of the Wall.[140] Other recent examples include the cancellation of performances by foreign artistes from around the world.[141]

Although what is ideal is that a comprehensive negotiated solution to the entire Palestine question should be implemented. States may formulate targeted sanctions at Israel specifically to encourage Israel abandon its policy on the wall by; dismantling parts already built, returning all lands confiscated for the Wall and compensating the affected population for all losses.

XV. Conclusions

As noted by the Court in its Namibia judgment: "the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end."[142] Progress in giving effect to the World Court's opinion in this celebrated case has been one of the most disappointing in the history of the Court. What has been lacking so far as is reflected in

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[137] Alan Dershowitz, "*Israel follows its own law, not bigoted Hague decision*" in *The Jerusalem Post*, July 11 2004; Senator Hillary Clinton in "*Powell says Israel proved fence reduces terror*," by Shlomo Shamir, *Haaretz*, July 11, 2004; Senator John Kerry and Secretary of State Colin Powell in "*US dismisses ICJ ruling*" by Janine Zacharia, in *The Jerusalem Post*, July 11, 2004; and House Resolution 713, available at http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=108_cong_bills&docid=f:hr713eh.txt.pdf; See Akram, Quiggley t.al, *op. cit*. p. 14.

[138] See Palestinian BDS National Committee, BDS marks another victory as Veolia sells off all Israeli operations September 1, 2015, available at 13270?utm_content=buffer9db48&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer#sthash.xdz9gEkJ.dpuf.

[139] Nir Hasson, "*French Firm Pulls Out of Controversial Jerusalem Cable Car Project*" *Haaretz* Mar 25, 2015, available at http://www.haaretz.com/news/diplomacy-defense/.premium-1.648797, accessed 02 September 2015; BDS Movement, "*French firms pulls out of Jerusalem cable car after government warning*", available at: http://www.bdsmovement.net/2015/french-firms-pulls-out-of-jerusalem-cable-car-after-government-warning-13074#sthash.q4ggBDIu.RGYtdVuh.dpuf, accessed 05 September 2015.

[140] Stop the Wall is one of the founding organisations of the Palestinian campaign for Boycott, Divestment and Sanctions, which seeks to apply economic and political pressure on Israel until it complies with international law. See *War on Want, Boycott, Divestment and Sanctions: Winning justice for the Palestinian people* (London: 2010) p. 14, available at http://www.waronwant.org/resources/boycott-divestment-sanctions, accessed on 05 September 2015.

[141] Recent examples of which include cancellations by American singer Lauryn Hill (former singer of The Fugees) and Spanish American singer Marianah. Palestinian BDS National Committee, "Marinah becomes first singer in Spain to cancel concerts" May 15, 2015, available at http://www.bdsmovement.net/2015/marinah-becomes-first-singer-in-spain-to-cancel-concerts-13152#sthash.KRjr8H26.dpuf, accessed 10 September 2015.

[142] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, 52 (para 111).

James Crawford's conclusion that "[]regrettably, the political will does not seem to exist at present to enforce principles of international law in respect of the settlements".[143]

Adopting a multiple stakeholder review of the reactions to the last decade of practice in response to the dictates of the *Legality of the Construction of Wall Opinion* reveals a deficit of political will on all sides even surprisingly including the Palestinian authority which has not exploited the legal and political capital of this opinion to its full potentials. Although it could do more the General Assembly actually appears to have come out best in an objective assessment of positive reactions to the Court's decision. The establishment of UNRoD is arguably one of the best steps that has been taken in giving effect to its imperatives. The Security Council on the other hand has been disappointingly catatonic in its response considering its central mandate in giving effect to authoritative decisions of the ICJ and its general mandate in maintenance of international peace security and justice. The institution of the veto vote and the willingness of certain veto wielding States to shamelessly exploit the device is perhaps responsible for the inaction of the Security Council in this case.

Responsibility for the lack of progress in relation to giving effect to the legal imperatives of the opinion, however, is to be borne first and foremost by the State of Israel. Israel's inability to recognise and implement the imperatives of this advisory opinion is a serious shortcoming of its responsibility under international law. The fact that further building and maintenance of this illegal wall has continued up to the present time is an egregious disregard for the international rule of law. Israel's factual military, economic, and diplomatic supremacy in the territory and in the region does not grant immunity from international legal rules. Rather such factual vitality imposes immense responsibility on Israel as it remains the only party that can very easily remedy the situation by bringing the illegal situation to an end. Doing so will be inexpensive and fully in alliance with the true national and international interests of Israel. To this one may add that the lack of political will to enforce international law in respect of the approximately 760 km wall in the occupied territories built by Israel is one of the reasons why progress in resolving the Israeli–Palestinian dispute continues unabated.

The Security Council is the principal enforcement organ of the United Nations and has formidable powers within its jurisdiction to compel Israel to comply with the courses of action indicated by the World Court in this case. Its inability to do this is a vacation of its primary responsibility under the current system of international order and a sad reflection of its political impotence in relation to the Palestinian-Israeli question and the Middle-East crises generally. The failure of responsibility by the State of Israel and the Security Council calls for a reconfiguration of their respective power bases to move them in alignment with the true ends of international law and international relations.

The expiration of a full decade after the delivery of the Court's decision in response to the competent request of the world's most democratic and representative legislative body, is more than enough time to implement the decision in good faith.

The UN may decide to re-constitute the UN Special Committee and Centre against Apartheid. This body should then be charged with investigating Israeli apartheid, especially as promoted by the existence of the wall. This body may also recommend measures to combat such manifestation of apartheid policies and mechanisms and monitor compliance of all States and private entities in light of their individual, collective, domestic and extraterritorial obligations vis-à-vis Israel's regime of prolonged occupation.

A full decade after the Opinion, the UN ought to meaningfully reconfigure its approach by developing a vibrant UN Agenda for Action in consultation with the UN

[143] Crawford, *op.cit*., pp. 59-60.

human rights treaty bodies, ILO compliance mechanisms, legal advisors to the Secretary-General and the depositary of the IV Geneva Convention.[144]

The General Assembly must continue developing capacity in the maintenance of its mandate regarding the UN Register of Damage. Capacity development in the determination of reparations for losses, costs and damages to any party as a consequence of the wall's development, construction and/or maintenance must be pursued vigorously.

Furthermore and very importantly a systematic UN led reparation mechanism of sanctions should be imposed on the State of Israel allowing participating States to seize Israel's assets within their reach to satisfy damages and compensation determined under the processes of the UN Register of Damage. Perhaps only when the purses of Israel are strained under the financial implications of its acts in relation to the building and maintenance of the globally condemned wall will it reconsider and rescind this illegal structure and the apartheid policy upon which it is built.

There ought to be an intensification of efforts to ensure more successes like that achieved by the Stop the Wall campaign in bringing the onset of targeted sanctions against Israel. It is also recommended that there should be a general revitalisation of world-wide activism by civil society, academic and intergovernmental groups to incentivise compliance with the will of the international community on this notorious apartheid wall.

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[144] Our conclusions in this area dwells heavily upon the the conclusions and recommendations of the experts that signed up to the document "*10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action*" in Mondoweiss Editors.

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COMENTARII
privind activitatea organizaţiilor internaţionale în domeniul dreptului internaţional/COMMENTARIES regarding the Activities of International Bodies in the Field of International Law

The Joint Comprehensive Plan of Action as endorsed by United Nations Security Council Resolution 2231/2015- a presentation

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Abstract: *The conclusion of the Joint Comprehensive Plan of Action saw the end of multilateral negotiations that brought together actors of almost the entire international community having some of the most diverging interests in a field that arguably lies at the core of international peace and security: nuclear activity. This article will first analyze the background for the adoption of the agreement, then analyze its provisions and consequence and finally highlight a number of uncertainties that are left on the Iranian nuclear activity and the international sanctions adopted in this regard.*

Key-words: *sanctions, JCPOA, nuclear activity, resolutions, Security Council.*

I. Introduction

14 July 2015 marks the successful conclusion of multilateral diplomatic negotiations for an agreement on Iran's nuclear activity. The negotiations, which spanned over several years, on a background of intense decades of tensions, advancements and drawbacks in talks between Iran and the international community, aimed at addressing the uncertainty of Iranian nuclear power use, question that had evolved since the 1980s and culminated, in recent years, in deep mistrust and fears of regional and international instability. Thus, after repeated talks and deliberations, an agreement on Iran's nuclear activity, settling key answers to concerns and issues forwarded by all parties, was finally reached, under the terms of the Joint Comprehensive Plan of Action (or JCPOA).[1] The Plan is concluded by Iran and the E3/EU+3 countries, namely the European Union/France, Germany, Great Britain, China, the Russian Federation and the United States and endorsed by the United Nations Security Council Resolution 2231 on 20 July 2015.

This article aims at presenting the agreement's core elements, while contextualizing them and trying to assess their impact on the parties to the deal and other international actors. As such, this study will take into consideration the legal obligations and means of implementation envisioned by the agreement and its annexes, as well as its implications for the economies of States and its impact on regional politics.

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[1] Available at http://www.un.org/en/sc/inc/pages/pdf/pow/RES2231E.pdf, accessed on 25 September 2015.

II. Background for the JCPOA

The JCPOA was concluded in a context of repeated attempts for a deal between States preoccupied by nuclear proliferation and the development of non-peaceful nuclear capabilities, and the Islamic Republic of Iran, a State with a decades-long history of nuclear activity which it has always maintained is for civilian purposes only. Iran was repeatedly accused by the international community that it was not complying with the Treaty on Non-Proliferation of Nuclear Weapons, which it signed in 1968 as a non-nuclear power and ratified in 1970.[2] Nuclear activities in Iran first began in the 70s by the Shah, with support by the United States, then stopped after the Islamic Revolution and during the war with Iraq. Activities were restarted in 1980, raising suspicion upon Iran's civil program, reaching a peak in 2002 at the discovery of the secretly built Natanz Fuel Enrichment Plant and Arak heavy-water reactor.[3] Concerns further increased in 2003 when inspectors of the International Atomic Energy Agency were admitted for on-site partial verifications only, determining the IAEA to declare it was incapable to confirm or deny whether Iran abided by international standards for nuclear activities. Nevertheless, Iran started to engage in negotiations with EU3 countries, concluded in the Tehran Declaration on full cooperation between Iranian authorities and IAEA inspectors[4] and, in 2004, in the Paris Agreement on temporary suspension of uranium enrichment.[5] This cooperative stance diluted once Mahmoud Ahmadinejad was elected as president of the republic in 2005, a hard liner that retracted Iran from these agreements and resumed uranium enrichment for purposes declared for power generation only.[6] Tensions continued to rise over the next years with the opening of a new facility at Fordow and concerns raised by the IAEA Board of Governors, followed by the series of six UNSC resolutions, between 2006 and 2010,[7] tightening the sanctions regime over Iran, in response to suspicious enrichment activities.

The situation deescalated once a more moderate president, Hassan Rouhani, was elected in 2013. As such, an Iran-IAEA Framework for Cooperation was initiated that year,[8] consisting of a process to address issues regarding access to investigation

[2] In its address to the Security Council after the adoption of Resolution 2231, the representative of Iran invoked the 2000 and 2010 Review Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, which stipulated that Member States' choices with regard to their fuel-cycle activities must be respected, so as to prove that Iran had the right to develop nuclear peaceful activities and that the international community's claims on an Iranian program for nuclear weapons were unfounded.

[3] A short background on the issue is available at *Global Security.org* in the Weapons of Mass Destruction chapter, http://www.globalsecurity.org/wmd/world/iran/natanz.htm, accessed on 25 September 2015.

[4] The Tehran Declaration can be consulted at http://news.bbc.co.uk/2/hi/middle_east/3211036.stm, last visited on 25 September 2015.

[5] *Communication Dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris on 15 November*, INFCIRC/637, available at https://www.iaea.org/sites/default/files/publications/documents/infcircs/2004/infcirc637.pdf, accessed on 25 September 2015

[6] Iran has always claimed that its nuclear activity was destined to civilian, peaceful use only, and that the Islamic law prevented Iran from building weapons of mass destructions. Ayatollah Khomeini, and, more recently, Ayatollah Khamenei issued a fatwa, an Islamic law, in this sense. More details and an analysis of this fatwa: Gareth Porter, "When the ayatollah said no to nukes" in *Foreign Policy*, article available at http://foreignpolicy.com/2014/10/16/when-the-ayatollah-said-no-to-nukes/, accessed on 25 September 2015.

[7] Security Council Resolutions no. 1696/2006, 1737/2006, 1747/2007, 1803/2008, 1835/2008, 1929/2010.

[8] "IAEA, Iran Sign Joint Statement on Framework for Cooperation" in *IAEA Press Releases*, available at https://www.iaea.org/newscenter/pressreleases/iaea-iran-sign-joint-statement-framework-cooperation, accessed on 25 September 2015.

and verification on arms control[9] and, most importantly, an interim agreement, the Joint Plan of Action, between Iran and the E3/EU+3, on a short-term freeze of portions of the nuclear program, in exchange for the suspension of some economic sanctions.[10] Among the provisions, Iran agreed to limit the enrichment of uranium to 5% and stop the development at Natanz, Arak and Fordow in exchange for U.S. and EU suspension of sanctions on petrochemical exports, gold and precious metals and the automotive industry, as well as the pausing of efforts by the U.S. and EU to reduce Iran oil exports.[11]

III. The JCPOA and UN Security Council Resolution 2231/2015

The JCPOA was endorsed by the Security Council in its Resolution 2231/2015. The Resolution was adopted on 20 July 2015, 5 days after the conclusion in Vienna of the Joint Comprehension Plan of Action. Apart JCPOA and its five annexes, the UNSC resolution includes provisions for the termination of previous of Security Council resolutions 1696/2006, 1737/2006, 1747/2007, 1803/2008, 1835/2008, 1929/2010 and 2224/2015, as well as provisions on the implementation of the JCPOA.[12]

Although not specifically mentioned in its preamble, Resolution 2231/2015 was adopted under UN Charter. This is because the Security Council first recalls several of its resolutions adopted under Chapter VII[13] and later decides on a number of measures in accordance with Article 41 of the UN Charter. Resolution 2231/2015 is legally binding and mandatory for all UN member States,[14] because of the imperative wording used on several occasions in the operative paragraphs in relation to the JCPOA. Thus, the Resolution reinforces the primary responsibility of the Security Council, namely the maintenance of international peace and security, in light of a series of irrefutable principles of international security: non-nuclear proliferation, collective security and nuclear cooperation.[15] Moreover, the resolution reveals the willingness to cooperate internationally in accordance to nonproliferation norms, regarding Iran's "indigenous program"[16] as the country envisions its nuclear activities.

The preamble paragraphs express the historical importance of the moment, by declaring the creation of a "new partnership with Iran"[17] through the JCPOA. The resolution underlines the high role of the International Atomic Energy Agency in the process of the agreement's implementation by Iran. It is for the IAEA to monitor and verify nuclear activities as technically detailed in the annexes of the agreement. The importance of the IAEA is apparent not only because of its attributions of control and verification, but from the perspective of its role as a facilitator, an enabler of development, technologically and research, as emphasized by Annex III on types of joint projects with Iran and possible areas of cooperation.[18]

Moving further into the document, every aspect is minutely detailed, be it on technical elements, nuclear-related measures, the timing of sanctions-lifting or methods of dispute settlement. Structure-wise, the agreement establishes a central body, in charge of reviewing the implementation of the Plan and discussing eventual disputes:

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[9] "Implementation of the Iran-IAEA Framework for Cooperation" in *Arms Control Association*, 30 September 2014, updated on July 2015, available at https://www.armscontrol.org/Implementation-of-the-Iran-IAEA-Framework-for-Cooperation, page consulted on 25 September 2015.

[10] *Joint Plan of Action*, Geneva, 24 November 2013, available at http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf, accessed on 25 September 2015.

[11] *Idem.*

[12] S/RES/2231 (2015), pp 1-3.

[13] *Ibid*, p. 1.

[14] See Annex B of the Resolution, p. 98.

[15] *Ibid*, p 2.

[16] *Ibid*, p 8.

[17] *Ibid*, p 1.

[18] *Ibid*, p 81.

the Joint Commission.[19] Another important provision to be taken into consideration for the interpretation of the resolution before entering into the technical annexes is that "all provisions contained in the JCPOA are only for the purposes of its implementation between the E3/EU+3 and Iran and should not be considered as setting precedents for any other State or for principles of international law and the rights and obligations under the Treaty on the Non Proliferation of Nuclear Weapons and other relevant instruments, as well as for internationally recognized principles and practices".[20]

With this mention in mind, the JCPOA regulates enrichment activities and research and development activities and provides for the lifting of international and national sanctions on the Iranian nuclear program, without bringing changes in other nuclear dossiers and without altering the international laws and principles on nonproliferation and nuclear weapons.

Regarding general nuclear measures, they refer to Iran's obligations on uranium enrichment, research and development, stockpiles, Arak heavy water reactor, as well as transparence and confidence building measures, and to the EU and U.S. financial and economic sanctions-lifting.

Thus, the agreement foresees a gradual limitation of uranium enrichment and of IR-1 centrifuges, followed by the phasing-out in 10 years.[21] All activity of uranium enrichment will be made at Natanz facility solely, for 15 years, without passing a level higher than 3.67%, and in research purposes only.[22] Enrichment activities for research and development is permitted as long it does not accumulate enriched uranium.[23] Furthermore, current enriched uranium surpassing 300 kg will be taken out of Iran via commercial transactions, with the specification that "Russian designed, fabricated and licensed fuel assemblies for use in Russian supplied reactors in Iran do not count against the 300 kg UF6 stockpile limit."[24] Equally important, Fordow Fuel Enrichment Plant will become a research plant used in nuclear science, technology and physics and no heavy water will be produced for 15 years.[25] Added to this, Iran is totally forbidden to build nuclear explosive devices for the same time span.[26]

At the same time, Iran will stop building a new reactor it had in plan for Arak, it will minimize the production of plutonium and will proceed to modernize the reactor, with the technical and financial assistance of participant States, upon final approval of the project by the Joint Commission.[27] In addition, all heavy water in excess to the reactor will be cleared for export, Iran will not be keeping irradiated fuel, plutonium or uranium on its territory for 15 years, and the EU3 countries will help Iran comply with this obligation, by storing the fuels.[28] The Arak reactor is a very good example for understanding the implementation the implementation of the agreement: Iran has the main responsibility for the accomplishment of its obligations, but it is assisted by the international community, and particularly, the participating States, and it is verified by the IAEA.

In exchange for these measures taken by Iran which experts say will neuter Iran's capability of producing a nuclear weapon not only for 15 years, but on a longer term, the EU and the U.S. agree to lift, as a first measure, economic and financial sanctions as detailed in Annex II of the document. The sanctions will be lifted following, and not prior to, Iranian implementation of measures on nuclear activity. In a first stage, the EU and the U.S. will lift economic and financial sanctions, followed, in a second stage, 8 years after the adoption of JCPOA, by sanctions on nuclear related

[19] *Ibid*, p. 5.
[20] *Ibid*, p. 6.
[21] *Ibid*, p. 11.
[22] *Ibid*, p. 22.
[23] *Ibid*, p. 21.
[24] *Ibid*, p. 30. The same rule applies for enriched uranium from outside sources currently used for research in Iran.
[25] *Ibid*, p. 11.
[26] *Ibid*, p. 34.
[27] *Ibid*, p. 23.
[28] *Idem.*

goods and activities[29] (sanctions related to subjects such as human rights violations, the embargo on ballistic missile technology or terrorism will remain in place, be them economic or not). Iran can also indicate if measures by participant States are preventing the lift of sanctions, with the consequence that the parties have to address the issue. If they cannot reach an agreement, the Joint Commission shall be seized, according to JCPOA.[30] The high commitment by States is further revealed as the agreement gives additional insurances to Iran: the EU and the U.S. will refrain from reintroducing or creating new sanctions, the U.S. will address regional or national law if it prevents sanction lifting, together with administrative and regulatory measures for the lift of sanctions or for the normalization of economic relations.

Another aspect that certifies the extent of commitment and the amount of precision exercised in this agreement and, thus, the genuine intent of parties to reach a solid, lasting deal is represented by the methods conceived for dispute settlement. These methods stipulate that participating States can refer to the Joint Commission if other participants aren't meeting their obligations. The Joint Commission has 30 days to assess the petition, and if the problem is still not solved, the participant can refer to the ministers of foreign affairs, doubled by an Advisory Board[31] if this is considered to be necessary. Furthermore, if a solution is still not drawn, the Security Council will be notified in order to decide on the continuation of sanctions-lifting, while the petitioning State can withdraw from JCPOA.[32] To this procedure, it is extremely relevant and important to mention that "Iran has stated that if sanctions are reinstated in whole or in part, Iran will treat that as grounds to cease performing its commitments under this JCPOA in whole or in part".[33] This mechanism reveals the importance of the agreement and of the objective of transparent behavior with regards to assumed engagements. This is underlined by the fact that all situations where the parties do not reach an agreement to the dispute be treated at the highest level of political representation. Equally important, Iran holds a very strong position in case a State will decide to withdraw from the deal.

In response to Iran's measures to be implemented in its nuclear program, the resolution lists in Annex II the sanctions-related commitments taken by the EU and the U.S.. In this respect, EU commits to the termination of Council Regulation 267/2012, Council Decision 2010/413/CFSP and of national legislation as required.[34] These terminations affect the following sectors: financial, banking and insurance measure (meaning financial assistance, public bonds, trade with Iran), oil gas and petrochemical (meaning investments, export/import in these fields), shipping and transport sectors, gold and precious metals, non-proliferation measures (in all activities, including investments, training), metals sales, software exports and imports, arms, as well as asset freeze and visa ban for persons, entities and bodies banned in all above sectors by the EU and the UNSC.[35]

It is thus very clear that the agreement is crucial for Iran's economy, as it stipulates the lifting of economic and financial international sanctions that have crippled the Iran economy until the present day. There is an evident major economic impact of these terminations, triggering a historical opening of relations between Iran and international western States, with closed opportunities that are will eventually be opened: EU funding will be accessible towards Iranian persons, institutions, and entities, Iranian banks can be present on EU soil, together with the possibility of joint ventures, of financial support to trade, import and transport of Iranian oil products. Also, Iran will be able to benefit from related technology for exploration, production refining, naval equipment, and the construction of cargo vessels. Iranian cargo international movement will be admitted without inspection. Added to this, the sale,

[29] See Annex II of JCPOA.
[30] S/RES/2231 (2015), p. 16.
[31] The Advisory Board can only provide for non-binding opinions.
[32] S/RES/2231 (2015), p 20.
[33] *Idem.*
[34] *Ibid*, p. 37
[35] *Ibid*, pp 37-39.

export of gold, the delivery of coinage, of metals and software from the European Union will be available to Iran.[36]

As for sanctions by the Unites States, they are to be lifted by executive waivers in the following sectors: financial sanctions applied to a number of individuals and entities such as the Central Bank of Iran, the National Iranian Oil Company, sanctions on the Iranian Rial, on bilateral trade limitations, on governmental bonds, as well as on limitations of crude oil sales or investments in technology, or transportation of oil and natural gas.[37] In comparison to sectors foreseen by the EU, the U.S. commits on sanctions-lifting in the automotive sector, allows joint ventures in uranium mining, production and transportation, and also the termination of exclusion of Iranian students to classes in nuclear science or energy.[38] The U.S. obligations are underlying the shipment and naval sanctions-lifting, as well as sales in civil aviation and operations in Iranian ports.[39]

At this point, it is highly important to mention that "U.S. sanctions relief will only be provided through the suspension and termination of nuclear-related secondary sanctions, which were applicable to non-U.S. persons."[40] Thus, foreign companies that reengage in relations with Iranian ones will not be sanctioned by the U.S.. However, "sanctions will remain in place with regard to activities by U.S. persons, which includes U.S. citizens, U.S. permanent residents, companies organized under the laws of the U.S. and their foreign branches, and any entity owned (50% or more) or "otherwise controlled" by a U.S. person".[41] All U.S. persons and companies will have the possibility of engaging in business with Iran if they have their transactions authorized by the U.S. government.[42] This rule does not apply to EU citizens and entities, as they will be able to make transactions with Iran without restrictions or prior approval.

Added to that, the preamble of the JCPOA includes a series of exemptions to sanctions-lifting for member States, as they will not be able to benefit from interaction on key sensible issues of the agreement: the works on the Fordow cascades, the export of Iran's enriched uranium, the modernization of Arak.[43] The interaction on these activities will fall back on participating States, with the possibility of being extended to other States provided they are granted permission from the Joint Commission and the IAEA.[44]

Sanctions and nuclear measures are not the only important aspects of the agreement, as Annex III highlights commitments to civil nuclear cooperation. This part of the agreement is relevant in showing that the parties agree to go beyond the elimination of a series of sanctions in exchange for the reduction of the nuclear activity (production, research and development) of Republic of Iran and its employment in peaceful purposes only. This Annex, being guided by the principle of international cooperation, is indicative of efforts of added contribution to the economies and industries of the implied parties. It is not only about eliminating potential threats to regional and international security, but also about building security and prosperity, meaning positively using the negotiations to achieve not only an even level of commitments based on political compromises in exchange for facilities such as trade and investments, but also going one step further in the direction of an integrative perspective via civil nuclear cooperation. Concretely, the areas of cooperation include

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[36] *Ibid*, pp 40-42.
[37] *Ibid*, pp 43-47.
[38] *Ibid*, pp 43-47.
[39] *Ibid*, pp 43-47.
[40] Theodore W. Kassinger, Greta Lichtenbaum, Thomas E. Donilon, Arthur B. Culvahouse Jr., David J. Ribner, **"***The Iran Nuclear Deal: Setting the Path Forward to Lift International Economic Sanctions*" in *O'Melveny and Myers LLP,* 15 July 2015, available at http://www.omm.com/the-iran-nuclear-deal-setting-the-path-forward-to-lift-international-economic-sanctions-07-15-2015/, accessed on 25 September 2015.
[41] *Idem.*
[42] *Idem.*
[43] S/RES/2231 (2015), p. 5.
[44] *Idem.*

light water power and research reactors, software and supplies for these reactors, equipment, system upgrades, Arak modernization process into a research reactor, via a partnership between Iran and a working group (of E3/EU+3 origin),[45] research and development practices transposed into scientific exchanges, research at Fordow facility for "international collaborative projects."[46] All these areas of cooperation address concerns on sensible nuclear activities in Iran that would raise potential queries. The establishment of a Nuclear Safety Centre based on international cooperation and of trainings and workshops for the creation of a nuclear culture are good examples in this sense.[47]

All these measures are to be decided and implemented by the Joint Commission, the core entity to assure the well-functioning of the JCPOA provisions, as stated in Annex IV. Among its functions, one notes reviewing and approving technical plans for uranium production, research development facilities, centrifuges, plant development and modernization, supporting assistance, approving possible explosive detonation systems, evaluating claims of nonperformance by members.[48] For 15 years, the Joint Commission will have to approve every commercial transaction that Iran makes on nuclear technology and equipment. A powerful symbol for the negotiations preceeding the conclusion of the JCPOA is the fact that the High Representative is the coordinator of the Commission. This is one of the indicators of the leading role played by the EU at the negotiations table, placing it as an important player in the deal, its observance and implementation.

The last Annex offers in its turn important technical aspects agreed by parties with regards to the timeline, especially because every national representative declared that the importance of the agreement does not derive from its commitments, but from their implementation.[49] The endorsement of the JCPOA upon conclusion of negotiation represents the Finalization Day. JCPOA was endorsed by the UNSC and adopted by the EU on 20 July 2015. The agreement stipulates an Adoption Day, 90 days after the endorsement in the Security Council, representing the beginning of the necessary preparations for all parties so as to be able to comply with their commitments. Also, Adoption Day will see an EU regulation and a U.S. order taking effect on Implementation Day, on the termination of a number of nuclear related economic and financial sanctions. Thirdly, Implementation Day will occur after the IAEA has verified that Iran has taken the nuclear related measures (regarding heavy water, the Arak reactor, centrifuges, Fordow Plant, and uranium enrichment) and will have as a consequence the termination of the EU, U.S. economic and financial sanctions, as well as those adopted by the UN Security Council, as established on Adoption Day. 8 years after the Adoption Day, after the IAEA will have confirmed that all Iranian nuclear activities are for peaceful ends, the EU and the U.S. will lift another set of sanctions, marking Transition Day. Finally, Termination Day will occur 10 years from Adoption Day, unless previous resolutions have been reinstated, and the termination by the EU of all remaining nuclear activity-related sanctions.[50]

Once more, the Implementation Plan is indicative of the minute work done by the negotiators of the agreement, assessed as "one of the most comprehensive and detailed nuclear arms agreements ever reached."[51]

IV. Reactions by the international community. Conclusions

[45] *Ibid*, p. 82.
[46] *Ibid*, p. 83.
[47] *Ibid*, p. 84.
[48] *Ibid*, pp 87-89.
[49] "Resolution 2231 and debates (Iranian nuclear)" in *Voltairenet.org*, 20 July 2015, available at http://www.voltairenet.org/article188256.html, accessed on 25 September 2015.
[50] The sequence of the Implementation Plan is detailed in S/RES/2231 (2015), pp 93-97.
[51] John Mecklin, "The experts assess the Iran agreement of 2015" in *Bulletin of the Atomic Scientists*, 14 July 2015, available at http://thebulletin.org/experts-assess-iran-agreement-20158507, accessed on 25 September 2015.

Of course, there are also critics and concerns over the deal, rightfully claimed by analysts. Among the most invoked, is the short time span of the deal (15 years) and that it allows a short breakout time for Iran to develop nuclear weapons after the termination of the deal, or even in the second part of the deal.[52] Other criticism on chose time spans are linked to the 5 years restrictions on export and import of conventional arms and 8 years restrictions on the ballistic missile program, which some consider to be too short.[53]

Linked to the economical aspect, one pertinent concern is the usage of the estimated $100 billion in frozen assets that will be unlocked, unrecoverable in case sanctions are reinstated.[54] Other critics argue that Iran is not obliged by the deal to disclose its nuclear past, while the future is not assured when it comes of Iran's new possibilities to destabilize its region. Other fears, although smaller, are linked to the strong debates in the U.S. Congress where Republicans are against the deal and threat not to ratify it. At its turn, the Majlis, the Iranian Parliament, awaits the vote in Congress to ratify the accord.[55]

Beyond all criticism, almost everyone agrees that a better deal could not have been drawn. What is more, the deal is crucial for regional politics as it enables Iran to become a powerful regional and international player. The agreement can be considered a tactical achievement that could strategically reshape Middle East politics. Iran will thus become a leading regional player-its geographical position, its resources and the economic recovery will make it a very important actor, as High Representative Federica Mogherini declared in Tehran.[56] On the same note, Donald Tusk, president of the European Council, evaluated the agreement as a game-changer in world politics.

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[53] *Idem.*
[54] *Idem.*
[55] Mehdi Khalaji, "*Iran's Security Concern and Legal Controversies Over the Nuclear Deal*" in *The Washington Institute,* PolicyWatch 2460, 5 August 2015, available at http://www.washingtoninstitute.org/policy-analysis/view/irans-security-concerns-and-legal-controversies-over-the-nuclear-deal, accessed on 25 September 2015.
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Ukraine and the International Criminal Court: the second declaration of acceptance and why it is worth the comparison to the situation in Georgia

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Abstract: *Now that the first step towards bringing to justice those responsible in the conflict in Georgia has been made, it is fairly normal to put some hope into the fact that, following the second declaration of accepting the ICC's jurisdiction, the situation in Ukraine will fall into the same steps, although probably much later. Without bringing too much attention to the facts, since they are not unfamiliar, the focus of the article will be brought to picturing the course of events following Ukraine's second declaration, from the ICC Prosecutor's point of view. The choice of comparison to Georgia is not random in the slightest: from the historical background to the evolution of events, the Russian Federation's implication and scopes, to the procedure that has to be followed by the Prosecutor in order for the alleged crimes to be brought to justice.*

Key-words: *International Criminal Court; the Rome Statute; crimes of war; crimes against humanity*

I. Introduction

On 8 September 2015, the Registrar of the International Criminal Court[1] received a declaration lodged by Ukraine accepting the ICC's jurisdiction with respect to alleged crimes committed on the State's territory since 20 February 2014. Formulated under article 12(3) of the Rome Statute,[2] the founding treaty of the ICC, which makes it possible for a State not party to the Statute to accept the exercise of the jurisdiction of the ICC, the declaration highlights the determination of Ukraine to engage in a full cooperation with the Court as soon as requested. This is, however, the second declaration of the sort lodged by Ukraine under article 12(3); the former declaration was lodged on 17 April 2014 and referred to alleged crimes committed on its territory from 21 November 2013 to 22 February 2014.

As many of the east-European States, Ukraine is not a party to the Rome Statute and neither is Russia, which is pointed largely responsible for the occurred events. Such being the case, in order for a State that is not party to the Statute to defer a situation to the ICC, the latter has to lodge a declaration of acceptance of the Court's jurisdiction with respect to a specific situation – alleged crimes. The acceptance of the jurisdiction does not automatically call for the commencement of an investigation, however. It is for the ICC Prosecutor to decide whether to request the judge's authorization to open an investigation, when and if the Prosecutor considers that the information made available for the Office is sufficient for establishing the existence of a reasonable basis to open an investigation.

By means of these two declarations submitted by Ukraine, the ICC would be competent to exercise jurisdiction, if the case should be, over alleged crimes committed in the context of Euromaidan and those committed since the 20 February 2014 onwards.

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[1] Abbreviated, in the following, as ICC.

[2] Article 12 *Preconditions to the exercise of the jurisdiction.*

3. If the acceptance of a State, which is not a Party to this Statute, is required under para.2, the State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without delay or exception in accordance with Part 9.

This demarche of the Ukrainian State is not at all a surprising one; on the contrary, given the example of the situation in Georgia in the period of 1 July to 10 October 2008 concerning war crimes and crimes against humanity allegedly committed in and around South Ossetia and given the quite striking similarities of the two situations, it is even more likely to say that the events in the last two years in Ukraine make for an even more solid case before the ICC. Of course, when referring to the similarities of the two situations, the common historical background and the Russian implication are the first that come to mind.

II. Briefly stating the facts

It is probably fair to say that the present crisis in Ukraine was foreseeable since the Orange Revolution in November 2004 – January 2005 and the State's first attempt to join NATO in 2008; and it is likewise agreed that the European Union[3] failed to take into consideration the entangled nature of the Russian and Ukrainian economies when launching the Eastern Partnership in 2009; as it was, it all came down to facing Ukraine with the impossible: having to choose between Europe and Russia.[4] Postponing the decision on the agreement costed Mr. Viktor Yanukovych his chair and gave an excuse for pro-European manifestations at Maïdan, whilst the Russian president was completely excluded from the discussions in respect of the EU-Ukraine agreement.

It is also questionable to say that the European officials did not see, so to speak, the handwriting on the wall. Nevertheless, the manifestations at Maïdan were encouraged by various site visits of European and American officials and thrusting aside the Ukrainian president in the dawn of 22 February, whilst choosing not to respect the agreement of 21 February - this was overall interpreted by Moscow as a genuine "coup d'état".

On 28 February 2014, the Permanent Representative of Ukraine to the United Nations addressed a letter requesting an urgent meeting of the Security Council, due to the deteriorations of the situation in Ukraine. The drafted Security Council Resolution on 15 March 2014 – which was vetoed by Russia – echoed the general appreciation that the referendum in Crimea[5] was invalid and called upon all member States and international organizations not to recognize any alteration of the status of Crimea based on this referendum[6]. The separatism threat become vivid when pro-Russian protesters occupied on 7 April 2014 government offices in Donetsk, Luhansk and Kharkiv. In the meantime, the EU envisioned and implemented a series of sanctions directed towards individual Russians and the Russian Federation.

On 17 April 2014, Russia, Ukraine and EU foreign ministers agreed on a de-escalation arrangement for the conflict, whilst the European Parliament called for EU sanctions against the Russian energy sector. A couple of days later though, the Russian foreign minister Sergei Lavrov accused Ukraine of breaking the Geneva agreement by not disarming illegal nationalist groups. Until 20 June 2014, the United Nations estimated more than 400 casualties since 15 April.

On 11 May 2014, the pro-Russians separatists declared the independence of Luhansk and Donetsk, after the referendums that were generally looked upon in the same manner as was the referendum in Crimea. On 27 June 2014, the EU-Ukraine Association Agreement was signed, symbolizing a political and economic arrangement. The Malaysia Airlines flight MH17 from Amsterdam to Kuala Lampur

[3] Abbreviated, in the following, as EU.

[4] Jean-Pierre Chevènement, *Crise ukrainienne, une épreuve de vérité*, Le Monde Diplomatique, p. 11, juin 2015 The author sees the Ukrainian crisis as an accidental skid and the annexation of Crimea as an unplanned for event.

[5] Which happened on 16 March 2014 and where 97% of voters opted for secession. The following day, the Crimean parliament declared independence and formally asked the Russian Federation to join it, whilst adopting the rouble and switching to Moscow time. On the same day, Russia recognized the Crimean independence.

[6] UN Security Council draft resolution S/2014/189 (www.securitycouncilreport.org).

was downed near the village of Hrabove in the Donbass region, which was held by the rebels; 298 people were killed in the catastrophe, which was very recently proved to have been due to an attack by a Russian-made Buk missile.

By the end of October 2014, Ukrainians had already elected a new parliament, a new head of State and started on its way to a more stable situation in territory. All the while, harsher international sanctions were implemented towards the Russian Federation by the EU and vice versa.

The beginning of 2015 brought yet another event to shatter the hope: eight people were killed in a shelling of Donetsk bus stop on 22 January 20km from the besieged airport of Donetsk, which was believed to be under separatist control and, only a day later, 30 civilians died in a shelling of Mariupol.

The second Minsk agreement was signed on 12 February 2015 involving Russia, Ukraine, Germany and pro-Russian separatists. The casualties risen in the escalating conflict around the village of Starohnativka in the Donetsk region in August 2015 were, however, not in the spirit and the letter of the Minsk agreements.[7]

III. The two declarations

On 22 February 2014, the Verkhovna Rada of Ukraine[8] adopted the Resolution "On the self-withdrawal of the President of Ukraine from performing his Constitutional Duties and Setting Early Elections of the President of Ukraine". Consequently, the parliament also adopted a resolution authorizing the Chairman of the Verkhovna Rada, Mr. Oleksandr Turchynov, to exercise the presidential duties in accordance with article 112 of the Constitution of Ukraine. Within the limits and the temporary nature of its powers, the Acting President had the constitutional abilities to represent the State of Ukraine in international relations, to administer the foreign political activity, to conduct negotiations and conclude international treaties of Ukraine. No later than 24 February, the Parliament also adopted *the Declaration on Recognition of the Jurisdiction of ICC*[9] *over crimes against humanity, committed by senior officials of the State, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013 – 22 February 2014.*[10]

The declaration pursues to bring to criminal liability in the ICC a number of senior officials, namely Yanukovych,[11] in respect of crimes against humanity stipulated in the article 7 of the Rome Statute and committed during the peaceful protests within the named period.[12] The declaration mentions that Ukrainian law enforcement agencies, on the orders of senior officials of the State, unlawfully used physical force, special means and weapons towards the participants of peaceful actions in Kiev and other cities. The events led to killing over 100 nationals of Ukraine and other States, injuring and mutilating more than 2000 persons, torturing civilian population, abducting and enforced disappearing of persons, forcefully and unlawfully depriving of liberty, forcefully transferring to deserted places for the purpose of torture and murder, arbitrary imprisoning of persons in different cities of Ukraine, brutal beatings, unlawfully damaging peaceful actions participant's property and many other features of the time.[13] Furthermore, the using by the local authorities and police of organized criminal groups for the purpose of intimidating and abducting, torturing, murdering people, damaging their property etc. and the overall fact that the persecution of people

[7] For a detailed timeline of events, see www.europarl.europa.eu.
[8] Ukraine's exclusive legislative body.
[9] Which Mr. O. Turchynov signed as Chairman of the Parliament.
[10] The Declaration was lodged on 17 April 2014.
[11] The Declaration also refers to Pshonka Viktor Pavlovych – ex-Prosecutor-General of Ukraine, Zakharchenko Vitalii Yuriivych – ex-Minister of Internal Affairs of Ukraine, stating that other officials who issued and executed manifestly criminal orders which might be determined by the Prosecutor of the International Criminal Court.
[12] Declaration of the Verkhovna Rada of Ukraine, 17 April 2014 (www.icc-cpi.int).
[13] Ibidem.

was carried out on political grounds (opposition parties, civil society organizations, "Euromaidan", "AutoMaidan" activists etc.)[14]

Consequently, the ICC Prosecutor opened on 25 April 2014 a preliminary investigation into the Euromaidan events and in November 2014, an ICC delegation visited Kiev to assess the situation. On the 1-year anniversary of the Euromaidan protests, a coalition of 13 Ukrainian organizations and initiatives for combating impunity against humanity (such as Public Initiative Euromaidan SOS, Human Rights Information Center, International Renaissance Foundation or the Office of the Ukrainian Parliament Commissioner for Human Rights) published the summary of the communication that was submitted in January 2015 to the Prosecutor of the ICC and the International Partnership for Human Rights.[15]

On 4 February 2015, the Verkhovna Rada adopted yet another resolution, this time regarding another series of events: *The Declaration "On the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations "DNR" and "LNR", which led to extremely grave consequences and mass murder of the Ukrainian nationals".*[16]

The declaration was made for an indefinite period and pursues to bring a series of senior officials to criminal liability in the ICC in respect of crimes against humanity and war crimes, stipulated in article 7 and 8 of the Rome Statute, committed on the territory of Ukraine starting 20 February 2014. This second declaration mentions an ongoing-armed aggression against Ukraine by the hands of the military forces of the Russian Federation and Russian supported militant-terrorists, during which a part of the territory of an independent and sovereign State of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – was annexed, but also parts of Donetsk and Luhansk regions were occupied; all of these, of course, with the cost of killing thousands of Ukrainian nationals, injuring other thousands, destroying the infrastructure of the whole regions and consequently forcing hundreds of thousands of people to flee from their homes.[17] The declaration of acceptance particularly highlights a recent act of violence by the hands of the above mentioned: the shelling from multiple-launch rocket system "Grad" of civilians in residential areas of the Mariupol city in Ukraine on 24 January 2015, which concluded in more than thirty deaths of civilians, including children, and over a hundred injuries.

IV. The situation in Georgia: a comparison that is worth making

When the dissolution of the Soviet Union was peacefully decided in the late 1991, little was thought about the potential conflicts that were to rise in that multinational, multiethnic space; as it is, the capricious tracing of the State frontiers would only multiply tensions between successor States and minorities (Transnistria, South Ossetia, Abkhazia, Adjara, etc.)[18]. Many of those multiethnic States had not existed before and such is the case of Ukraine, which had been an independent State only for 3 years during its history, from 1917 to 1920; moreover, Crimea had, in fact, never been Ukrainian before Nikita Khrushchev's precipitated decision in 1954.

The South Ossetian Autonomous Region, on the other side, was created in Georgia following the occupation by the Bolshevik forces that occupied the latter, whilst North Ossetia was formed in Russia. As sunset reached over the Soviet Union, a separatist sentiment came to life in South Ossetia and led to several outbreaks of violence; the region even declared its intention to secede from Georgia in 1990 and proclaimed its independence in 1992; when offered autonomy in 2006, South Ossetians

[14] Ibidem.
[15] The summary of the communication can be found at www.fidh.org.
[16] Submitted officialy on 8 September 2015.
[17] Declaration of the Verkhovna Rada of Ukraine, 8 September 2015 (www.icc-cpi.int).
[18] Jean-Pierre Chevènement, *Crise ukrainienne, une épreuve de vérité*, Le Monde Diplomatique, p. 11, June 2015.

widely rejected it in a referendum and tensions came to rise fiercely again in August 2008; clashes between Georgian troops and separatist forces, and days later joined by Russian forces, concluded in the sweeping away of the Georgians from the region; after the war, Russia formally recognized both South Ossetia and Abkhazia as independent States.[19] What followed the events in 2008 was a so-called *quiet annexation* of South Ossetia by the Russian Federation: in April 2009, Russia bolstered its position in the region by signing a five-year agreement to take formal and effective control of South Ossetia's frontiers with Georgia proper, as well as those of Abkhazia and started in 2015 an alliance with South Ossetia that would abolish border checkpoints.

However, Georgia's position vis-à-vis the ICC is slightly different from Ukraine's: Georgia deposited its instrument of ratification to the Rome Statute on 5 September 2003, therefore the ICC has jurisdiction over Statute crimes committed on the territory of Georgia or by its nationals from 1 December 2003 onwards. On 14 August 2008, the ICC Prosecutor issued a statement on Georgia by which it informs that the Office considers all information relating to alleged crimes within its jurisdiction committed on the territory of Georgia or by its nationals[20] and therefore started analyzing the alleged crimes committed during the conflict in August 2008 in what is formally known as a *preliminary investigation*. Consequently, at the end of this examination, on 13 October 2015, the Prosecutor requested authorization to open an investigation.

The procedure, instated by the Rome Statute, does not allow the Prosecutor to formally commence an investigation in this situation at its own will, considering the fact that such an investigation can only be triggered following a referral of either the United Nations Security Council or an ICC member State. Given the fact that the Prosecutor decided to open an investigation on its own motion, without such a referral, an ICC Pre-Trial chamber must authorize the investigation at the Prosecutor's request.

Likewise, neither the Ukrainian lodged declaration of accepting the ICC jurisdiction formulated under article 12(3) of the Rome Statute does not simply set course to an investigation by the Prosecutor of the ICC. Once a declaration of acceptance of the jurisdiction is submitted, the Prosecutor of the ICC is responsible for determining whether there is a reasonable basis to proceed with an investigation into a situation. The prosecutor analyses the seriousness of the information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that the Prosecutor deems appropriate and receives written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, a request for authorization of an investigation can be submitted to the Pre-Trial Chamber. If the Pre-Trial Chamber, upon examination of this request and the supporting material, considers that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation.[21]

A. A few facts on the Preliminary Examination by the Prosecutor of the ICC

General Principles

Article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. The Prosecutor shall consider *jurisdiction* (temporal, material, and either territorial of personal jurisdiction), *admissibility* (complementarity and gravity) and the *interests of justice*.

The preliminary examination process is conducted on the basis of the facts and information available, and in the context of the principles of independence, impartiality and objectivity.

[19] The independence was also recognised by Venezuela and Nicaragua and some of the Pacific island States.
[20] Prosecutor's statement on Georgia, 14 August 2008 (www.icc-cpi.int).
[21] Policy Paper Preliminary Examinations, ICC-Office of the prosecutor, 2013, p. 2.

The Prosecutor shall act independently of instructions, which means that any decision made should be in no way influenced or altered by presumed or known wishes of any party, or in connection with efforts to secure cooperation.[22] The scope of the prosecutor's examination cannot be limited in a manner contrary to the Statute and whenever a referral is accompanied by supporting documentation identifying potential perpetrators, the Office is not bound or constrained by the given information when conducting the investigation. In other words, if the Prosecutor finds specific persons that should be charged and that were not initially pointed at within the given information, it shall proceed in consequence.

The principle of impartiality[23] means that the Prosecutor will apply consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned, which can only lead to the conclusion that, for instance, geo-political implications are not relevant criteria determining whether to open an investigation into a situation under the Statute or not.[24]

The principle of objectivity provides for an investigation by a Prosecutor that takes equally into consideration both incriminating and exonerating circumstances.[25] But the same principle of objectivity is applied at the preliminary examination stage in relation to information that could constitute the basis for a determination to proceed with an investigation.

Statutory Factors

Firstly, it is extremely important to underline the fact that the statutory factors apply to all situations, whether the preliminary examination was triggered by a declaration lodged under article 12(3) of the Statute, on the basis on information received on crimes or by a referral.[26]

In accordance with article 53(1)(a) of the Statute, the Prosecutor must determine whether there is a reasonable basis to believe that a crime within the *jurisdiction* of the Court has been committed. Consequently, the temporal, territorial, personal or subject-matter jurisdictional requirements have to be fulfilled.

In terms of *admissibility*, an assessment of *complementarity* and *gravity* are required[27] and the Prosecutor must be satisfied with regard to admissibility on both aspects before proceeding. The complementarity assessment[28] is case-specific and relates to whether genuine and lawful investigations and prosecutions have been or are being conducted in the State concerned in respect of the case(s) identified by the Office.[29] However, the complementarity principle extends to any State that has jurisdictional competence over a case and applies irrespective of whether that State is a Party to the Statute.[30] As confirmed by the Court, the absence of national proceedings (for instance, domestic inactivity) is sufficient to make the case admissible. In essence, the complementarity assessment is the expression of the compromise between promoters of a court that has the competence to judge and rule *prima facie* any kind of crime that, judging by its gravity, should concern the international community as a whole and the states' wish to keep their sovereign prerogatives in respect to exercising jurisdiction over certain persons. In other words, the ICC only becomes competent to judge when the State does not want or cannot act in consequence of its judicial prerogatives.[31] Gravity, as the second assessment of complementarity, includes both quantitative and qualitative considerations. The factors that guide the Prosecutor's assessment include the scale, nature, manner of commission of the crimes and their impact.

[22] Idem, p.7.
[23] Article 21(3) of the Rome Statute.
[24] Policy Paper Preliminary Examinations, ICC-Office of the prosecutor, 2013, p. 8.
[25] Article 54(1) of the Rome Statute.
[26] Policy Paper Preliminary Examinations, ICC-Office of the prosecutor, 2013, p. 8.
[27] As set out in article 17(1) of the Statute.
[28] As stated also in the Preamble and article 1 of the Statute.
[29] Policy Paper Preliminary Examinations, ICC-Office of the prosecutor, 2013, p. 11.
[30] Idem, footnote no. 33, p. 11.
[31] Bogdan Aurescu, *Sistemul jurisdicţiilor internaţionale,* Ediţia 2, C.H.Beck, 2013, p. 170.

Finally, *the interests of justice* are only considered where the requirements of jurisdiction and admissibility are met; whilst the jurisdiction and admissibility are positive requirements, the lack of interests of justice is the one that, in the end, may not give a reason to proceed.[32]

However, there are no timelines provided in the Statute for ending a preliminary examination[33] and in the course of its preliminary examination activities, the Office shall seek to contribute to the two important goals of the Rome Statute: the prevention of crimes and the ending of impunity, by encouraging genuine national proceedings.

B. The Prosecutor's request for authorization of an investigation in the situation in Georgia

Pursuant to article 15(3) of the Rome Statute, the Prosecutor's request for authorization for an investigation in respect to the situation in Georgia referred, however, to events taking place from 1 July 2008, which precedes the dates of the alleged crimes; in its application, the Prosecutor indicated that it might be relevant to establishing the existence of crimes against humanity and war crimes that the events prior to August 2008 be considered. Since August 2008, the Prosecutor's Office conducted a preliminary examination into the situation in Georgia and gathered information on alleged crimes attributed to the three parties involved in the armed conflict: the Georgian armed forces, the South Ossetian forces and the Russian armed forces. As a result of its examination based on the information available, the Prosecution has identified the following *war crimes and crimes against humanity* which it reasonably believes fall within the jurisdiction of the ICC, thus triggering its request to the Pre-Trial Chamber I to authorize its investigation: killings, forcible displacements and persecution of ethnic Georgian civilians, destruction and pillaging of their property by South Ossetian forces (with possible participation by Russian forces); intentionally directing attacks against Georgian peacekeepers by South Ossetian forces and against Russian peacekeepers by Georgian forces.[34]

As far as complementarity is concerned, the Prosecutor indicated in the application that however well the national proceedings seemed to look at the beginning, the Georgian government confirmed in 2015 that domestic proceedings for the alleged displacement of ethnic Georgians from South Ossetia or for the allegations of intentional directing attacks against Georgian peacekeepers have been indefinitely suspended (although Russian domestic investigations on attacks against Russian peacekeepers are currently processing). The Prosecution also pointed that the Independent Fact-Finding mission on the Conflict in Georgia (IIFFMCG)[35] reported that about 850 persons died as a result of the armed conflict while more than 100,000 civilians fled their homes. It also showed that there is a reasonable basis to believe that members of the Joint Peacekeeping Force Headquarters (JPKF HQ), including the Georgian and Russian contingents, were at separate times the subject of intentional attacks constituting war crimes within the jurisdiction of the Court.[36]

Of course, setting aside all doubts about the fact that the Prosecutor would have competency in investigating the situation in Georgia since the principle of complementarity is respected, an important aspect has to be mentioned: as far as South Ossetia is concerned, the Prosecution Office has considered it as a part of the territory of Georgia and not as a State within the meaning of article 17 of the Rome Statute.[37] Accordingly, the Prosecution does not consider that the South Ossetian *de facto* authorities would have a standing before the ICC to lodge an admissibility challenge

[32] Policy Paper Preliminary Examinations, ICC-Office of the prosecutor, 2013, p. 16.
[33] Idem, p. 3.
[34] Request for authorization of an investigation pursuant to article 15, Office of the Prosecutor, ICC-01/15, 13 October 2015, p. 5.
[35] Established by the Council of the European Union.
[36] Request for authorization of an investigation pursuant to article 15, Office of the Prosecutor, ICC-01/15, 13 October 2015, p. 9.
[37] As pointed out in the application, idem, p. 150.

pursuant to article 19(2)(b) of the Rome Statute.[38] Furthermore, neither could the Russian Federation have a standing in the matter.

As far as the condition of gravity is concerned, the Prosecution attached to its application two annexes presenting an indicative list of crimes within the jurisdiction of the Court allegedly committed and a preliminary list of persons or groups that appear to be the most responsible for the most serious crimes.[39]

The Prosecutor also mentioned that victims of alleged crimes within the context of the situation have manifested their interests in seeing justice done in various ways, which gives motif to believe the third condition for admissibility is fulfilled as well.

The application formulated to request authorization to investigate the situation in Georgia, irrespective of the Pre-Trail Chamber's decision, gives enough reason to believe that a similar preliminary procedure would be opened by the ICC Prosecutor in respect to the situation in Ukraine. With regard to the situation in Georgia though, one aspect is undoubtedly clear: no charges against Georgian or Russian officials suspected of responsibility for starting the conflicts will be pressed by the ICC Prosecutor, since the court will not be able to exercise jurisdiction over the crime of aggression until at least 2017 – and, if activated, it will only apply to cases that occur after the activation. Similarly, the situation in Ukraine will most certainly not result in charges against State officials for the crime of aggression. Such as it is, the odds are not likely to play in favor of this happening, since the Review Conference of the Rome Statute in 2010 (Kampala) states that: the Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties[40] and, in respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.[41]

Last, but not least, one more aspect needs to be mentioned: while it is true that Russia is not an ICC State-party, the question of whether the ICC Prosecutor can or cannot investigate allegations against Russian nationals is one of the first ones to come to mind. The ICC has jurisdiction over crimes committed on the territory of a State party – Georgia's case – and over crimes committed on the territory of a State that has accepted the ICC's jurisdiction – Ukraine's case. This means that the Court's jurisdiction extends to crimes committed or directed to be committed by Russian nationals on the territories of the above mentioned States. And as far as the international law goes, both the South Ossetia region and the regions concerned in the Ukrainian conflict are still part of each of the respective State; therefore, crimes committed on those territories by Russian nationals or directed to be committed by Russian nationals fall under the Court's jurisdiction. This, however, does not guarantee much: while the Georgian – and, respectively, the Ukrainian – government will be obligated to fully cooperate with the court if the investigation is authorized, Russian authorities will not be bound by the same obligation.

In other words, there is not much of a chance that the Russian Federation will hand over on a plate several or even any of its nationals to face justice before ICC.

VIII. Conclusion

[38] The article's content states that challenges to the admissibility of a case on the grounds reffered to in article 17 or challenges to the jurisdiction of the Court may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.

[39] Request for authorization of an investigation pursuant to article 15, Office of the Prosecutor, ICC-01/15, 13 October 2015, p. 152.

[40] Article 15*bis* as proposed by the Draft Resolution at the Review Conference of the Rome Statute, 11 June 2010, Annex I: Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggresion.

[41] Ibidem.

The ICC Prosecutor requesting authorization for investigation in respect to the situation in Georgia and the potentially identical request with regard to the situation in Ukraine, however far from the present hour that shall be, can mean only one thing for the future of the ICC: the Court can finally put to flight all those critics and accusations of unfairly targeting only African leaders for prosecution. As it is, the situation in Georgia could be motif for the very first case of the ICC outside of Africa and a potential second case in respect to the situation in Georgia could mean an even stronger proof of the Court trying to keep up to the expectations everyone has put into her. The only aspect we cannot predict much on, though, is the outcome of the procedures when it comes down to the Russian Federation.

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EVENIMENTE
relevante din practica românească a aplicării dreptului international/RELEVANT EVENTS in the Romanian Practice of Implementing International Law

Communication of procedural documents for judicial and administrative proceedings in a foreign State against the Romanian State

*Alina OROSAN**

***Abstract*:** *This paper aims to analyze the communication of the procedural documents for judicial and administrative proceedings in a foreign State against the Romanian State. It will examine the relevant legal framework, the practice of the States, and the position of the Romanian authorities on this subject. Finally, it will provide some explanations as to the process by which the Romanian authorities reached their current position as well as to the way in which this position has been transmitted to third States hence becoming binding upon them in the sense that the Romanian authorities will deem incorrectly performed the summoning procedure against the Romanian State not complying with the notified procedure.*

***Key-words*:** *procedural documents, litigation, diplomatic missions, consular missions, cultural institutes, privileges, immunities.*

I. Introductory aspects. The current situation

As of late there was an increase in the number of litigations brought before foreign courts in which the Romanian State (through its embassies, consulates, cultural institutes) was summoned as defendant. This appeared to be a general trend of recognizing some limitations of the rule of immunity of a State before the courts of another State (for instance, the exception from the possibility to invoke immunity in cases involving employment litigation or possession or use of immovable assets) in the customary international law.

In most cases, Romanian diplomatic and consular missions (and, in some instances, even the cultural institutes) are *directly summoned by the court of the receiving State*. This summoning procedure thus disregards, on the one hand, the absence of legal capacity to be summoned of the diplomatic and consular missions (in reality the litigations are brought against the Romanian State) and, on the other hand, the inviolability of such missions.

II. The relevant legal framework and the practice of States

The *1961 Vienna Convention on Diplomatic Relations* (in paragraph 1 of Article 22)[1] and the *1963 Vienna Convention on Consular Relations* (in paragraph 1 of

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1. Paragraph 1 of Article 22: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of mission."

Article 31)[2] codify the customary international law principle of *inviolability of the diplomatic and consular premises*. The inviolability of the mission involves inter alia the receiving State's obligation to refrain from the exercise of its sovereign rights, especially those linked to the application of laws, with regard to the premises of the mission. Furthermore, paragraph 2 of Article 2 of the Convention on Diplomatic Relations requires that all official business with the receiving State be conducted by the diplomatic missions through the Ministry of Foreign Affairs of the receiving State.

The *United Nations Convention on Jurisdictional Immunities of States and Their Property* (New York, 2004) was ratified by Romania through Law no. 438/2006 and stipulates that, in the absence of a special arrangement, "serving of process by writ or other document instituting a proceeding against a State shall be effected (...) by transmission through *diplomatic channels* to the Ministry of Foreign Affairs of the State concerned; or by any other means accepted by the State concerned, if not precluded by the law of the State of the forum" (Article 22 paragraph (1) c). (...) (3) These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned."

Although this Convention is not in force, some of its provisions are deemed to codify the customary international law in the field.

Some aspects on the interpretation of the aforementioned article are debated at a multilateral level (The Ad Hoc Commitee of Legal Advisers on Public International Law (CAHDI) - within the Council of Europe, the EU Council Working Group on Public International Law (COJUR) - within the European Union), especially with regard to the meaning of the phrase "*through diplomatic channels*", as well as to the recognition of the character of customary law of such procedural provisions.

There are States that favor a restrictive approach by accepting only those procedural documents communicated by the diplomatic mission of the State of forum to the Ministry of Foreign Affairs of the defendant State. But at the same time there are States which accept procedural documents communicated to their diplomatic missions from the State of forum, but solely through the Ministry of Foreign Affairs of the latter State, and *not directly from the courts*, considering that otherwise the inviolability of the mission would be breached.

Some States either adopted national laws covering these matters or notified other States about their position on the acceptance of procedural documents addressed to the respective States by the courts of law of a foreign State through diplomatic channels.

III. Conclusions

Against this backdrop, it was absolutely necessary for the position of the Romanian authorities with regard to the management of the procedural documents for judicial and administrative proceedings in a foreign State brough forward against the Romanian State to be clearly defined and then communicated to Romania's missions abroad and notified to the respective Ministries of Foreign Affairs. This makes Romania's position binding for the authorities of the foreign States in circumstances where the procedure of summoning of the Romanian State would be deemed incorrectly performed.

Given the relevant international law provisions, the practice of other States and the interest of the Romanian State to strengthen its procedural position in litigations before foreign courts, Romania has resolved to accept only those procedural documents transmitted, to the extent possible, in Romanian or in an international language (at least the essential parts of the request), to the Ministry of Foreign Affairs through the Bucharest diplomatic or consular mission of the State of the forum. If the

[2] Article 31: "(1) Consular premises shall be inviolable to the extent provided in this article. (2) The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post (…)."

State of the forum has no diplomatic representation in Bucharest, the communication can be exceptionally performed by the Ministry of Foreign Affairs of the State of the forum to Romania's diplomatic/consular mission in the respective State.

The Acceptance by Romania of the Compulsory Jurisdiction of the International Court of Justice

Ion GÂLEA[*]

***Abstract**: The jurisdiction of the International Court of Justice is non-compulsory. States have the possibility to submit cases by compromise or compromissory clauses, on the basis of article 36 (1) of the Statute of the Court[1], by forum prorogatum, or by the means of the "optional clause", as provided by article 36 (2) of the Statute. Following the public debate that ended in June 2013, Romania drew a proposal for a bill containing a draft declaration accepting the compulsory jurisdiction of the ICJ. Romania deposited the declaration on 23 June 2015, becoming the 72nd State to take such step.*

***Key-words**: compulsory jurisdiction, declaration, reservations, optional clause*

I. Introduction

It is well known that the jurisdiction of the International Court of Justice is non-compulsory. States have the possibility to submit cases by compromis or compromisory clauses, on the basis of article 36 (1) of the Statute of the Court,[2] by *forum prorogatum*, or by the means of the "optional clause", as provided by article 36 (2) of the Statute. It would be important to point out that the "optional clause" is the only means by which the jurisdiction of the Court is not a limited *ratione materiae.*[3] Conceptually, the declaration accepting the compulsory jurisdiction, or the "optional clause" represents the basis for a potential "universal" mandatory jurisdiction of the Court.[4]

A decision to submit a declaration for accepting the compulsory jurisdiction of the International Court of Justice is always a legal and a political decision. The initiators of the project, the drafters of the declaration, have to bear in mind simultaneously the global interest of supporting the international rule of law, the State's position of upholding this goal, as well as the State's sensible points in possible disputes with other States. The draft is not just a "product" of the legal department of the Ministry of Foreign Affairs, but is in turn a "compromise" between the various views of different institutions.

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[1] In these cases, the jurisdiction of the Court is limited *ratione materiae*. See, for example, C. Tomuchat, *Article 36*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (ed.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, p. 589.

[2] In these cases, the jurisdiction of the Court is limited *ratione materiae*. See, for example, C. Tomuchat, *Article 36*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (ed.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, p. 589.

[3] G. Merrills, *Optional Clause Revisited,* British Yearbook of International Law, (1993) 64 (1), p. 197-244, 198; M. Fitzmaurice, *The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice,* Australian Journal of International Law, no. 20 (1999), p. 127; H. Waldock, *Decline of the Optional Clause,* British Yearbook of International Law, 32 (1955-1956), p. 244.

[4] Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice. A Mith? A Statistical Analysis of Contentious Cases,* International and Comparative Law Quarterly, vol. 49, Issue, 2, April 2000, p 251-277, 252.

This issue of the Romanian Journal of International Law could not ignore a moment which may be labelled as "crucial" in the history of Romania's relation with the International Court of Justice: 60 years after becoming an UN Member and party to the Statute of the International Court of Justice, Romania accepted the compulsory jurisdiction of the International Court of Justice. The declaration was deposited to the Secretary General on 23 June 2015 and it was the result of a lengthy process of debate.

The purpose of this study is to present the most essential elements of Romania's declaration accepting the compulsory jurisdiction of the International Court of Justice, being "dedicated" to the first on-line issue of the Romanian Journal of International Law. The presentation would comprise a short overview of the process leading to the adoption of the declaration, a presentation of the legal aspects that may arise when such a declaration is made and, naturally, the details of the Romanian reservation would be presented.

II. The process

The process of debate concerning the acceptance of the compulsory jurisdiction of the International Court of Justice was launched on 24 September 2012, when Romania announced, within the "High Level Meeting on the Rule of Law at the National and International Levels", held in the margin of the United Nations General Assembly, that a national debate would be started on the possible acceptance of the compulsory jurisdiction of the ICJ.[5] The debate was started on 4 February 2013 (exactly on the day when the fourth anniversary of the judgment in the *Maritime Delimitation in the Black Sea* was held), and continued throughout 2013 with a series of conferences. In March 2013, a conference was held in the "Babes-Bolyai" University in Cluj-Napoca, and in April 2013 a conference was hosted by the "Transilvania" University of Brasov. The series of public debates was closed on 14 June 2013, in a conference in Bucharest, attended as special guest by the President of the International Court of Justice, Judge Peter Tomka.[6]

Following the favourable opinions expressed by the academia, a draft law on the acceptance by Romania of the compulsory jurisdiction of the International Court of Justice that was presented for public debate on the website of the Ministry of Foreign Affairs on 27 November 2013,[7] which incorporated a draft declaration. This draft declaration was presented during the conference *"Romania and the International Court of Justice. 5 Years since the Maritime Delimitation in the Black Sea"*, held in Bucharest, on 3 February 2014: the discussions within that conference were very valuable for shaping the final form of the Declaration.

The adoption of the Declaration by a law of the Parliament was chosen as domestic procedure. Even if the Constitution of Romania does not provide for the need to "ratify" or submit to any form of "approval" of the Parliament an *unilateral act* done by Romania on the basis of a treaty provision (article 36 (2)) of the Statute of the Court, the adoption of a law was chosen for several reasons: first, the widest legitimacy would have been ensured, because all the institutions within the State would participate in its adoption (Government, Parliament, President) and the decision would be based on the widest political consensus, second, the adoption of a Law would have been beyond any criticism concerning the constitutionality and, third, it would have been in line with the 1930 "tradition", when the declaration for accepting the jurisdiction of the Permanent Court of International Justice was adopted.

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[5] T. Corlatean, *Introduction* in B. Aurescu *(ed.), Romania and the International Court of Justice*, Hamangiu, 2014, p. 9.

[6] *Ibid.*

[7] Raport privind aplicarea în anul 2013 a prevederilor Legii nr.52/ 2003 privind transparenta decizionala în administratia publica (Report on the application in 2013 of the Law no. 52/2003 concerning transparency in decision-making process within the public administration), available on http://www.mae.ro/sites/default/files/file/transparenta/raport_transparenta_decizionala_2013.pdf (accessed 31 March 2014).

The law no. 137/2015 for the acceptance of the compulsory jurisdiction of the International Court of Justice was published in the Official Journal of Romania no. 408 of 10 June 2015. The votes expressed within the Parliament demonstrated the largest political support for this step. Romania became, thus, the 72nd State to accept the compulsory jurisdiction of the Court (and the 23rd to do so, within the European Union).

III. Short overview of the 1930 Declaration for accepting the compulsory jurisdiction of the Permanent Court of International Justice

Romania's relation with the World Court was long and difficult to assess. This relation had always followed historical developments and foreign policy trends. From the case-law point of view, the relation started in 1927 with the Advisory Opinion of the Permanent Court of International Justice on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila.*[8] Even though he Court did not uphold Romanian's position on the question addressed by the Council of the League of Nations, the advisory opinion had the advantage of putting an end to a dispute that had lasted for more than 40 years.

The fact that the Advisory Opinion brought the dispute to an end seemed to have had an important impact on Romania's view about its relation with World Court. Thus, it is no surprise that less than three years after this Opinion was issued, on 8 October 1930, Romania submitted a declaration of acceptance the jurisdiction of the Permanent Court of International Justice. The jurisdiction of the PCIJ was accepted for a period of 5 years and renewed, in 1935, for a further period of 5 years. Romania has circumscribed the jurisdiction of the Court, excluding certain matters: (i) any question of substance or of procedure which might directly or indirectly cause the existing territorial integrity of Romania and her sovereign rights, including her rights over her ports and communications, to be brought into question, and (ii) disputes relating to questions which, according to international law, fall under the domestic jurisdiction of Romania. The first reservation had in mind sensible issues for Romania, such as its territorial integrity and sovereignty. However, Romania's interests towards the disputes within the "pattern" of the Danube Commission Advisory Opinion can be seen in the reference to "rights over ports and communications".[9]

IV. The significance of submitting a declaration for accepting the compulsory jurisdiction

An important question relates to the significance of submitting a declaration for the foreign policy of a State. First, it sends a signal that the State believes it is desirable to have any disputes of a legal nature with other Sates settled by the International Court of Justice, by the application of international law. It is, consequently, a proclamation of its belief in international law and in particular in the role of the ICJ as promoter and guarantor of the supremacy of law in international relations.

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

Thirdly, from a pragmatic perspective, the acceptance of the Court's jurisdiction would facilitate the settlement of disputes which cannot be solved through negotiations. Of course, the challenges must not be neglected. From the same

[8] *Advisory Opinion of 8 December 1927*, Ser. B, no. 14, p. 6.

[9] It can be noted that a similar reservation related to "ports and communications" was submitted by Greece; On "reserved domain" reservation see, Stanimir Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiciton of the ICJ*, Martinus Nijhoff, 1995, p. 70.

pragmatic perspective, the risk is represented by the possibility that the State would undertake procedures against Romania, in a dispute of a legal nature, on the basis of the declarations made pursuant to article 36 (2). In certain cases, such procedures may be regarded as contrary to foreign policy interests. From a legal point of view, practice in submitting the declarations of acceptance of compulsory jurisdiction shows that States anticipate possible sensitive fields and submit their declarations to "limitations" or "reservations".[10] Thus, inserting such limitations to the Court jurisdiction might be a possible legal tool to "defend" certain sensible policy areas.

The importance of reservations or limitations cannot be neglected. Certain elements from the case-law might seem very useful, in order to examine the type of situations the States had in mind when submitting reservations or limitations. Thus, for example in the *Anglo-Iranian Oil Company Case*[11] the Court recalled that "by these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it", and jurisdiction must be based on the most restrictive declaration.[12] The Court dealt with the interpretation of the Iranian declaration of 1930, which referred to "any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration". Iran argued that jurisdiction was limited to the application of treaties or conventions it accepted after the ratification of the Declaration, while the UK argued that only the facts should have been posterior to the Declaration. The Court retained that, although both positions are compatible with the text of the Declaration itself, and even if, strictly speaking, the British position would be closer to the purely grammatical interpretation of the text, the Court must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.[13] The Court upheld the Iranian position, retaining that the clause must not be regarded as a treaty, but as the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text. This dispute thus appears very important for providing an insight on the rules of interpretation that the Court would follow when examining a unilateral declaration.

Also, the *Norwegian Loans Case (France v. Norway) of 1957*[14] confirmed the reciprocal application of limitations: Norway successfully invoked the French reservation excluding from the Court's jurisdiction "differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic"[15] (the so-called *reserved domain* limitation).[16] On the basis of this limitation, the Court decided not exert its jurisdiction. By contrast, it can be noted that present day *reserved domain* limitations, made by States like Poland or Hungary, refer to national jurisdiction "according to international law".

Two almost similar situations were dealt with in the cases concerning the *Right of passage over Indian territory*[17] and the *Land and Maritime Boundary between Cameroon and Nigeria*.[18] India objected to the fact that Portugal's application was introduced before its declaration accepting the compulsory jurisdiction had been notified to all States, including India. Similarly, Nigeria, which accepted the compulsory jurisdiction in 1965, objected to the fact that it could not know and did not know about Cameroon's acceptance of compulsory jurisdiction on 3 March 1994, since the declaration was notified by the Secretary General within 11 months, while the

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[10] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005,* Martinus Nijhoff Publishers, 4th Ed, 2006, vol II, p. 737; Stanimir Alexandrov, *op. cit.,* Martinus Nijhoff, 1995, p. 67.
[11] *Anglo-Iranian Oil* Co. *case (jurisdiction),* Judgment of 22 July 1952: I .C. J . Reports 1952, p. 93.
[12] *Ibid.*, p. 103.
[13] *Ibid.*, p. 104.
[14] *Case of Certain Norwegian Loans, Judgment of July 6th, 1957* : *I.C. J. Reports 1957,* p. 9.
[15] *Ibid.*, p. 21.
[16] Shabtai Rosenne, *op. cit,* vol. II, p. 748, refers to « subjective reservation of domestic jurisdiction ».
[17] *Case concerning right of Passage over Indian territory, (Preliminary Objections), Judgment of November 26th, 1957: I.C. J. Reports I957,* p. 125.
[18] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998,* p. 275.

application of Cameroon was introduced on 19 March 1994. The Court ruled in both cases that in the first day that a state deposes the declaration, a consensual link is created, which does not entail other further requirements. In order to avoid such situations, practice showed that States submit the so-called "12 month time limitations" (such as the one made in 1974 by India, which excludes from the jurisdiction of the Court "*disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court*").

Last but not least, it would be useful to point out that the interpretation of a limitation in order to determine its application to the subject-matter of a particular dispute is made by the Court, not by the Applicant State.

V. The Romanian declaration

The aforementioned cases revealed how important the jurisdiction's reservations or limitations can be in certain cases. Hence, following the public debate that ended in June 2013, the Department for Legal Affairs drew a proposal for a bill containing a draft declaration accepting the compulsory jurisdiction. It was posted on the website of the Ministry of Foreign Affairs for public consultation and it was sent to the relevant Romanian institutions to hear their opinion. The text of the declaration was slightly amended after the debate held during the Conference *"Romania and the International Court of Justice. 5 Years since the Maritime Delimitation in the Black Sea"*, held on 3 February 2015, to incorporate valuable comments made during those debates.

Firstly, it was meant to operate in an overt non-retroactive manner, referring to "all legal disputes related to facts or situations arising after this declaration is made". Indeed, the Court had dealt with such issues in cases like, for example, *Legality of Use of Force (Serbia and Montenegro v. Netherlands,*[19] *Belgium,*[20] *United Kingdom*[21]*)* and *Interhandel.*[22]

Secondly, even if the "initial draft" of the declaration, submitted in 2013 to the public debate, had in mind that the acceptance of the compulsory jurisdiction would be valid for a period of 5 years (in a similar manner to the 1930 declaration), this approach was changed following the debate held during the Conference of 3 February 2015. Initially, the declaration provided for a 5 year term and for Romania's shall right to extend, withdraw or modify the Declaration at any time and by means of a notification addressed to the Secretary-General of the United Nations. However, even if redundant, a mention shall be inserted in that sense.[23] Moreover, a *domestic* mechanism for the Government to accomplish the extension of the validity was initially envisaged. The final version of the Declaration, submitted to the Secretary General of the UN, is made for *undetermined period*. At the same time, following suggestions made during the Conference held on 3 February 2015, the following formula was added: " […] shall remain in force until such time as notice may be given to the Secretary- General of the United Nations withdrawing or modifying this declaration, *and with effect from the moment of such notification*" (emphasis added).

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[19] *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1011.

[20] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 279.

[21] *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1307.

[22] *Interhandel Case, Judgment of 21 March 1959*: *I.C. J . Reports I959, p. 6.*

[23] Shabtai Rosenne, *op. cit.*, vol. II, p. 783 ; It can be noted that certain States reserved the right of "immediate termination" – se for example the UK, as mentioned in Michael Wood, *loc. cit.*, p. 635.

Thirdly, the text provides expressly for the "condition of reciprocity", even if this formula has the sole purpose of reinforcing the legal effects of the words of the Statute "in relation to any other State accepting the same obligation".[24]

Fourthly, an option for a set of limitations (or "reservations") has been made. In 2014, following the debate held on 3 February, the "structuring" of the limitations was made, in order to reflect: first, procedural limitations, and second, substantial ones.

The first procedural limitation concerns "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement for its final and binding decision". This limitation would appear normal, taking into account the provisions, for example, of article 344 of the Treaty on the Functioning of the European Union or article 55 of the European Convention on Human Rights. It is also very often encountered in the practice of States.[25] It can be noted that the words "for its final and binding decision" have been added following the debate on 3 February 2014: only dispute settlement methods which lead to final and binding decisions – as other Courts or Tribunals – could have the effect of excluding the jurisdiction of the ICJ.

The other "procedural limitation", "any dispute with any State which has accepted the compulsory jurisdiction of the International Court of Justice under Article 36(2) of the Statute less than twelve months prior to filing an application bringing the dispute before the Court or where such acceptance has been made only for the purpose of a particular dispute", shall be excluded from the jurisdiction. This limitation has the purpose of preventing "surprise applications" – situations such as those occurring in the *Right of passage over Indian territory*[26] and *Land and Maritime Boundary between Cameroon and Nigeria.*[27] Similar limitations have been provided, for example, by Bulgaria, Hungary or UK.[28]

The substantial limitations concern: environment and "use of force" issues. Thus, disputes regarding the protection of the environment shall be excluded. Similar reservations are made by countries like Slovakia or Poland. Also, following consultations with relevant authorities, reservations shall be made with respect to "any dispute relating to, or connected with, hostilities, war, armed conflict, individual or collective self-defence or the discharge of any functions pursuant to any decision or recommendation of the United Nations, the deployment of armed forces abroad, as well as decisions relating thereto" and "any dispute relating to, or connected with, the use for military purposes of the territory of Romania, including the airspace and territorial sea, or maritime zones subject to its sovereign rights and jurisdiction".[29] It may be argued that such reservations may look complex and, in certain places, even redundant. Some elements have indeed been "inspired" from the practice of States. It has to be underlined that its main purpose is to cover in a manner as exhaustive as possible disputes involving issues of a "military" nature. But the drafting is the result of a "compromise" between views of different institutions.

Finally, the "reserved domain" limitation was included, in order to address concerns of certain Romanian institutions. Even if it can be questioned whether

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[24] John Collier, Vaughan Lowe, *The Settlement of Disputes in International Law*, Oxford University Press, 2000, p. 150.

[25] Michael Wood, *United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court*, in Festkrift til Carl August Fleischer, Universitetsforlaget, Oslo, 2006, p. 637.

[26] *Case concerning right of Passage over Indian territory, (Preliminary Objections), Judgment of November 26th, 1957: I.C. J. Reports I957*, p. 125.

[27] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998*, p. 275.

[28] The UK invoked the clause in the *Legality of Use of Force Case, Serbia v. UK*, ICJ Reports, 1999, p. 835, para. 23-25, see Michael Wood, *United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court*, in Festkrift til Carl August Fleischer, Universitetsforlaget, Oslo, 2006, p. 640.

[29] Reservations related to military and security matters have been made by other countries such as: Djibouti Germany, Greece, Hungary, Honduras, Malawi, Lithuania, India; Before 1963, the United Kingdom had a "subjective national security reservation", H. Briggs, *Reservations to acceptance of the compulsory jurisdiction of the International Court of Justice*, Recueil des Cours de l'Academie de Droit International, vol. 93 (1958-I), p. 303.

contemporary international law still allows for what it had been traditionally understood by "reserved domain",[30] the usefulness of inserting such a reservation should not be totally excluded. It can be noted that the definition of the "reserved domain" is understood by Romania as to be found in international law (the limitation provides "any dispute relating to matters which *by international law* fall exclusively within the domestic jurisdiction of Romania" – emphasis added), in contrast, for example, with the French reservation in the *Norwegian Loans* case.[31]

IX. Conclusion

The Romanian declaration may be regarded as a balanced one. Although from the "textual" point of view, the reader may think that it contains a high number of limitations (reservations), it has to be underlined that from the substantive point of view, there are only two areas where Romania reserves the right not to submit disputes to the International Court of Justice: disputes concerning the *protection of the environment* and *disputes concerning issues of a military nature.* The other two reservations are merely procedural limitations related to: first, avoidance of "surprise" applications and second, excluding from the competence of the Court issues for which the parties have agreed on other methods of binding dispute settlement. This latter reservation might seem useful in the context of other commitments towards the European Court of Human Rights and the European Court of Justice.[32] The "reserved domain" limitation might be seen as a supplementary "safety belt" (including for domestic purposes) as the scope of the "exclusive jurisdiction of Romania" is to be determined by international law.

It would be important to underline the essential importance that the *Maritime Delimitation in the Black Sea Case* had for shaping a general public opinion in the sense that international law, international justice and rule of law represent the just option for Romania. Without the awareness that this case had arisen, questions might have been raised whether this demarche would have been possible. But, as history has shown, not all procedures before the World Court had been favorable for Romania. However, a commitment towards the rule of law entails the acceptance of such scenarios, and shall decisively contribute to raising awareness among institutions and decision-makers in Romania towards this commitment.

It must also be underlined that the declaration submitted on 23 June 2015 may be seen as marking a final point of a "paradigm" shift in Romania's position towards international jurisdiction. In 1969, Romania has not even sign the Vienna Convention on the Law of Treaties merely because its dispute settlement mechanism: the Romanian delegation rejected even a "mild" form of dispute settlement, the conciliation, which was "a compromise" between the Soviet Union and the Western Block. Today, Romania is one of the States that shows the highest degree of support for international justice: and the acceptance of the compulsory jurisdiction of the ICJ is the most natural step in this direction.

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[30] Ian Brownlie, *Principles of Public International Law*, 7th Ed., Oxford University Press, 2008, p. 293, mentioning: "the extent of this domain depends on international law and varies according to its development; *Nationality Decrees in Tunis and Morocco*, PCIJ, Sec B., no. 4 (1923), p. 24.

[31] *Case of Certain Norwegian Loans, Judgment of July 6, 1957* : *I.C. J. Reports 1957, p. 9, 21.*

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A delicate institutional balance in the negotiation of international agreements on behalf of the European Union

*Raluca-Elena CĂLIN**

***Abstract**: Case C-425/13, European Commission[2] v Council of the European Union,[3] concerns an action for annulment under Article 263 TFEU, brought on 24 July 2013 by the European Commission. The judgment of the Court of Justice of the European Union on the Case C-425/13 provides a useful analysis on the Council's powers in the negotiation of international agreements by the European Union through the negotiating directives and the special committee set out in accordance with Article 218 (4) TFEU. The Court's reasoning in Case C-425/13 clarifies, to a certain extent, the scope of the Council's authority to lay down negotiating directives, in particular as regards the inclusion of procedural provisions, and the consultative role of the special committee assisting the Commission during the negotiation process. What makes the Court's judgment even more interesting is that this is the first time that the Court has been called upon to rule on these aspects.*

***Key-words**: negotiating directives, special committee, institutional balance, EU external relations law*

I. Introduction

The judgment of the Court of Justice of the European Union[4] on the Case C-425/13, *Commission v Council*, provides a useful analysis on the Council's powers in the negotiation of international agreements through the negotiating directives and the special committee, set out in accordance with Article 218 (4) TFEU.[5] The special committee is designated by the Council and, according to Article 218 (4) TFEU, "when the Council has designated a special committee, the negotiations must be conducted in consultation with that committee".[6] On a more general note, the Court's judgment is also important with respect to the clarifications it provides regarding the demarcation of the powers conferred by the TFEU on the Council and the special committee and on the European Commission.

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[2] Hereinafter referred to as "the Commission".

[3] Hereinafter referred to as "the Council".

[4] Hereinafter referred to as "the Court", ECJ or CJEU.

[5] Treaty on the Functioning of the European Union.

[6] Paragraph 65, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.

According to the Opinion of Advocate General Wathelet delivered on 17 March 2015 in Case C-425/13: "This case raises an important constitutional question, one that concerns *the division of powers, responsibilities and competences between the Commission and the Council of the European Union in the negotiation of international agreements to which the European Union is a party*. Scrupulous respect for the precise roles which the Treaties confer on those institutions, and on the European Parliament, in the process leading to the conclusion by the European Union of international agreements is essential to preserving the institutional balance in the exercise of the European Union's international powers.

This is the first time that the Court has been called upon to rule on the scope of the Council's authority to lay down negotiating directives, in particular as regards the inclusion of procedural provisions, and on the role of the special committees designated by the Council in accordance with Article 218(4) TFEU, and it must do so in the context of the almost constant legal wrangle between the Council (and the Member States) and the Commission which has, since the outset, been a feature of the European Union's emergence as a global player.[7]"

II. Background

Case C-425/13 concerns an action for annulment under Article 263 TFEU, brought on 24 July 2013 by the European Commission. By its application, the Commission sought the annulment of the second sentence of Article 2[8] of the *Council Decision of 13 May 2013 authorising the opening of negotiations on linking the EU emissions trading scheme with an emissions trading system in Australia* and of Section A of the Annex to that decision[9] (concerning the negotiating directives – the procedure for negotiations).

The Commission's first plea, "relating to the detailed procedure set out in Section A of the negotiating directives, alleges breach of Article 13(2) TEU[10], Article 218(2) to (4) TFEU, Article 295 TFEU and the principle of institutional balance. The second plea, relating to the contested decision in so far as it provides that 'detailed negotiating positions of the Union shall be established' by the special committee or the Council, alleges breach of Article 13(2) TEU, Article 218 TFEU and the principle of institutional balance".[11]

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[7] Paragraphs 2-3, Opinion of Advocate General Wathelet delivered on 17 March 2015 in Case C-425/13, *European Commission v Council of the European Union*.

[8] It provides that "the Commission shall report in writing to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly".

[9] According to section A of the Annex to the Council Decision authorising the opening of negotiations:

"A. Procedure for negotiations

1. The Commission shall conduct negotiations in accordance with relevant Union legislation in force. Where appropriate, detailed negotiating positions of the Union shall be established within the special committee referred to in Article 1(2) or within the Council. The Working Party on the Environment is designated as special committee to assist the Commission in this task. The meetings of the special committee shall be organised and chaired by the Member State holding the Presidency of the Council.

2. The negotiations must be prepared for well in advance. To this end, the Commission shall inform the Council of the schedule anticipated and the issues to be negotiated and shall forward the relevant documents as early as possible, in order to allow the members of the special committee reasonable time to prepare themselves properly for the forthcoming negotiations.

3. Each negotiating session shall be preceded by a meeting within the special committee in order to identify the key issues and establish negotiating positions or guidance, as appropriate. Where appropriate, guidance on specific technical aspects of the linking negotiations can be sought from the Climate Change Committee, subject to prior authorisation from the special committee.

4. The Commission shall report to the Council on the outcome of the negotiations after each negotiating session, and, in any event, at least quarterly. The Commission shall inform the Council and consult the special committee on any major problem that may arise during the negotiations."

[10] Treaty on European Union.

[11] Paragraph 32, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.

According to the Commission, the Council's prerogative to adopt negotiating directives does not include the power to set the conditions in which negotiation shall take place. Consequently, the negotiating directives should be limited to the substantive policy options and objectives to be attained during the negotiations with third countries or international organisations. According to the European Parliament (intervener in support of the Commission), "neither it nor the Council is entitled actively to play an independent and leading role in the negotiations, encroaching on the prerogatives of the negotiator".[12] On the contrary, the Council states that its power according to Article 218 (4) TFEU includes the possibility to establish the conditions in which negotiation must be conducted. Moreover, "any other interpretation of Article 218(4) TFEU would deprive it of its effectiveness."[13] The Czech Republic, the Federal Republic of Germany, the French Republic, the Republic of Poland, the Kingdom of Sweden and the United Kingdom (interveners in support of the Council) agree with the Council, stating that the wording of Article 218 (2) and (4) TFEU does not preclude the negotiating directives from establishing procedural rules, "in particular so far as concerns the manner in which the special committee is consulted".[14]

III. The Judgment of the Court

As regards the Commission's first claim, namely that its obligation to "(…) report in writing to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly', is contrary to Article 218(2) and (4) TFEU, Article 13(2) TEU and the principle of institutional balance, as well as to Article 295 TFEU",[15] the Court states that this plea should first be assessed in light of Article 218 (4) TFEU.

The Court continues its reasoning by recalling its previous case law[16] related to the interpretation of Article 218 TFEU. Thus, "*Article 218 TFEU* constitutes, as regards the conclusion of international treaties, *an autonomous and general provision of constitutional scope*, in that it confers specific powers on the EU institutions. With a view to establishing a balance between those institutions, it provides, in particular, that agreements between the European Union and one or more third States are to be negotiated by the Commission, in compliance with the negotiating directives drawn up by the Council, and then concluded by the Council, either after obtaining the consent of the European Parliament or after consulting it. The power to conclude such agreements is, however, conferred on the Council subject to the powers vested in the Commission in this field".[17]

In relation to the first plea, the Court finds that the obligation for the Commission to report in writing to the Council on the outcome of the negotiations complies with the obligations laid down in Article 218 (2) and (4) TFEU, Article 13 (2) TEU and Article 295 TFEU. Thus, the Court finds that in order for the special committee to be in a position to monitor the progress of the negotiations and to formulate advice concerning the negotiations, the Commission must provide all the necessary information to it. That information can be provided to the Council as well, because it should have a clear knowledge of the course of the negotiations of a draft agreement that will be submitted to it for approval.

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[12] Paragraph 44, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.
[13] Paragraph 45, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.
[14] Paragraph 46, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.
[15] Paragraph 60, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.
[16] CJEU judgment in Case C-327/91, *France v Commission*, paragraph 28.
[17] Paragraph 62, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.

According to the Commission's second claim, the negotiating directives (Section A of the Annex to the contested decision) do not observe the allocation of powers laid down in Article 218 (4) TFEU and infringes Article 13 (2) TEU and the institutional balance.

In relation to the second claim, the Court finds that "Article 218(4) TFEU must be interpreted as empowering the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission, as such rules meet the objective of ensuring proper cooperation at the internal level".[18] The Court then tries to determine whether other provisions, although procedural in nature, may affect the powers granted to the negotiator in Article 17 (1) TEU.

The Court finds that *the following obligations for the negotiator included in the negotiating directives, do not infringe Article 218 (4) TFEU, Article 13(2) TEU, the principle of institutional balance or Article 295 TFEU*: the Commission shall conduct negotiations in accordance with relevant Union legislation; it shall inform the Council of the schedule anticipated and the issues to be negotiated and shall forward the relevant documents as early as possible, in order to allow the members of the special committee reasonable time to prepare themselves properly for the forthcoming negotiations; it shall inform the Council and consult the special committee on any major problem that may arise during the negotiations and the guidance on specific technical aspects of the negotiations that can be sought from the Climate Change Committee, "subject to prior authorisation from the special committee".[19]

As regards *the provisions of the negotiating directives seeking to bind the negotiator* ("[w]here appropriate, *detailed negotiating positions of the Union shall be established within the special committee* referred to in Article 1(2) or within the Council", and the specific element of the first sentence of paragraph 3 which permits the special committee, before each negotiating session, to "*establish negotiating positions*"), the Court ruled that "it is contrary to Article 218(4) TFEU for the positions established by the special committee or, as the case may be, the Council itself to be binding in this way".[20] Thus, the task of the special committee to establish detailed negotiating positions of the EU goes beyond the consultative function assigned to it by Article 218(4) TFEU. Furthermore, this provision does not invest the Council with the power to impose "detailed negotiating positions" to the negotiator.

As a consequence, the Court concludes that the provisions of the negotiating directives seeking to bind the negotiator shall be annulled because, by including those elements, the Council infringed the obligation laid down by Article 13 (2) TEU to act within the limits of the powers conferred on it by Article 218 (2) to (4) TFEU, as well as the principle of institutional balance.

IV. Conclusions and brief analysis

The Court's reasoning in Case C-425/13 clarifies, to a certain extent, the scope of the Council's authority to lay down negotiating directives, in particular as regards the inclusion of procedural provisions, and the consultative role of the special committee assisting the Commission during the negotiation process. What makes the Court's judgment even more interesting is that this is the first time that the Court has been called upon to rule on these aspects, as we have seen above in the Opinion of Advocate General Wathelet. The Court's reasoning concerns primarily the

[18] Paragraph 78, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.
[19] Section A of the Annex to the Council Decision authorising the opening of negotiations, par. 3.
[20] Paragraph 88, CJEU judgment in Case C-425/13, *European Commission v Council of the European Union*.

interpretation and analysis of Article 218 (2)[21] and (4)[22] TFEU and the principle of institutional balance (Article 13 (2) TEU). [23]

Article 218 TFEU "sets out the internal procedure for negotiating and concluding 'agreements between the Union and third countries or international organizations'."[24] The negotiating process "is very much in the hands of the Council, although in practice it is above all the Commission that is the central actor in both the preparation and the negotiations themselves."[25] The negotiator conducts the negotiations and acts within the framework of the negotiating directives addressed to it by the Council. In the context of international negotiations, the term 'directives' does not have the same meaning as in Article 288 TFEU (a legislative instrument); the Council's directives are not addressed to the Member States, but to the negotiator.[26] In practice, the negotiating directives are of a rather general character. Nonetheless, "That does not mean that the negotiator has a free hand. Through the 'special committees', consisting of national government representatives, the Council machinery keeps a close eye on how the negotiations are evolving. The negotiator is therefore often a double negotiator: both with the other party to the negotiations and with Member States' representatives or the Council itself."[27] The power to sign and conclude the agreement is vested in the Council[28]. Therefore, "since the Council has to approve the agreement ensuing from the negotiations, it is reasonable that the Council should be able to put across its views (…) at the outset and during the course of the negotiations."[29]

Regarding *the principle of institutional balance*, we should emphasize that, while "all principles of EU constitutional law remain pertinent for EU external relations, three in particular are the cement of the structure underpinning EU external relations: the principle of conferral, the obligation of loyalty and the principle of institutional balance."[30] The principle of institutional balance entails that each of the seven institutions listed in Article 13 (2) TEU[31] "has been given a 'specific function' and set of competences in the decision-making process of the Union (Articles 13-19 TEU). The principle of institutional balance simply means that this division of powers established by the Treaties is to be respected".[32]

It is interesting to point out that the Court did not follow the Opinion of Advocate General Wathelet, who proposed to the Court to annul Section A of the Annex to the Decision of the Council (the negotiating directives setting out the 'Procedure for negotiations') or, in the alternative, to annul the Decision of the Council authorising the opening of negotiations. As we have seen previously, the Court only annulled in Section A - 'Procedure for negotiations', the second sentence of paragraph 1 of that section, according to which, '[w]here appropriate, detailed negotiating positions of the Union shall be established within the special committee

[21] "The Council shall authorise the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them."
[22] The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted."
[23] "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation."
[24] *European Union Law*, Third Edition, Koen Lenaerts, Piet Van Nuffel, Sweet & Maxwell, 2011, p. 1025.
[25] *EU External Relations Law. Text, cases and materials*, Bart Van Vooren, Ramses A. Wessel, Cambridge University Press, 2014, p. 45.
[26] *EU External Relations Law*, Second Edition, Piet Eeckhout, Oxford EU Law Library, 2011, p. 197.
[27] *Idem* 26.
[28] According to Article 218 (5) and (6) TFEU.
[29] *European Union Law*, Third Edition, Koen Lenaerts, Piet Van Nuffel, Sweet & Maxwell, 2011, p. 1028.
[30] *EU External Relations Law. Text, cases and materials*, Bart Van Vooren, Ramses A. Wessel, Cambridge University Press, 2014, p. 9.
[31] The European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.
[32] *EU External Relations Law. Text, cases and materials*, Bart Van Vooren, Ramses A. Wessel, Cambridge University Press, 2014, p. 9-10.

referred to in Article 1(2) or within the Council', and the words 'and establish negotiating positions' in paragraph 3 of that section.

As a consequence, we may draw the conclusion that the negotiating directives can contain provisions of procedural nature, as long as these procedures do not imply the power for the special committee or for the Council to establish detailed negotiating positions of the Union.

We should also mention that the Advocate General was of the opinion "that negotiating directives are meant to relate to the strategic choices and substantive objectives to be defended during negotiations, in other words, the content of the text being negotiated"[33]. We appreciate that it was improbable for the Court to follow this reasoning because we find it difficult to limit the scope of the negotiating directives, since the provisions of the EU Treaties do not contain indications for the conclusion that the negotiating directives cannot provide procedural rules.

In conclusion, having in mind the increasing number of cases brought before the CJEU concerning the allocation of powers between the EU institutions or between the EU and its Member States, "it appears that the EU institutions are still learning how to live with each other after the Lisbon Reform."[34]

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[33] Paragraph 89, Opinion of Advocate General Wathelet delivered on 17 March 2015 in Case C-425/13, *European Commission v Council of the European Union*.

[34] EU Law Analysis Blog: http://eulawanalysis.blogspot.ro/2015/07/institutional-balance-and-negotiation.html.

The role played by the *Kadi* judgements to articulating the UN legal system with the EU legal system

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Abstract: *Relationships between Security Council resolutions and other international treaties have undergone different conceptualizations in EU and ECHR case law[1]: some of them relate to the monist concept according to which SC resolutions are at the top of a hierarchy of norms, as provided by Article 103 of the UN Charter, so that their provisions prevail over any other treaty, irrespective of their human rights content. Arguing differently would allow a regional court – for example the European Court of Human Rights – «to interfere with the fulfillment of the UN's key mission to secure international peace and security». Other concepts claim that the measures implementing SC resolutions are not immune from judicial review when the resolution at hand is suspected to come in conflict with jus cogens norms that also constrain UN institutions. Thus the Kadi judgement played an extremely important role in the articulation of the UN legal system to the EU legal system.*

Key-words: *UN system, EU legal system, resolutions, Security Council.*

I. Introduction

The judgment issued by the Great Chamber of the Court of Justice of the European Communities on September 3, 2008 in joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, is part of the Community jurisprudence related to the interaction between the international legal order and the European Union legal order.

The joined cases represent two appeals brought forward by Y.A. Kadi and the Al Barakaat International Foundation on November 17, 2005 and on November 21, 2005, respectively, by which the appellants sought to annul the judgments of the Court of First Instance of the European Communities (CFIEC) of September 21, 2005 - *Kadi v Council and Commission* (T-315/01) and *Yusuf and Al Barakaat International Foundation v Council and Commission* (T-306/01). Through the latter judgments, the CFIEC dismissed the actions for annulment brought by Y.A. Kadi and Al Barakaat against Regulation (EC) no. 881/2002 of the Council of May 27, 2002.

In this instance, in 2001 a Saudi citizen (Y.A. Kadi) and a foundation established in Sweden were suspected of being linked to the Al-Qaida network and to Usama bin Laden and were therefore entered in the summary list of the Sanctions Committee. This committee was created by the Security Council through Resolution 1267 (1999)[2] for ensuring that the States implement the measures imposed by the aforementioned resolution and considering requests for exemptions from such measures. Thus the Security Council resolutions adopted for the freezing of the financial assets of the persons and institutions linked to the Afghan Talibans were put into effect at European Community level through several common positions adopted

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[1] A. Guazzaroti, *Security Council Resolutions before European Courts: The Elusive Virtue of Non Direct Effect*, Perspectives on Federalism, Vol. 4, issue 3, 2012.

[2] Resolution no. 1267 of 15 October 1999, the UN Security Council (S / 1999/1054), para. 6.

by the EU Council,[3] and based on such positions, through several regulations of the EU Council or of the Commission. Through Regulation (EC) no. 2062/2001 of October 19, 2001 and Regulation 2199/2001 of November 12, 2001 the names of Mr. Kadi and of the Al Barakaat foundation were added to the summary list. On May 27, 2002, pursuant to Articles 60 EC, 301 EC, and 308 EC, the Council adopted Regulation (EC) no. 881/2002,[4] maintaining the two appellants on the list of persons, entities and groups affected by the funds-freezing measure.

Under such circumstances, the two appellants asked the Court to annul Regulations no. 467/2001 and no. 2062/2001 (Mr. Kadi), and Regulation no. 2199/2001 (the foundation) in so far as they concerned them. The appellants invoked the breach of the right to be heard, of the right to respect for property, of the principle of proportionality, as well as of the right to effective judicial review. The CFIEC rejected the action for annulment finding that the contested regulation cannot be the object of a judicial review with regard to its internal lawfulness since the Community act is intended to give effect to a Security Council resolution, thus leaving no margin of appreciation in this respect. Nevertheless, according to the Court's judgments, this immunity from jurisdiction has an exception: the parts of the Regulation that deal with the question of *ius congens* can be judicially reviewed. At the same time, the CFIEC concluded that the rights invoked by the plaintiffs were not infringed thus making reference to a universal standard of protection of fundamental human rights which are included in *ius congens*. The lacunae with regard to the right to effective judicial review do not violate the *jus congens* rules, the Court emphasizing that "it did not have competence to review indirectly the conformity of the Security Council resolutions with the fundamental rights as such rights are protected by the European Union legal order."

Following the appeal, the CJEC annulled the CFIEC judgment *Kadi v Council and Commission*, and Regulation no. 881/2002 insofar as it concerned the appellants. The Court found that the analysis of the Court of First Instance is affected by an error of law and adopted a different position with regard to the relationship between the international legal order under the United Nations and the Union legal order. According to the CJEC, the international obligations cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the imperative respect of the fundamental rights, a condition of lawfulness of all Community acts. The Court is thus tasked with reviewing the lawfulness of the EU measures within a complete system of legal remedies established through the founding treaties of the European Union.

As a result, the immunity from jurisdiction of the contested regulation is rejected, finding that such immunity is not based in the EC Treaty. According to the Community justices, the European Union courts must ensure "in principle the full review" of the lawfulness of the EU measures in the light of the fundamental rights, including those which are designed to give effect to Security Council resolutions. Thus, in view of the regional standard of protection of fundamental rights, the Court has found that the appellant's' rights of the defense and to an effective judicial remedy as well as the fundamental right to respect of property have been infringed.

II. The legal basis for the implementation of Security Council resolutions on the European Union level

[3] Common Position 1999/727 / CFSP concerning restrictive measures against the Taliban (OJ L 294, p. 1).

[4] Regulation (EC) no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Talibans, and the repealing Regulation (EC) no. Council 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in what concerns the Talibans of Afghanistan.

The disputed regulation in the *Kadi* case was adopted by the EU Council under articles 60, 301 and 308 of the TEC. This triple legal base was validated both by the Court of First Instance (CFI) and the Court of Justice of the European Communities (CJEC), each considering different grounds. This made the Court of Justice believe that the CFI argumentation was incorrect.

Because the Community measure was adopted before the Lisbon Treaty entered into force, a special procedure was incident, which considered the three pillars of the European Union. Thus, in an inter-governmental phase, the EU Council unanimously adopted a joint statement with regard to CFSP (the second pillar), imposing restrictive measures. In a Community phase, based on this joint statement, a regulation was adopted that transposed the restrictive measures in pillar one.[5] Consequently, difficulties on this level originate precisely in the old structure with three pillars of the Union. A thorough construal of TEC provisions was necessary to create bridges between the pillars.[6]

Both in first instance and appeal, Community judges considered that articles 60 and 301 did not represent a sufficient legal basis in this respect. These provisions solely referred to measures against third States and, eventually, against certain persons in management positions from the respective States. This is not the case for *Kadi*, where measures were imposed against the terrorist organization Al-Qaeda of Osama bin Laden and against persons associated with them. Moreover, since the disputed regulation does not expressly refer to international commercial exchange, the Court[7] rejected the idea of acknowledging the Community competence on grounds of the joint commercial policy.

As regard the flexibility clause under article 308, the grounds invoked by both courts were different; the CJEC considered that the CFI judgment is vitiated by an error of law. The CJEC drew attention on the fact that article 308 cannot represent grounds for extending the Community competences beyond the general frame determined by the founding treaties, due to the principle of granted competence. Thus, a necessary action under article 308 for reaching one of the Community objectives does not also include CFSP goals, as mistakenly considered by the CFI. However, the Court allows the application of the flexibility clause corroborated with articles 60 and 301 TEC, acknowledging that, within Community competences, "the Community did not benefit from any capacity to take necessary action in order to impose restrictive economic and financial measures to recipients that had no connection whatsoever to the government of a third State." [8]

Currently, this legal basis has been renewed by the Lisbon Treaty, which "acknowledged a way to overcome these legal issues arisen in the *Kadi* case". Along with the elimination of pillars and introducing fields of competence for the Union, the adoption procedure for restrictive measures has been simplified, while article 215 TFEU (former-art. 301 TEC) provides in par. (2) an explicit legal basis for adopting such measures against natural persons or non-State legal entities. Furthermore, article 75 TFEU (former-art.) 60 TEC has a limited ambit in terms of counter-terrorism actions.[9] We observe that such explicit provisions eliminate the need to apply the flexibility clause currently regulated in article 352 TFEU, while the Lisbon Treaty makes it difficult to resort to it.

Finally, we observed that the Lisbon Treaty solved a last difficulty in this matter. Since the joint foreign and security policy is not part of the jurisdiction, article 275 TFEU offers an explicit solution to the matter of restrictive measures against

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[5] J.-P. Jacqué, *Primauté du droit international versus protection des droits fondamentaux*, în Revue trimestrielle de droit européen, no. 45 (1), 2009, p. 163.

[6] I. Gâlea, *Tratatele Uniunii Europene: comentarii și explicații*, Ed. C.H. Beck, 2012, p. 388.

[7] CJEC, 3 september 2008, *Yassin Abdullah Kadi & Al Barakaat International / Council & Commission*, C-402/05 P & C-415/05 P, § 183-187.

[8] D. Simon, A. Rigaux, *Le jugement des pourvois dans les affaires Kadi et Al Barakaat : smart sanctions pour le Tribunal de première instance ?*, no. 11, November 2008, p. 3.

[8] I. Gâlea, *op. cit.*, p. 389.

[9] I. Gâlea, *op. cit.*, p. 389.

natural persons or legal entities. Thus, the competence of the Court is limited to reviewing lawfulness of only those measures, hence only of decisions that are relevant to article 215 par. (2), not also to par. (1).

III. The Principle: establishment of immunity from jurisdiction for the SC resolutions

First, the CFI recognizes the immunity from jurisdiction for SC resolutions, claiming that: "the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations." Therefore, such competence is justified neither by international law, nor by Community law, for "[it] would be incompatible with the undertakings of the Member States under the Charter of the United Nations,[10] especially Articles 25, 48 and 103 thereof, and also with Article 27 of the Vienna Convention on the Law of Treaties".

In first instance, Community judges refuse even the direct review of internal lawfulness for the disputed regulation, since it does nothing more than implementing SC resolutions, with no margin of discretion for EU institutions in this respect. Ruling directly on the lawfulness of the disputed Community measure would represent an indirect effectiveness review of the SC decision.

On the other hand, according to an extensive motivation of the CFI, the European Community is bound to comply with obligations undertaken by EU member States. Thus, the CFI considered that member States ought to take any measure necessary in order to ensure performance of SC resolutions adopted under Chapter VII, given their binding character. Moreover, States are bound to leave unapplied any primary norm or general principle of Community law,[11] should these represent an impediment in performing obligations undertaken under the UN Charter.

In other words, we observe that the CFI considered itself not competent to examine the compliance of SC decisions with EU law, while it also established a norm hierarchy by which resolutions are given priority over national and EU law, including the primary legislation and the general principles of Community law.

The Exception: incidental competence to verify compliance with peremptory norms

The CFI "tempered" the establishment of a norm hierarchy in the EU legal order by affirming an incidental competence to review SC decisions[12] in the light of peremptory norm. This was considered "an interesting attempt to establish a minimal control in a system where individuals were deprived of any means to directly appeal the registration on the list of entities whose funds were frozen[13]".

In a monist context with the priority of international law, the CFI carries out a lawfulness review solely from the perspective of international law. Thus, the Community measure implementing the SC resolution is invalid only if the SC is

[10] TPI, Judgement from 21 September 2005, *Kadi / Council and Commision*, T-315/01, § 225.
[11]TPI, Judgement from 21 September 2005, *Yusuf and Al Barakaat International Foundation/Council and Commision*, T-306/01, § 282.
[12] J.-P. Jacqué, *Droit constitutionnel national, Droit communautaire, CEDH, Charte des Nations Unies. L'instabilité des rapports de système entre ordre juridique*s, in Revue française de droit constitutionnel, P.U.F., nr. 69, 2007/1., p. 32-34.
[13] J.-P. Jacqué, *Primauté du droit international versus protection des droits fondamentaux*, *op. cit.*, p. 162.

contrary to the universal peremptory norms. Particularly, the CFI reviews the compatibility of these measures with the "imperative norms seeking universal protection of Human rights, which neither member States, nor UN courts may derogate from", being "inviolable principles of international common law". Among these, CFI identifies the right to respect for property, the right to be heard and the right to an effective judicial review. Proceeding to a classic review of proportionality, the CFI considered there was no infringement of claimed rights. Along with including the respective rights in universal *ius cogens* norms, the main point open to criticism of this judgment is that Community judges did not concretely justify the lawfulness review in the light of universal peremptory norms. In this way, the CFI presented as "the interpreter of the international community, recognizing its power to unilaterally sanction the violation of a peremptory norm". Even under these circumstances, the international jurisprudence already stated that invoking peremptory norms does not necessarily confer competence to an international court.

Thus, the ICJ indicated in several judgments[14] that invoking *erga omnes* rights and obligations does not make the Court competent to judge the dispute in cause.

IV. A dualist vision with regards to international law

The Court ascertains that the CFI committed a legal error when the latter appreciated there is, in principle, no competence to review the internal effectiveness of the disputed regulation. The CJEC eliminated the idea of immunity from jurisdiction for Community acts, including even the foreclosure acts of SC resolutions, developing an entire argument to fundament its competence to judge over the lawfulness of the disputed regulation.

In the first place, CJEC shifts the analysis from the international law perspective to a perspective that refers exclusively to EU "constitutional" law. Even the Advocate General in its conclusions expressed this direction: "Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community." Following this argument, the Court reaffirms the autonomy of the Community legal order in relation to international law: "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court".[15] However, some authors consider the *Kadi* judgment as part of the logic of consolidating EU law autonomy, rather than building a hierarchy of norms in the EU legal order.

On the Community law level, the Court refers to its own jurisprudence, according to which EC is a community of law that involves that „neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions". Subsequently, the Court verified whether the primary Community law or the UN law would in any way prevent the review of regulations that implement SC resolutions. First, CJEC referred to the immunity from jurisdiction of a Community measure „as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially

[14] CIJ, East Timor *(Portugalia v. Australia)*, Judgement from 30 June 1995, Rep. 1995, p. 102, § 29; *Military activities on the territory of the Republic of Congo (RDC v. Rwanda)*, Judgement from the 3rd of February 2006, Rep. 2006, p. 32, § 64, p. 52, § 125.
[15] CJCE, *Kadi I*, § 282.

those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of that Charter", which "cannot find a basis in the EC Treaty." [16]

On the other hand, from the "principles governing the international legal order created under the United Nation" it does not result that the review of a Community act "is excluded in the light of fundamental freedoms by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council".

Therefore, the nature of the disputed legal act – an EU regulation – firstly founded the competence of the Court. However, as presented hereinafter, this is not sufficient. Such competence is also necessary to avoid the absence of a lawfulness review of the disputed regulation. If the nature of the disputed act would be enough, it would not be necessary for Community judges to "evaluate the effectiveness of the UN review system".

Such a competence is required also to avoid the lack of a lawfulness review for the disputed regulation. If the nature of the measure in question would be enough, Community judges would not be requested an "evaluation of the effectiveness of the UN review system".

a) ***The refusal of coordination based on article 103 UN Charter***

As previously shown, article 103 of the UN Charter imposes a primordial position to SC resolutions over international agreements. The Court, without being explicit, eliminates the application of these provisions in the cause brought before it: "Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations[17] would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy".[18] Provisions of the Charter could solely be applicable in the EU legal order as per article 300 par. (7) of the TEC. According to this article, the Charter would only benefit from priority over derived Community law, not also primary law or general principles of law, of which fundamental rights are part of. In seconding this argument, the Court refers also to par. (6) of the same article, according to which "an international agreement cannot become effective in case the Court issued a negative opinion with regard to its compatibility with the EC Treaty".[19]

Thus, the Court discreetly exhausts the application of article 103, leaving the impression that EU treaties are not subject to this provision, given the specificity of the EU legal order. At the same time, judges of the Community launch an ambiguous reasoning, countered even by the critics of Community law authors: first of all, this cannot be alleged and the Court does not argue for the applicability of the cited article of the UN Charter, of which the European Community is not part; secondly, the Court makes a "hierarchical assimilation that is at least debatable between the general principles and primary law". Last but not least, the corroboration with art. 300, par. (6) is not pertinent, since it does not refer to agreements concluded before the establishing treaties, such as the Charter, while the *a priori* review of treaties done by CJEC cannot lead to the priority of constitutive treaties over international agreements.

As already mentioned at the beginning of this article, the main distinction to the first instance judgment is the CJEC accepting the competence to review the lawfulness of the Community regulation, as resulting from the following paragraph: "The obligations imposed by an international agreement cannot prejudice the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights. This compliance represents a

[16] CJCE, *Kadi I,* § 281.
[17] A.Pellet, P. Daillier, M. Forteau, *Droit international public*, 8th edition, Paris, 2009, p. 321.
[18] CJCE, *Kadi I,* § 305.
[19] *Idem,* § 309.

condition for lawfulness, which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty".[20]

Therefore, Community judges resort to a legal fiction specific to the dualist tradition, pointing out that subject to the lawfulness review is the disputed regulation implementing the SC resolution and under no circumstances the latter itself. According to CJEC, this does not prejudice the effectiveness of the resolution in cause; the latter maintains its superior position within the international legal order. SC decisions continue to benefit from jurisdictional immunity with no exception, while the Court blames the CFI's endeavor of incidentally, exceptionally reviewing the lawfulness from the perspective of peremptory norms. Thus, the CFI made use of a monist logic, incidentally reviewing the compliance of a SC resolution with international law (*ius cogens*), the CJEC adopted a dualist position, considering the international UN law and EU law as two separate and independent legal systems.[21] Dualism reflects precisely in the lack of competence for the Court to censor an act that is not part of its own legal order.

Thus, the monist logic established in CJEC jurisprudence with regard to the relation between EU legal system and domestic systems of member States cannot find its equivalent in the relation between Union law and international law; this may be explained by the fact that „no «supreme» judge of a legal order accepts to be considered hierarchically subordinated to a judge of another legal order and therefore maintains the primate of at least its constitutional values".

*b) **The controversial value of SC resolutions in the EU legal order***

Dualism does not hinder application of a SC resolution in the EU legal order. Such acts of the UN become applicable in the Community system, provided they are transposed by a Community norm. In this case, such transposition acts into the Union law exist: the joint statement at CFSP and the disputed regulation implementing the SC resolution. However, after these observations, some questions remain inevitable: does the Court argumentation involve the existence or inexistence of a legal obligation to implement the SC resolutions adopted under Chapter VII? Implicitly, is there an obligation to incorporate them into the Community legal order?

In this regard, opinions of the doctrine split. Alina Miron elaborated an interesting study claiming that neither *Kadi I* case, nor subsequent jurisprudence clarified the question about the binding character of SC resolutions in the EU legal order.

Although the Court often refers to the "observance of the undertakings given in the context of the United Nations",[22] it does not clearly identify the "authors of these undertakings" – member States or the EU. On the other hand, the judges refer to the existence of such an obligation when a joint statement is adopted at CFSP; this obligation requires that, when elaborating these measures, "the competent European Union authority must take due account of the terms and objectives of the resolution concerned and of the relevant obligations under that Charter".[23] Thus, a legal obligation does not clearly result for the EC in the absence of a joint statement; neither the fact that European institutions systematically implemented SC resolutions may lead to such a conclusion.

This ambiguity created by the Court with regard to the status of SC resolution in the Community legal order requests two observations: on one hand, SC decisions do not apply autonomously within the EU; on the other, they represent norms the Court "is to take due account of".[24] Moreover, the Court acknowledged in an earlier cause that "(…) an obligation to 'take due account' of the wording and purpose of the resolution concerned in no way runs counter to the finding that the Council [EU]

[20] CJCE, *Kadi I,* § 285.
[21] R. Chemain, *Les "suites" de l'arrêt Kadi,* in Revue du marché commun et de l'Union européenne, no. 529, June 2009, p. 388.
[22] CJCE, *Kadi I,* § 292-293.
[23] CJCE, *Kadi I,* §. 296.
[24] Idem.

legislates autonomously within the limits of its own legal order". Thus, even if the SC resolutions are no EU law, they represent "more than mere facts", being granted a certain "normative dignity, even if an imperfect one".[25]

As seen, the dualist perspective of the Court represents the main contribution brought by the *Kadi I* case. The judges of the European Community each time emphasized that censoring the regulation does under no circumstances affect the validity of the SC resolution within the international legal order.

Fully aware of this inconvenient, the European court also acknowledged the necessity to respect commitments undertaken by States in the UN, which determined the Court to "temper" the solution. Thus, the Court promoted a "moderated" dualist perspective, trying to avoid as much as possible a conflict of legal norms. First of all, in the attempt of protecting the effectiveness of SC acts, the Courts refers to the existence of a margin of discretion for Community institutions, even if, in this case, the margin is limited: "The Charter (…) does not, however, impose the choice of a predetermined model for the implementation of resolutions (…),[26] since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations." Under these circumstances, the Court leaves the question of whether the effectiveness control strictly refers to the Community act and does not affect the SC resolution open to interpretation, precisely because, theoretically, Community institutions would benefit from this margin of discretion.

Secondly, the Court limits the effect of the issued judgment both *ratione personae* and *ratione temporis*. The disputed regulation in only annulled "so far as concerns the appellants". This decision is justified also by the appeal mechanism *per se*. However, the judgment is arguable as per EU law, considering that regulations have general application, while keeping provisions regarded as illegal in force affects fundamental rights of all persons concerned by the regulation.

This limitation of the Court actually intends to ensure that the judgment "does not severely affect the effectiveness of the fight against terrorism".[27] In this respect, the Court also introduced a temporary limitation, deciding to maintain effects of the contested regulation for a period that may not exceed three months, so that EU institutions have time to remedy the ascertained infringements.

In this respect, CJEC argued that: "Annulment of that regulation with immediate effect would thus be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation the appellants might take steps seeking to prevent measures freezing funds from being applied to them again."[28] Therefore, this represents an exceptional solution in the CJEU jurisprudence, given that its judgment has no *ex tunc*, but *ex nunc* effects delayed by three months.

Finally, the *Kadi I* judgment raised awareness of the SC with regard to aspects invoked in the case, so that several reforms have been initiated in recent years, even if cautious ones. Currently, the progress of the SC is moderate, while the political will is likewise limited in this respect.

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[25] CJCE, Judgement from 16 November 2011, *Bank Melli Iran*, C-548/09 P, §. 106.
[26] J.-P. Jacqué, *Primauté du droit international versus protection des droits fondamentaux*, *op. cit.*, p. 169.
[27] D. Simon, A. Rigaux, *op. cit.*, p. 8.
[28] CJCE, *Kadi I*, § 373.

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Contribuţia doctorandului şi masterandului/ Ph.D. Candidate's and Master Student's Contribution

International Law Perspectives on the Evolution of Civil Aviation Security

*Viorel CHIRICIOIU**

***Abstract*:** *The international legal provisions regulating civil aviation security have been constantly evolving, mostly adopted as the direct response of the international community to various accidents and incidents. The main international actor in this field is ICAO, contributing a great deal to the improvement of the security regulations, chiefly through the adoption of the major conventions dealing with international criminal law in civil aviation. The UN Security Council also offers other valuable resources, while the International Court of Justice itself has also dealt with a number of relevant cases. However, even though we are witnessing the adoption of new, up-to-date regulations covering, preventing and criminalising the most various threats, there is no effective enforcement mechanism and, as such, international cooperation is essential in order to prevent further aviation tragedies.*

Key-words: *aviation, security, safety, ICAO, terrorism*

I. Introduction

The present paper seeks to analyse the evolution of Public International Law rules in the field of civil aviation security ("AVSEC"), arguing these rules have been continuously developing as the direct consequence of various aviation incidents and accidents.

Following a review of the early legal provisions regulating AVSEC, the paper will analyse some of the main issues threatening civil aviation: hijackings, aircraft bombings, airport attacks and aerial shoot downs. Within each of these sections, the events are treated in a chronological and critical manner, based on a "cause-and-effect" template – each important event is followed by the legal instruments adopted in direct response thereto. The purpose is to argue how International Law has been evolving in order to react and respond to the various threats in a continuing effort to close any existing loopholes.

The paper will also explore the impact the events of 11 September 2001 and how the international legal framework had to be modified and revised in their immediate aftermath.

The essay will conclude with an analysis of the most recent international legal instruments in the field of AVSEC – the 2010 Beijing Convention and Beijing Protocol and the 2014 Montreal Protocol.

II. Early regulations and the role of ICAO

Air travel and its strict restrictions form such an important part of our lives nowadays that it might be difficult to imagine these rules have not always been in

existence. The numerous regulations in place today have been constantly developing over the decades in order to reflect and respond to the latest threats to civil aviation.[1]

The first international document addressing international aviation regulations was the Paris Convention of 1919,[2] concluded under the League of Nations. Although representing a vast improvement at the time by internationally unifying the various local and regional aspects already in force, it had little to say about security, limiting itself to placing restrictions upon the transport of "explosives and of arms and munitions of war" (Article 26).

States with different legal systems had different views regarding the exercise of jurisdiction over unlawful acts committed aboard aircraft: common law States had a tendency of relying exclusively on territorial jurisdiction, without including aircraft in this category,[3] while civil law States were inclining to use the active personality principle as well, including acts committed by their nationals wherever they were.

The Convention on International Civil Aviation[4] was signed at Chicago in 1944 and it entered into force in 1947, establishing the International Civil Aviation Organization ("ICAO"). Today, 191 States are Parties to the Convention.[5]

Whilst the Preamble of the Chicago Convention recognized the unlawful use of aviation might very well "become a threat to the general security"[6] and safety was set as a main objective,[7] there was little original development upon that remark, as the Convention did not deal with security issues. Rather, its content focused on jurisdictional issues such as States' sovereignty over their airspace, on the nationality of aircraft, as well as on the structure and organization of ICAO.

The only security-related provision (and even this marginally so)[8] was Article 4, prohibiting States from using civil aviation in any way incompatible with the scope of the Convention. This is consistent with the State-centric approach characterizing International Law at the time, where individuals were seen as legal objects rather than subjects. As such, it was natural for legal provisions to address only the rights and duties of States, which had to "insure the prosecution" of those acting in violation of the Convention.[9]

ICAO has also presented various Standards and Recommended Practices ("SARPs") to the international community (the so-called "Annex 17 to the Chicago Convention"), these being the direct result of major aviation incidents. They were first adopted in 1974, as an additional attempt to prevent and respond to any unlawful acts committed against civil aviation, with the latest Amendment coming into force in November 2014.[10]

III. The unlawful seizure of aircraft (Hijackings)

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[1] Christopher C Joyner and Robert A Friedlander, '*International Civil Aviation'* in Mahmoud Cherif Bassiouni (ed), *International Criminal Law* (Vol I, 3rd edn, Martinus Nijhoff 2008) 831.

[2] Convention Relating to the Regulation of Aerial Navigation (signed 13 October 1919, entered into force 11 July 1922) 11 LNTS 173 (Paris Convention).

[3] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 466.

[4] Convention on International Civil Aviation (done 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, ICAO Doc 7300/9 (Chicago Convention).

[5] ICAO List of Parties to the Chicago Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf, accessed 24 October 2015.

[6] Chicago Convention, Preamble (first recital).

[7] Ibid, Article 44.

[8] Ruwantissa Abeyratne, *Aviation Security Law* (Springer 2010) 198.

[9] Chicago Convention, Article 12.

[10] ICAO, 'Annex 17' http://www.icao.int/Security/SFP/Pages/Annex17.aspx, accessed 24 October 2015.

Hijacking incidents can be divided into two categories: (i) acts done for material gain, such as transporting the hijackers to a certain place or for pecuniary purposes (ransom, extortion etc.); (ii) hijackings committed for political purposes.[11]

Several early acts of hijacking were committed in the beginning of the Cold War, as individuals from the Eastern Bloc sought refuge or asylum in the West. One of the world's first hijackings of a passenger flight took place in Romania in 1947, with an aircraft forcibly diverted to Turkey in an attempt to flee the newly-instituted Communist regime. A similar incident occurred in 1950, with three Czechoslovakian aircraft simultaneously hijacked to West Germany.

Besides more and more States ratifying the Chicago Convention, no other international legal measures were adopted in response to these early incidents. The few laws criminalising violence directed against aircraft were domestic in nature.[12]

However, the international community thought of drawing a connection between air hijackings and the hijacking of maritime vessels – also known as piracy. Piracy *jure gentium* had long been established as an international crime, drawing upon universal jurisdiction[13] and the pirate being considered "an enemy of all mankind".[14]

As such, one of the first attempts to regulate aerial hijackings was to include them in the same context with maritime piracy. This was done through the 1958 Geneva Convention on the High Seas,[15] whose Article 15 defines piracy as "illegal acts of violence" directed against ships or aircraft. States also have a right to exercise universal jurisdiction (including enforcement jurisdiction) over any aircraft taken over by pirates.[16] The Convention on the High Seas was thus intended to apply equally to both maritime and aerial hijackings.[17]

It was quickly determined the provisions of the Convention on the High Seas would not apply to these incidents of aerial hijacking for several reasons.[18]

Firstly, not all hijackings were committed for private ends (as required by the Geneva Convention) – more and more such acts started to be undertaken for political purposes. Furthermore, Article 15 of the Geneva Convention describes piracy as committed by persons onboard a vessel against another vessel, which evidently excludes the typical situation where an aircraft is hijacked by one of its passengers. Lastly, most hijackings are committed simply through threats; the actual use of violence (another requirement set by the Geneva Convention) remains rare.

Noting, in consequence, the inapplicability of the rules set out in the Convention on the High Seas, the international community – through ICAO – proceeded to conclude a series of treaties in response to the growing threat, the first of which was the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.[19]

The object and purpose of the Convention are to protect and maintain the security of civilian aircraft and civil aviation in general, through a range of powers bestowed upon the commander of the aircraft, the other members of the flight crew and even upon passengers themselves (Article 6). The latter are also authorized to take preventive measures by themselves on reasonable grounds.

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[11] Robert T Holden, '*The Contagiousness of Aircraft Hijacking'* (1986) 91-4 American Journal of Sociology 874, 878.
[12] Joyner and Friedlander (n 1) 832.
[13] *Re Piracy Jure Gentium* [1934] AC 586.
[14] *The Case of the S.S. "Lotus" (France v Turkey)* PCIJ Rep Series A No 10 [1927], 70.
[15] Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11.
[16] Ibid, Articles 14 and 19.
[17] Henry Reiff, *The United States and the Treaty Law of the Sea* (University of Minnesota Press 1959) 6.
[18] Abeyratne (n 8) 216.
[19] Convention on Offences and Certain Other Acts Committed on Board Aircraft (signed 14 September 1963, entered into force 4 December 1969) 704 UNTS 219, ICAO Doc 8364 (Tokyo Convention).

Restraining measures may also be taken against persons who have committed – or are about to commit – offences or unlawful acts onboard, including arresting, disembarking and handing them to the competent authorities (Articles 8–9).

Article 10 of the Convention grants immunity to the persons acting in order to preserve security onboard, as a natural corollary to the above-mentioned powers[20]. This immunity is not absolute and should be analysed on a case by case basis, as discussed by an Israeli court in *Zikry*.[21]

Although primary jurisdiction over any offences committed onboard is awarded to the State of registration of the aircraft, the Tokyo Convention also grants concurrent jurisdiction to various other States based on objective territoriality, the protective principle, as well as on the active and passive personality principles.[22] This ensured no incident occurring on board an aircraft would be left outside the scope of law and at least one State (the State of registration) would be able to exercise jurisdiction.[23] Jurisdiction exercised according to each State's own domestic law is not excluded, meaning the rules set in the Convention are subsidiary.[24]

The Convention has a very limited scope of application, as it only governs acts committed by persons onboard an aircraft which is "in flight", defined as "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends" – thus excluding any act of sabotage or hijacking committed with the aircraft parked or taxiing. A secondary definition is provided only insofar as the powers of the commander are concerned, those being enforceable from the closing of all external doors until the opening of any such door.[25]

The Tokyo Convention also refers to the unlawful seizure of aircraft, however in an incomplete way,[26] not providing for any particular rules except for the landing State to "take all appropriate measures" to bring the lawful commander back to the control of the aircraft and allow passengers and crew to continue their journey (Article 11).

States have the duty to allow commanders to disembark passengers in exercise of their powers, take delivery and, if the circumstances so require, take custody of them (Articles 12–13). They also have an obligation to make an inquiry over the facts of any disembarkation.

For extradition purposes, the Tokyo Convention treats offences committed on board an aircraft registered in a State Party as also being committed within that State's territory. Unless affecting the safety of the aircraft, political offences are excluded from extradition, due to concerns of divergence over what would constitute the political nature of such an offence.[27] Last but not least, there is no mechanism to extradite or prosecute (*aut dedere, aut judicare*) in the Convention, which was also perceived as a major lack thereof.[28]

Initially, States were slow to ratify the Tokyo Convention because they considered aerial incidents were rare events which did not require their governmental involvement.[29] However, in response to the extensive wave of hijackings occurring in the following period of time and which will be discussed below, numerous States hurriedly ratified it and it entered into force in 1969. At present,[30] 186 States are parties to it.

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[20] ICAO Legal Committee 'Annual Report of the Council to the Assembly for 1963' (April 1964), ICAO Doc 8402, A15-p/2, 95.
[21] *Zikry v Air Canada*, Civil File 1716/05 A, Magistrates Court of Haifa (2006).
[22] Tokyo Convention, Articles 3–4.
[23] Allan I Mendelsohn, '*In-flight crime: The international and domestic picture under the Tokyo Convention*' (1967) 53 Virginia Law Review 509, 515.
[24] Isabella H Ph Diederiks-Verschoor, *Introduction to Air Law* (9th edn, Wolters Kluwer 2012) 395
[25] Tokyo Convention, Articles 1 and 5(2).
[26] Joyner and Friedlander (n 1) 833.
[27] Robert P Boyle, '*The Tokyo Convention on offences and certain other acts committed on board aircraft'* (1964) 30 Journal of Air Law and Commerce 305, 333.
[28] Ibid, 320.
[29] Abeyratne (n 8) 219.
[30] ICAO List of Parties to the Tokyo Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf, accessed 24 October 2015

Hijacking acts committed for political purposes by extremist guerrillas were particularly widespread during the 1960s and 1970s. As such, El Al Flight 426 (a Boeing 707) was hijacked in 1968 by members of the PFLP ("Popular Front for the Liberation of Palestine") and diverted to Algiers. After weeks of negotiations, the passengers were released. Flight 426 remains the only successful hijacking in El Al's history, as air marshals were immediately instituted on their flights.

Concerned by the growing number of hijacking incidents, the ICAO Assembly adopted in 1968 Resolution A16-37, inviting States to ratify the Convention and enforce the principles therein, as well as requesting the development of other legal measures.[31]

States formally asked the United Nations to take legal measures to combat air piracy in October 1969 by means of a memorandum.[32] Consequently, the UN General Assembly adopted Resolution 2551 (XXIV), expressing concerns over the unlawful seizure of aircraft and urging all States to continue their cooperation in the fight against these incidents. The Resolution referred particularly to adopting relevant legal measures and ratifying or acceding to the Tokyo Convention in order to combat the "forcible diversion of civil aircraft in flight".[33]

The events of the following year would prove instrumental in the adoption of international legal measures in aviation security. On 31 March 1970, Japan Airlines Flight 351, a Boeing 727, was hijacked by members of a Japanese Communist movement. After forcing the aircraft to Seoul (where the passengers were released), the hijackers flew to Pyongyang.

One of the most complex incidents was represented by the so-called "Dawson's Field hijackings", carried out by the PFLP in 1970. On 6 September, TWA Flight 741 and a Swissair Flight 100 were hijacked and flown to an abandoned airstrip in Jordan. On the same day, PFLP fighters hijacked a Boeing 747 flying for Pan Am and flew it to Cairo. Three days later, a Vickers VC10 operating BOAC Flight 775 was also hijacked and flown to Dawson's Field.

In immediate and direct response to this, the UN Security Council adopted Resolution 286 (1970) on the same day, calling for the urgent release of all passengers and appealing to States to adopt new legal measures in order to prevent both further hijackings and other dangerous incidents and preserve the safety of civil aviation worldwide.[34]

The UN General Assembly reacted as well by adopting Resolution 2645 (XXV), which "condemns without exception whatsoever" any acts of unlawful interference with the safety or security of flights, calling for further international measures in order to prevent and combat the growing phenomenon.[35] While reflective of the international community's intent, the Resolution was not legally binding and carried no enforcement effects.[36]

The series of hijackings and the UN Resolutions led ICAO to draft and adopt the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,[37] now having 185 States Parties,[38] with an intention to cover the deficiencies of the Tokyo Convention. It was very quickly ratified by ICAO Member States, entering into force on 14 October 1971.[39]

The Hague Convention has a vastly greater scope of application by establishing aircraft hijacking as a separate international crime punishable by States

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[31] ICAO Assembly Resolution A16-37 on Unlawful Seizure of Civil Aircraft (19 September 1968).
[32] UN Doc A/7656 (1969).
[33] UNGA Res 2551 (12 December 1969) UN Doc A/RES/2551(XXIV).
[34] UNSC Res 286 (9 September 1970) UN Doc S/RES/286(1970) adopted without vote.
[35] UNGA Res 2656 (25 November 1970) UN Doc A/RES/2656(XXV).
[36] Joyner and Friedlander (n 1) 834.
[37] Convention for the Suppression of Unlawful Seizure of Aircraft (signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, ICAO Doc 8920 (Hague Convention).
[38] As of October 2015.
[39] ICAO List of Parties to the Hague Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf, accessed 24 October 2015.

Parties (Article 2). There is no specific *mens rea* requirement, but the acts must be committed forcefully or through intimidation. The Convention also regulates the threat to hijack an aircraft (limited to threats made on an aircraft during its flight), as well as attempts to do so and acts committed by accomplices (Article 1).

States have an obligation to criminalise hijacking within their domestic systems[40], provide each other with complete assistance over any criminal proceedings undertaken and report any relevant information to the ICAO Council. States must also take action to restore the aircraft to its lawful commander and ensure the passengers and crew continue their journey (Articles 9–11).

The list of States able to exercise jurisdiction was also expanded over that from the Tokyo Convention in order to reflect the emerging trend of leasing aircraft, by including the State of nationality of the lessee in case of a dry lease, *i.e.* a lease of an aircraft without any crew (Article 4).

The Hague Convention includes the States' obligation to extradite or prosecute the suspects (*aut dedere, aut judicare*),[41] which also constitutes an improvement over the Tokyo Convention.[42] In effect, the Convention grants to its Parties universal jurisdiction.[43]

Despite its improvements over the Tokyo Convention, several limitations have been identified regarding the provisions of the Hague Convention:[44] just like the Tokyo Convention, it only applies to offences committed "in-flight" (although slightly expanded to cover the time frame between the closing of all external doors and the opening of any such door),[45] therefore it still did not cover acts of sabotage committed on the ground, nor any hijackers or accomplices thereof who do not board the aircraft. Other acts of unlawful interference with civil aviation, such as those directed against air navigation facilities, airports or radio communications were left outside the ambit of the Convention.[46] There was also no effective obligation for States to prosecute.[47]

Probably the most notorious extortion hijacking took place on 24 November 1971 aboard Northwest Orient Airlines Flight 305. In that incident, a man known as "D. B. Cooper" threatened the aircraft with a bomb concealed in his suitcase, demanded $200,000 in ransom and later parachuted mid-flight using a deployed staircase of the Boeing 727. The man has never been found or identified. In November 1972, three persons hijacked a Douglas DC-9 operating Southern Airways Flight 49. They demanded ransom of $10 million by threatening to crash the aircraft into a nuclear reactor, after which they flew to Havana.

As a direct legal consequence of these incidents, the screening of all passengers and carry-on baggage was instituted by the FAA on 5 January 1973.[48] The Federal Aviation Administration measures were not adopted by the rest of the world too quickly, so the hijackings did not stop, as proved by the remaining years of the decade filled with various incidents.

As such, Lufthansa Flight 649 was hijacked in 1972 by PFLP members who demanded a ransom in exchange for the passengers and were later released without any charges by South Yemeni officials. The Belgian national airline Sabena was also the target of a hijacking committed by members of the Black September organisation. A rescue operation was carried out by Israeli commandos on the grounds of the Tel Aviv (then Lod) airport.

In 1976, an Airbus A300 operating Air France Flight 139 was hijacked by revolutionary fighters who diverted the flight to Entebbe, Uganda, demanding the release of imprisoned militants; the airport was stormed by Israeli commandos on 4

[40] Martin Dixon, *Textbook on International Law* (6th edn, OUP 2007) 172.
[41] Crawford (n 3) 470.
[42] Hague Convention, Article 7.
[43] Joyner and Friedlander (n 1) 835.
[44] Abeyratne (n 8) 236.
[45] Hague Convention, Article 3.
[46] René H Mankiewicz, '*The 1970 Hague Convention'* (1971) 37(2) Journal of Air Law and Commerce 201, 206.
[47] Diederiks-Verschoor (n 24) 404.
[48] 49 US Code §44901 (Screening passengers and property).

July. The UN Security Council failed to adopt a Resolution on the matter of "Operation Entebbe".

A Boeing 737 operating Lufthansa Flight 181 was hijacked in 1977 and flown to Rome, Larnaca, Bahrain, Dubai, Aden and finally Mogadishu by militants demanding the release of imprisoned Red Army Faction leaders. The incident ended with a very successful counter-terrorist operation carried out by the German GSG 9 forces.

It is interesting to note that despite the grave character of most incidents, they did not receive any direct international legal response *per se*. The only reaction to these was the Declaration on International Terrorism[49] issued by the Governments of the G7 after their 1978 summit in Bonn.

"The Bonn Declaration", as it is known, only considers terrorism by means of aircraft hijacking and is therefore inapplicable to any other forms of terror attacks.[50] The issuing Governments expressed their concerns over these incidents and declared their intention to take measures against States refusing to comply with their international obligations in this respect (refusal to extradite or prosecute, or refusal to return the aircraft to its lawful owners, pursuant to the Tokyo and the Hague Conventions). These measures implied ceasing all flights to and from those States. Consequently, the Declaration is addressed to States and not to individuals.[51]

Commentators have pointed out the Bonn Declaration is a non-binding international instrument[52] and it cannot be legally enforced. However, it represents an unequivocal statement of the international will to combat and prevent hijackings. The Bonn Declaration was called upon in 1981, in the aftermath of the hijacking of a Pakistan International Airlines Boeing 720 by Pakistani extremists. The G7 Governments condemned Afghanistan for assisting the hijackers and proposed the suspension of all flights to and from it in order to persuade the Afghan Government to comply with its obligations under the Hague Convention.[53]

Hijacking incidents were drastically reduced during the 1990s, before culminating with the events of 9/11 – the aftermath of which also constituted the peak of safety measures and regulations,[54] such as improved passenger and luggage screening, restricted access to the flight deck and the maintenance of watch lists pursuant to Annex 17.

IV. Aircraft bombings and sabotage

At first, bombs were simply stored in passenger luggage, as no screening existed to identify the presence of explosives. Numerous incidents directly led to the improvement of security measures through the adoption of new international regulations.

On 21 February 1970, an altitude-triggered bomb went off in the cargo compartment of a Convair CV-900 operating Swissair Flight 330 to Tel Aviv, causing the aircraft to crash shortly after takeoff and killing everyone onboard. The same day, another bomb was detonated aboard a Caravelle operated by Austrian Airlines, which was able to land safely.

Aware the Hague Convention would not be applicable to other acts of sabotage and unlawful interference with civil aviation besides hijacking, the ICAO

[49] Bonn Economic Summit Conference, '*Joint Statement on International Terrorism'* (17 July 1978) 17 International Legal Materials 1285.
[50] James T Busuttil, '*The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking'* (1982) 31 The International and Comparative Law Quarterly 474, 476.
[51] Abeyratne (n 8) 247.
[52] Busuttil (n 50) 486.
[53] Montebello Economic Summit, 'Statement on Terrorism' (21 July 1981) 20 International Legal Materials 956.
[54] Joyner and Friedlander (n 1) 831.

Assembly adopted Resolution A18-9 in 1971,[55] calling for the adoption of a new legal instrument in response to those threats.

The 1971 Montreal Convention,[56] now with 188 States Parties,[57] was the next step taken by ICAO, criminalising other unlawful acts that had so far been left unregulated. These acts are defined in a broader manner, by using the term "aircraft in service" (defined as the period between any preflight preparations and until 24 hours after landing and including the actual flight time).[58] This covered those situations where the offender would not actually be onboard the aircraft.

The list of unlawful acts is greatly expanded, including violence against persons, destruction or damage brought to aircraft, damage directed against international air navigation facilities or the intentional communication of false information – Article 1(1).

By defining and enumerating the offences, in a way which was considered "novel" at the time,[59] the Convention also encompasses any dangerous devices or substances placed on an aircraft before the beginning its flight. All the listed acts are considered offences only if committed under the dual requirements of unlawfulness and intent and if they are "likely to endanger" the safety of the flight (Article 1).

In a similar manner to the Hague Convention, States Parties to the Montreal Convention also undertake to make the respective offences punishable under their own domestic laws and assist each other to the greatest extent (Articles 3 and 11).

In practice, the two Conventions often overlap, since hijackings are mostly done through acts of violence or even through the threat of using explosives. The Montreal Convention, by contrast to the Hague Convention, does not cover threats to carry out unlawful acts, though it does regulate attempts and complicity in Article 1(2).

The jurisdictional provisions are taken from the Hague Convention, with the addition of a new one: jurisdiction is also granted to the State on whose territory the offence was committed (Article 5). The *aut dedere, aut judicare* mechanism is the same as in the Hague Convention and there have been criticisms that since neither of the two Conventions provides for mandatory prosecution, States may decide not prosecute a suspect at all.[60]

Furthermore, the wording of Article 1(1)(e) referring to the communication of false information which endangers the aircraft's safety is somewhat deficient as false bomb alerts may be left unpunished, since they do not actually affect the safety of the flight.

The deadliest airline bombing incident to date[61] remains Air India Flight 182 from Montreal to London Heathrow, on 23 June 1985. Although the piece of baggage containing the hidden bomb was loaded, the passengers never boarded the plane. The bomb exploded just as the aircraft finished its Atlantic crossing and was approaching the Irish coast.

Despite airport security being increased in response, another incident would lead to a drastic improvement in legal measures and regulations.

The detonation of Pan Am Flight 103 over Lockerbie, Scotland on 21 December 1988 was one of the most serious pre-9/11 terrorist attacks. The aircraft, a Boeing 747, had taken off from London Heathrow and was flying to New York's JFK

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[55] ICAO Assembly Resolution A18-9 (7 July 1971).

[56] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 177, ICAO Doc 8966 (Montreal Convention).

[57] ICAO List of Parties to the Montreal Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf, accessed 24 October 2015.

[58] Montreal Convention, Article 2(b).

[59] Gerald F Fitzgerald, '*Toward legal suppression of acts against civil aviation'* (1971) 585 International Conciliation 42, 71.

[60] Declan Costello, '*International terrorism and the development of the principle Aut Dedere Aut Judicare*' (1975) 10 Journal of International Law and Economics 483, 488.

[61] Aviation Safety Database http://aviation-safety.net/database/dblist.php?Event=SEB, accessed 24 October 2015.

airport. All passengers and crew, as well as several inhabitants of Lockerbie, were killed. The bomb had been concealed inside a portable radio cassette player and the passenger who had checked in the baggage did not board the plane.

The American and British Governments requested Libya to hand over the Libyan citizens suspected under the provisions of the Montreal Convention. Upon meeting the refusal of the Libyan State, the Security Council itself requested the surrender of the individuals concerned[62] and eventually imposed sanctions upon Libya.[63]

In 1992, Libya instituted proceedings before the International Court of Justice against the US and the UK regarding the interpretation and application of the Montreal Convention. It also requested provisional measures by arguing the defendant States had breached their obligations under the Montreal Convention, which were rejected.[64]

The trial of the two suspects took place in 2000 in a Scottish High Court of Justiciary sitting in Camp Zeist, The Netherlands as part of a deal with Libya. One of the two defendants, Mr Fhimah, was acquitted, while his co-defendant Mr al-Megrahi was convicted of murder.[65]

The aftermath of the incident saw the prohibition of passengers and their bags from travelling separated; this also instituted a 100% screening of baggage, passengers and staff.

After the Lockerbie incident, ICAO proposed an eight-point security plan immediately meeting universal adoption, becoming the basis for all future measures in aviation safety and security. The plan included such measures as the complete screening of all passenger baggage and cargo, passenger-baggage reconciliation, restricting carry-on items, improved detection of explosives and regulating access to security-sensitive parts of airports.

The bombing of Philippine Airlines Flight 434 in 1994, which resulted in one casualty, was a "test-run" for the al-Qaeda planned *Bojinka* plot to simultaneously destroy multiple American airliners over the ocean. A nitroglycerin bomb hidden underneath one of the Boeing 747's seats was detonated. The bomb had been assembled in the lavatory from items concealed in shoe heels, since metal detectors in existence at the time were not able to scan that low. The explosive nitroglycerin itself was disguised as contact lens fluid.

The case was brought to trial before US courts, which discussed, *inter alia*, jurisdiction over the defendant.[66] Thus, the Court of Appeals showed that even though the case did not fall under the universality principle (as had been argued by the District Court), US courts still had jurisdiction in application of the domestic provisions implementing the Montreal Convention. Furthermore, jurisdiction could also be established pursuant to the customary protective principle of international law since Yousef intended to target US-flagged airliners in the *Bojinka* operation.

In August 2006, British law enforcement agents foiled a plot reminiscent of the 1994 Philippine Airlines incident regarding the simultaneous detonation of bombs on transatlantic jets using liquid explosives concealed as carry-on items. The target flights would have departed London Heathrow for the US, which led to the temporary grounding of all flights at the airport.

Immediately following this, severe restrictions were instituted on the carrying of liquids, aerosols and gels ("LAGs"). For the first few days, no carry-on items were allowed at all. Although gradually relaxed subsequently, the restrictions in place were

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[62] UNSC Res 731 (2 January 1992) UN Doc S/RES/731(1992).
[63] UNSC Res 748 (31 March 1992) UN Doc S/RES/748(1992).
[64] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1998*, p 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Preliminary Objections, Judgment, ICJ Reports 1998*, p 115.
[65] *Her Majesty's Advocate v Abdelbaset Ali Mohmed al-Megrahi and Al-Amin Khalifa Fhimah*, High Court of Justiciary at Camp Zeist, Case No 1475/99, Judgment of 31 January 2001.
[66] *United States v Yousef*, 327 F.3d 56 (2d Cir. 2003).

still stricter than before – LAGs had to be placed inside transparent plastic bags, carry-on items were to be thoroughly scanned and all passengers had to be hand searched.[67]

The scope of the regulations soon grew from domestic (within the UK) to regional (throughout the EU) and eventually to international – through an ICAO State Letter from 1 December 2006 recommending the universal adoption of security restrictions on LAGs.[68]

The failed bombing attempt of Northwest Airlines Flight 253 on Christmas Day 2009, an Airbus A330 flying from Amsterdam to Detroit, led to an even higher set of security measures, such as restrictions on carry-on bags and the implementation of full-body scanners.[69]

V. Airport attacks

The 1970s and the 1980s saw a wave of terrorist attacks directed against airports. The 1972 Lod (Tel Aviv) Airport massacre was committed by members of the Japanese Red Army who had concealed their weapons inside violin cases.

Due to a lack of consensus regarding a proper legal response, the UN Security Council was only able to produce a statement expressing its concern over the incident, recalling its previous Resolution 286 (1970).[70]

New York's LaGuardia Airport was the site of a bombing attack in 1975, with a bomb being hidden inside a locker in the terminal area. In 1982, a bomb was detonated inside the Esenboğa International Airport in Ankara, Turkey, followed by the perpetrators opening fire on the staff and passengers. A bomb also exploded in 1984 at Heathrow's Terminal 2, without killing any persons and without anyone claiming responsibility for the act.

The year 1985 was particularly notable in this sense. On 19 June, a bomb killed 3 people and injured 32 at Frankfurt Airport. On 23 June (the same day as the downing of Air India Flight 182 and allegedly as part of the same plot), a bomb exploded at Tokyo's Narita Airport. The bomb had been hidden inside a piece of luggage which was intended for an Air India flight. On 27 December, the Rome-Fiumicino and Vienna International Airports were simultaneously attacked by terrorists targeting the El Al check-in counters and passengers boarding the respective flights to Tel Aviv.

In response to these attacks, 1988 saw the conclusion of a Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.[71]

As its title says, the Protocol supplements the 1971 Montreal Convention by extending its scope of application over those offences directed against persons at airports and airport facilities, as well as aircraft not in service[72]. The Protocol, now with 173 States Parties,[73] also established the *aut dedere, aut judicare* principle.[74]

VI. Aerial shootdowns

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[67] United Kingdom Department for Transport, 'Transport strategy: Airline security' (2006).
[68] ICAO State Letter of 1 December 2006, ICAO Doc AS 8/11-06/100 (Confidential).
[69] US 111th Congress 2nd Session CRA10376, '*Securing Aircraft From Explosives Responsibly: Advanced Imaging Recognition Act of 2010*' ("SAFER AIR Act of 2010").
[70] UNSC Dec (20 June 1972) UN Doc S/10705(1972).
[71] Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474, ICAO Doc 9518 (Montreal Protocol 1988).
[72] Montreal Protocol 1988, Article II.
[73] ICAO List of Parties to the 1988 Montreal Protocol http://www.icao.int/secretariat/legal/List%20of%20Parties/VIA_EN.pdf, accessed 24 October 2015.
[74] Montreal Protocol 1988, Article III.

The first aerial shootdown incident to provoke a strong legal response took place on 1 September 1983, when a Boeing 747 operating Korean Air Lines Flight 007 was shot down by a Soviet Sukhoi Su-15 interceptor over the Sea of Japan. All 269 persons on board were killed.

The flight had departed Anchorage, Alaska for Seoul and the flight crew mistakenly kept the aircraft on a fixed magnetic heading, not remembering (or not succeeding) to intercept the proper course. As a consequence, KAL 007 ended up more than 350 nautical miles off its course, flying over the Kamchatka Peninsula and over Sakhalin Island, which was prohibited Soviet airspace.

The USSR believed the aircraft to be on an enemy spying mission (as they considered no civilian flight would normally be in that area), decided to intercept it and eventually ordered it shot down with air-to-air missiles. The aircraft crashed into the Sea of Japan.

An emergency ICAO meeting was held, adopting a resolution calling for an international investigation into the incident. At the same time, a draft resolution condemning the shootdown and demanding an enquiry was negotiated within the Security Council,[75] but it did not pass owing to a negative veto of the Soviet Union. Thus, whilst the US strongly affirmed sovereignty "neither required nor permitted" shooting down an aircraft, the USSR contended this was included in every State's sovereign right to protect its territory, including its airspace.[76]

ICAO found the violation of the prohibited Soviet airspace had been accidental, due to a "lack of situational awareness"[77] by the flight crew.

As a direct consequence of the Korean 007 incident, ICAO Member States unanimously adopted a Protocol in 1984 amending the Chicago Convention[78] by introducing Article 3*bis*. This Article calls for States to refrain from using force against civil aircraft and from endangering the safety of the passengers and of the aircraft itself in case of interception.

Should a State have "reasonable grounds" to believe an aircraft is flying in its airspace without authorization or for unlawful purposes, that State is entitled to order the aircraft to land at a designated airport or to give it any other instructions as deemed necessary. At the same time, all civilian aircraft must comply with such orders or face penalties.[79] Article 3*bis* does not prejudice any provisions of the UN Charter, respectively the right of States to use force against a civilian aircraft in self-defence pursuant to Article 51.[80]

On 3 July 1988, a civilian Airbus A300 operating Iran Air Flight 655 from Bandar Abbas to Dubai was shot down over Iranian internal and territorial waters with surface-to-air missiles by the USS *Vincennes*, a US cruiser stationed in the Persian Gulf, killing all 290 people on board.

ICAO investigated the incident and reported the aircraft had been within its usually assigned airway and within its regular schedule, information available to the *Vincennes*.[81] The A300 was also transmitting a civilian identification code ("squawk"), picked up by the US cruiser, and it was climbing to its assigned cruising altitude when it was struck by the two missiles.

Iran brought the matter before ICAO, seeking the condemnation of the United States for their actions. On 17 March 1989, the ICAO Council limited itself to "deplore the tragic incident", "express its profound sympathy and condolences" and ask for the rapid ratification of Article 3*bis* to the Chicago Convention.[82] In response to this, Iran

[75] UNSC Official Records, 38th year, 2476th meeting (12 September 1983) UN Doc S/PV.2476.
[76] UNSC Statements (6 September 1983) 22 ILM 1121.
[77] ICAO News Release, '*ICAO Completes Fact-Finding Investigation'* (16 June 1993).
[78] Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3*bis*] (signed 10 May 1984, entered into force 1 October 1988) ICAO Doc 9436.
[79] Chicago Convention, Article 3*bis*(c).
[80] Anthony Aust, *Handbook of International Law* (2nd edn, CUP 2010) 326.
[81] ICAO, Report of the ICAO Fact-Finding Investigation (November 1988), para 2.8.3.
[82] ICAO News Release, 'Decision Taken by ICAO Council on IR 655 Tragedy' (17 March 1989) PIO 4/89.

instituted proceedings before the ICJ, appealing the ICAO decision.[83] Iran argued the US had violated the Chicago and the Montreal Conventions.

The incident was recognized as an error on behalf of the USS *Vincennes* crew, who had mistakenly thought the aircraft was an attacking Iranian F-14 Tomcat fighter. This was followed by extensive negotiations which ended with the conclusion of a Settlement Agreement. The US had to pay a settlement amount to Iran and the Court removed the case from its list.[84]

In February 1996, two civilian US-registered Cessna aircraft were shot down by a MiG-29 belonging to the Cuban Air Force. The incident led the UN Security Council to adopt Resolution 1067, condemning the unlawful use of force and urging Cuba to ratify the Protocol introducing Article 3*bis*, which it regarded as codifying customary international law.[85]

In November 2002, two surface-to-air missiles were fired at a Boeing 757 belonging to Arkia Israeli Airlines as it was taking off from Mombasa. Carried out by al-Qaeda sympathizers using "MANPADS" (man-portable air-defence systems), the shots missed the plane, which eventually landed safely in Tel Aviv. In response, a resolution was adopted by the UN Security Council condemning the attack[86] and reaffirming the implementation of Resolution 1373 in the context of the international fight against terrorism.[87]

In September 2007, ICAO adopted Resolution A36-19 regarding the threat posed to civil aviation by MANPADS, urging States to take effective measures in order to control them and co-operate in restricting their manufacture and unauthorized usage.[88]

On 17 July 2014, a Boeing 777 operating Malaysia Airlines Flight 17 ("MH17") from Amsterdam to Kuala Lumpur crashed in the Donetsk Oblast of Eastern Ukraine, an area engulfed in civil war. The Report of the Dutch Safety Board, issued on 13 October 2015, indicated the aircraft had been shot down by a surface-to-air missile which caused an in-flight break-up of the 777. The Report also recommended urgent improvements to airspace management by all interested parties (ICAO, IATA, airlines etc.), in order for flight routes to avoid passing over conflict areas.[89]

On 21 July 2014, the UN Security Council unanimously passed Resolution 2166, reaffirming the rules of international law prohibiting violence against civilian aviation, condemning the incident and urging full international co-operation in order to prevent any further such acts.[90]

VII. Post–9/11 international legal framework

On 11 September 2001, al-Qaeda terrorists hijacked four civilian passenger airplanes and used them as weapons against targets situated on the ground. American Airlines Flight 11 and United Airlines Flight 175 (both Boeing 767s) were deliberately flown into the Twin Towers of the World Trade Centre in New York City; American Airlines Flight 77 (a Boeing 757) was crashed into the Pentagon building in Virginia, whilst United Airlines Flight 93 (also a 757) crashed in Pennsylvania after the passengers fought with the hijackers.

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[83] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, Application instituting proceedings, 17 May 1989.
[84] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America), Order of 22 February 1996*, *ICJ Reports 1996*, p 9.
[85] UNSC Res 1067 (26 July 1996) UN Doc S/RES/1067(1996).
[86] UNSC Res 1450 (13 December 2002) UN Doc S/RES/1450(2002).
[87] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373(2001).
[88] ICAO Assembly Resolution A36-19, '*Threat to civil aviation posed by man-portable air defence systems (MANPADS)'* (28 September 2007).
[89] Dutch Safety Board, '*Report – Crash of Malaysia Airlines flight MH17'* (13 October 2015).
[90] UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166(2014).

As an immediate and direct consequence of the attacks, ICAO called for its 33rd Session of the Assembly, which resulted in the adoption of Resolution A33-1.[91] This recognized the possibility of using aircraft *not only as targets, but also as weapons*, in a manner contrary to international law in general and the Chicago Convention principles in particular. The Assembly called for all States to cooperate in implementing the existing security measures (including the SARPs) and developing new ones in order to prevent such incidents from ever happening again.

States are to cooperate in order to adopt the SARPs and allow ICAO to implement the necessary measures by means of regular and mandatory audits.[92] These audits are meant to identify the weaknesses in each State's security framework and provide assistance to the respective Governments in improving them.[93]

As the events of 9/11 had an unprecedented negative effect on international aviation, the cooperation of all States was deemed to be essential. The implementation of the AVSEC Plan was, consequently, a responsibility shared by all States.

The International Air Transport Association ("IATA") has also been working to improve security measures while avoiding economic disruptions. In June 2002, as a response to 9/11, IATA adopted a Security Resolution calling for the implementation of effective security programs throughout its member airlines, in order to comply with the ICAO requirements.[94]

VIII. The Beijing instruments 2010 and the Montreal Protocol 2014

In 2009, ICAO considered a series of amendments to the 1971 Montreal Convention in order to better reflect and respond to the contemporary and emerging threats to aviation security.[95] States were, however, unable to reach a consensus on these amendments due to concerns of affecting their economies and it was agreed further analysis was required.[96]

The following year, States negotiated and eventually adopted the Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation,[97] as well as the Beijing Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft[98] (collectively referred to herein as the "Beijing instruments"). These have the purpose of modernising the international legal framework and mechanisms of aviation security[99] in response to "the new types of threats against civil aviation".[100]

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[91] ICAO Assembly Resolution A33-1, 'Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation' (5 October 2001) ICAO Doc 9790.

[92] ICAO, High-Level Conference on Aviation Security, '*Principles Governing International Aviation Security Co-operation*' (20 July 2012) HLCAS-WP/31.

[93] ICAO, '*The Universal Security Audit Programme Continuous Monitoring Approach and its Objective'* http://www.icao.int/Security/USAP/Pages/default.aspx, accessed 19 July 2015.

[94] Joyner and Friedlander (n 1) 850.

[95] ICAO Legal Committee 34th Session, '*Draft Protocol to the Montreal Convention'* (31 July 2009) LC/34-WP/2-2.

[96] Ruwantissa Abeyratne, '*The NW 253 Flight and the Global Framework of Aviation Security'* (2010) 35(2) *Air and Space Law* 167, 170.

[97] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (done 10 September 2010) ICAO Doc 9960 (Beijing Convention).

[98] Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (done 10 September 2010) ICAO Doc 9959 (Beijing Protocol).

[99] ICAO, Administrative Package for Ratification of or Accession to the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation http://www.icao.int/secretariat/legal/Administrative%20Packages/Beijing_Convention_EN.pdf, accessed 29 July 2015.

[100] Beijing Convention and Beijing Protocol, Preamble (second recital).

The Beijing Convention, not yet in force,[101] is intended to prevail over the Montreal Convention and its 1988 Protocol, by having consolidated and revised provisions (Article 24).

In response to the 9/11 events and as a consequence of the lengthy discussions which followed, the Beijing Convention directly criminalises the act of using aircraft as weapons, as well as the illegal discharge or transport of biological, chemical and nuclear ("BCN") weapons. Notably, the Convention is also the first international law instrument to criminalise cyber attacks on air navigation systems and facilities in Article 1(1).

The Beijing Protocol, not yet in force either,[102] revises and updates the 1970 Hague Convention. Its applicability is thus expanded to multiple forms of aircraft hijacking, including hijacking through technological means (Article II).

Threats of unlawful acts directed against the safety of civil aviation are also criminalised by the two Beijing instruments, as are acts constituting assistance, agreement, contribution to or directions of such offences.[103] They also allow States to hold legal entities, not only individuals, criminally responsible.[104] Provisions regarding the offenders' *mens rea* are included in both instruments: the required mental element is intent.[105]

The Beijing instruments also provide the provisions thereof affect no other international rights, duties and responsibilities of both States and individuals (marking the current shift in international law to a more individual-focused perspective by expressly recognizing their rights and obligations), such as those under the UN Charter, the Chicago Convention and International Humanitarian Law.[106] Furthermore, their scope does not cover activities undertaken by armed forces during an armed conflict governed by International Humanitarian Law, nor by a State's military forces in the lawful exercise of their official duties.

Insofar as jurisdiction is concerned, the Beijing instruments require States Parties to establish their jurisdiction on the basis of the nationality of the offender (active personality), whilst also allowing them to do so based on the victim's nationality (passive personality).[107] By contrast to the provisions of the Tokyo Convention, the Beijing instruments do not allow for exceptions to extradition on the ground of the act being a political offence.[108]

Because of an alarming growth in the numbers of unruly passengers aboard aircraft between 2007 and 2013,[109] a Diplomatic Conference was held in 2014 at the request of IATA to discuss updating the Tokyo Convention. The topic of unruly passengers had been on ICAO's active list of research since 2010.[110] The main causes for violent behaviour are abuse of drugs or alcohol, the feeling of being in a confined space for a prolonged period of time, as well as the prohibition of smoking aboard commercial flights.[111]

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[101] ICAO List of Parties to the Beijing Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Conv_EN.pdf, accessed 24 October 2015.

[102] ICAO List of Parties to the Beijing Protocol http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Prot_EN.pdf, accessed 24 October 2015.

[103] Beijing Convention, Article 1(2)-(5); Beijing Protocol, Article II.

[104] Beijing Convention, Article 4; Beijing Protocol, Article IV.

[105] Beijing Convention, Article 1(1); Beijing Protocol, Article II.

[106] Beijing Convention, Article 6; Beijing Protocol, Article VI.

[107] Beijing Convention, Article 8; Beijing Protocol, Article VII.

[108] Beijing Convention, Article 13; Beijing Protocol, Article XII.

[109] IATA, '*Policy – Unruly Passengers'* https://www.iata.org/policy/pages/tokyo-convention.aspx, accessed 21 July 2015.

[110] ICAO Assembly, 37th Session, '*Supplementary Report on Activities of the Organization in the First Half of 2010*' (August 2010) Doc 9921 Supplement.

[111] Diederiks-Verschoor (n 24) 413.

In legal response to this, the Conference adopted the Montreal Protocol 2014,[112] which closes some of the legal loopholes identified in the Tokyo Convention over the past decades causing most offenders to escape prosecution or sanctioning.

The legal loopholes are determined mostly by lack of jurisdiction or lack of relevant provisions in domestic criminal law systems. The usual practice is for the flight crew to hand over the unruly passenger to the State of landing authorities, who may find themselves without jurisdiction. At the same time, the authorities of the State of registration (deemed to have jurisdiction under the Tokyo system) might fail to adopt appropriate measures due to a lack of proper connection to the incident in question.

One of the early cases which discussed the mentioned lack of jurisdiction over unruly passengers was *Cordova and Santano*, where two passengers got into a fight onboard a flight from Puerto Rico to New York, even attacking members of the flight crew. The Court found Mr Cordova guilty, but he was released from custody and left unpunished due to the lack of a proper Federal jurisdiction.[113]

Through the provisions of the Montreal Protocol, if an offence is committed onboard an aircraft, mandatory jurisdiction is additionally granted to the intended State of destination, taking into consideration proportionality (endangering the safety of the aircraft or the good order therein) and legal certainty (the offence should be regarded as such in the respective State).[114] The State of the operator (most relevant today in the large context of aircraft leasing operations) also has mandatory jurisdiction. Third States (where an aircraft lands in case of diversion) have discretionary, not mandatory, jurisdiction (Article IV).

The Protocol also amends the general definition of "in-flight" offered by the Tokyo Convention, replacing it with the improved one provided by the Hague, Montreal and Beijing Conventions (between the closing of all external doors and the opening of any such door).[115]

Furthermore, the notion of "unruly" behaviour is formally recognised and expanded to include physical assaults against members of the flight crew and refusal to follow safety instructions given by them (Article X). Legal recognition is also granted to "in-flight security officers" (sky/air marshals), who may be authorised by commanders to take necessary measures to protect the safety of the flight and they also may take preventive measures if deployed according to an international agreement (Article VII).

The Protocol also introduces a right of recourse, previously unavailable under the Tokyo Convention, to recover any damages caused by unruly passengers (Article XIII). This was introduced as a direct response to the concerns expressed by airlines over the difficulties of obtaining reparation in those situations.[116]

As of October 2015, the Montreal Protocol is not in force, having been ratified by only one State (Congo).[117]

IX. Conclusions

This paper has set the argument that the rules of International Law are particularly dynamic and responsive when it comes to AVSEC regulatory measures. The main international legal mechanisms, the AVSEC Conventions concluded under

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[112] Protocol to Amend the Convention on Offences and Certain other Acts committed on board Aircraft (done 4 April 2014) ICAO Doc 10034 (Montreal Protocol 2014).

[113] *United States v Cordova (and Santano)*, US District Court, Eastern District of New York, 17 March 1950, 89 F. Supp. 298.

[114] Montreal Protocol 2014, Article VII.

[115] Ibid, Article II.

[116] ICAO International Conference on Air Law, '*Comments on the Right to Recourse presented by IATA'* (13 March 2014) DCTC Doc No 22, para 2.2.

[117] ICAO List of Parties to the 2014 Montreal Protocol http://www.icao.int/secretariat/legal/List%20of%20Parties/Montreal_Prot_2014_EN.pdf, accessed 24 October 2015.

the auspices of ICAO, were all created in direct response to certain incidents in attempts to close the existing loopholes.

One of the most notable security issues facing civil aviation is the perceived lack of any effective international enforcement mechanism, since it ultimately falls down on each individual State to take the appropriate measures.

The recent updates brought to the Conventions still have to be ratified by States in order to take effect. An uneven process of ratification or accession might lead to an uneven application of these legal instruments, particularly in an age where air travel is more widespread than ever.

The ICAO SARPs, though usually followed and complied with by most States, remain in essence what their name suggests – recommendations. ICAO can continue appealing to States to assist each other and accede to the Conventions, but it has no enforcing actions at its disposal.

All in all, the effectiveness of international law in combating and preventing crimes against aviation security depends on the political actions of States to implement and enforce the existing instruments, cooperate in the prosecution or extradition of perpetrators, implement new security standards and actively engage in discussions for their permanent improvement without waiting for new accidents to occur and thus preventing thousands of deaths in tragedies which have been, and still are, writing the rules of international aviation security.

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Les débuts historiques de la relation entre la Roumanie et la Cour internationale de Justice. Analyse de l'opinion dissidente du juge Demetre Negulescu dans le contexte de l'avis consultatif de la Cour Permanente de Justice Internationale sur la compétence de la Commission Européenne du Danube entre Galatz et Brăila

*Irina MUNTEANU**

Abstract : *Reflétant l'histoire de l'Europe entre les XIXe et XXe siècles, "l'avis de la Cour (...) a exactement rendu aux Gouvernements intéresses le service qu'ils en attendaient: en les fixant leurs situations juridiques respectives, il a facilité les négociations ultérieurs"[1].*

La position de la Roumanie sur le fond de la problématique soulevée été de défendre sa souveraineté territoriale, en supprimant ou au moins réduire les servitudes territoriales quelle avait hérité après la succession étatique. C'est justement pour ça que la position de la Roumanie devant la Cours été de contester les "pouvoirs normatifs" de la Commission, relatives a la possibilité d'établir des taxes et aux compétences de police et de juridiction avec le but de mettre en application ses décisions, en acceptant en même temps l'existence de certains pouvoirs techniques de la Commission en ce qui concerne le maintenaient et la navigation sur le fleuve.

Alors que la réponse de la Cour offert par l'avis consultatif 1927, fait toujours référence au consentement de la Roumanie- consentement pour l'existence de la Commission, consentement pour sa mission et consentement tacite quant à ses compétences, Dimitrie Negulescu analyse la volonté de la Roumanie d'être lié de chaque document international, en étudiant son comportement au moment où elle devient partie ou lors de l'exécution de leurs dispositions.

En reconnaissant à travers son opinion dissidente l'importance indubitable des principes énoncés par la Cour, Dimitrie Negulescu se concentre uniquement sur cette problématique spécifique qui génère l'ensemble de son raisonnement, à savoir la mesure dans laquelle les décisions prises lors des Conférences de Berlin et de Londres peuvent être invoqué contre la Roumanie

En identifiant les limites d'application des droits des organisations internationales- en étroite liaison avec ses fonctions et les limites de la volonté des parties au moment de leur création- le juge applique un raisonnement audacieux et qualifie la Commission Européenne comme un organisme international avec sa propre souveraineté sur le territoire de l'État roumain, jouissant d'un pouvoir législatif pour l'élaboration des ses règlements, un pouvoir exécutif pour leur exécution y encore plus impactant, d'un pouvoir judiciaire-en vue de rendre les sentences en son propre nom. Heureusement il trouve le contrepoids de cette ligne d'argumentation dans les mêmes dispositions du traité de Berlin : « Mais tous ces droits, qui lui sont conférés et qu'elle peut exercer conformément à l'article 53 du Traité de Berlin « en complète indépendance de l'autorité territoriale », elle ne les a et ne peut les exercer que dans les limites des traités et conventions internationales qui l'ont créée. Elle ne peut, par sa

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[1] Charles de Visscher, *Les avis consultatifs de la Cour permanente de Justice internationale*, 26 RCADI (1929).

propre volonté, ni étendre ni diminuer ses propres pouvoirs. »[2]

Mots-clé : *Principes, pouvoirs, juridiction, abandon de souveraineté, consentement tacite*

Emis en 1927, l'avis consultatif de la Cour Permanente de Justice Internationale a été le premier contact de la Roumanie avec l'instance de La Haye, le précurseur de la Cour internationale de Justice.

Reflétant l'histoire de l'Europe entre les XIXe et XXe siècles, "l'avis de la Cour (...) a exactement rendu aux Gouvernements intéresses le service qu'ils en attendaient: en les fixant leurs situations juridiques respectives, il a facilité les négociations ultérieurs"[3]. En outre, le sujet concerné avait une bonne raison pour naviguer à travers le contexte historique de l'Europe ces années, dont les pouvoirs exacerbées de la Commission Européenne du Danube dépeignent un miroir de la succession des anciens empires pendant la lutte entre l'Est et l'Ouest.

Bien que publié il y a près de 100 ans, l'avis consultatif représente un point de repère pour la période concernée et coïncide avec un moment où l'égalité souveraine des Etats était pas une priorité dans l'application du droit international. Mais, comme Juliane Kokott affirmait, «l'égalité souveraine est une prémisse axiomatique fondamentale de l'ordre juridique internationale» (trad.n).[4]

Avant de commencer l'analyse des concepts du droit international et les interprétations soulevées par eux dans l'avis consultatif, et l'opinion dissidente du juge Dimitrie Negulescu, on doit regarder les questions soumises à la Cour pour avis:

« 1) Selon le droit en vigueur, la Commission européenne du Danube possède-t-elle sur le secteur du Danube maritime s'étendant de Galatz à Braïla les mêmes compétences que sur le secteur à l'aval de Galatz ? Dans le cas ***où*** elle ne posséderait pas ces mêmes compétences, possède-t-elle certaines compétences ? Le cas échéant, lesquelles ? Et quelle est la limite amont de ces compétences ?

2) Dans le cas où la Commission européenne du Danube posséderait, sur le secteur Galatz-Braïla, soit les mêmes compétences que sur le secteur à l'aval de Galatz, soit certaines compétences, ces compétences s'exercent-elles sur une ou plusieurs zones territorialement définies correspondant à tout ou partie du chenal navigable, à l'exclusion d'autres zones territorialement définies et correspondant à des zones de port soumises à la compétence exclusive des autorités roumaines ? Dans ce cas, selon quel critère doit être fixée la démarcation entre zones territoriales placées sous la compétence de la Commission européenne et zones placées sous la compétence des autorités roumaines?

Au cas contraire, selon quel critère de nature non territoriale doit être fait le départ entre les compétences respectives de la Commission Européenne du Danube et des autorités roumaines ?

3) Dans le cas où il résulterait de la réponse donnée au chiffre 1) que la Commission Européenne, soit ne possède pas de compétence dans le secteur Galatz-Braïla, soit ne possède pas dans ce secteur les mêmes compétences que dans le secteur à l'aval de Galatz, à quel point précis doit être établie la ligne de démarcation des deux régimes ? »[5]

La position de la Roumanie sur le fond de la problématique soulevée été de défendre sa souveraineté territoriale, en supprimant ou au moins réduire les servitudes territoriales quelle avait hérité après la succession étatique. C'est justement pour ça que la position de la Roumanie devant la Cours été de contester les "pouvoirs normatifs" de la Commission, relatives a la possibilité d'établir des taxes et aux compétences de police et de juridiction avec le but de mettre en application ses décisions, en acceptant en même temps l'existence de certains pouvoirs techniques de la Commission en ce qui

[2] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 111.
[3] Charles de Visscher, *Les avis consultatifs de la Cour permanente de Justice internationale*, 26 RCADI (1929).
[4] Juliane Kokott, *States, Sovereign equality*, in MPEPIL.
[5] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 89.

concerne le maintenaient et la navigation sur le fleuve.

Pour étayer du point de vue historique cette analyse c'est essentiel d'encadrer l'avis consultatif dans un moment où la Roumanie était un État «jeune» - moins de 100 ans depuis l'unification de 1918- qui s'avait substitué à l'Empire Ottoman quant aux obligations relatives au régime du Danube. Elle-même était devenue souverain sur le territoire dans lequel il était applicable le régime d'internationalisation du Danube, seulement après avoir déclaré son indépendance.

De toute évidence, la Roumanie était pas partie au Traité de Paris de 1956 qui réglementait la création de la Commission et, si complètement indépendant depuis 1878 avaient été admis uniquement avec le statut d'Etat observateur aux conférences de Berlin et Londres entre 1878 et 1883. Et les travaux de ces conférences étaient précisément ceux qui visaient à étendre les pouvoirs de la Commission entre Galati et de Braila. Jusqu'au moment concerné, la Roumanie avait ratifié le Traité de Versailles de 1919 et le Statut du Danube de 1921, les deux reconnaissant un droit pour la Commission d'exercer les mêmes pouvoirs qu'avant la première Guerre Mondiale.

En formulant ses réponses, la Cour n'a pas poursuivi avec priorité, comme il serait probablement attendu, la légalité et la validité du droit institutionnel, sinon a considéré comme reconnaissance tacite la participation du délégué roumain aux travaux des conférences à Berlin et à Londres, en utilisant ensuite ce fait comme un ressort d'opposabilité des obligations internationales de la Roumanie.

Pour déterminer l'étendue des obligations assumées par la Roumanie, la Cour a eu à interpréter et à appliquer en corroboration plusieurs dispositions du Traité de Protocole de Paris de 1866, du traité de Berlin de 1878 et le traité de Londres de 1883- à qui Roumanie était pas partie - et l'Acte additionnel de 1881 et le traité de Versailles de 1919, que la Roumanie avait seulement signé, en plus de divers règlements de la Commission du Danube.

Il était tout simplement le résultat de cette interprétation celui qui a généré la conclusion de la Cour sur le fond et, par conséquent, l'opinion dissidente du juge Demetre Negulescu, l'objet de la présente étude. Le cadre institutionnel mis en place par le réseau des traites mentionnés contienne deux commissions, chacune avec son régime particulière de compétence: le Danube maritime (entre les ressorts du fleuve et Galati / Braila- c'est justement la limite de cette zone qui génère les conflits interétatiques concernant l'interprétation de leur volonté) relève de la responsabilité de la Commission Européenne, tandis que le Danube fluviale (entre Ulm et Galati / Braila) relève de la compétence de la Commission Internationale.

Sous l'incidence de l'avis consultatif et, par conséquent, de l'opinion dissidente qui sera débattu, entre seulement la Commission Européenne investie du pouvoir de réglementer la navigation sur le Danube de tous les points de vue.

Revenant aux problématiques soulevées devant la Cour, selon l'opinion du Juge Negulescu, la première question comprend deux points, un concernant l'identité des compétences de la Commission européenne du Danube dans les deux secteurs secteur - Galatz-Braïla et à l'aval de Galatz et le deuxième, en cas de manque d'identité, sur l'existence ou non de compétence dans le deuxième secteur et sur les possible limites territoriales du cela.

En ce qui concerne la seconde et la troisième question posées a la Cour, elles ont un caractère subsidiaire ; l'une consiste à chercher la limite entre la compétence de la Commission européenne et celle des autorités territoriales roumaines dans le cas où les deux compétences ne s'exercent pas sur la même portion du fleuve ; l'autre cherche à déterminer, dans le cas où les deux compétences s'exercent sur la même portion, s'il est possible d'établir des critères de démarcation entre les deux régimes.

Le « droit en vigueur » d'après lequel la Cour doit répondre en première ligne aux questions qui lui sont posées est le Statut du Danube du 23 juillet 1921.[6]

Alors que la réponse de la Cour offert par l'avis consultatif 1927, fait toujours référence au consentement de la Roumanie- consentement pour l'existence de la Commission, consentement pour sa mission et consentement tacite quant à ses compétences, Demetre Negulescu analyse la volonté de la Roumanie d'être lié de

[6] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 89.

chaque document international, en étudiant son comportement au moment où elle devient partie ou lors de l'exécution de leurs dispositions.

Le premier commentaire pertinent à cette fin, formulé par le juge ad hoc en expliquant son raisonnement fait référence à la pertinence des faits antérieurs à la Première Guerre mondiale, à égalité avec les dispositions des documents internationaux sur le Danube et ses embouchures, concluant que les Grands Pouvoirs n'avaient pas la possibilité d'étendre la compétence de la Commission européenne entre Galati et de Braila sans accord préalable de la partie roumaine.

La valeur de l'avis consultatif est indéniable en termes de la modernité des principes indiqués dans le contenu - le principe de spécialité, la personnalité juridique internationale des organisations internationales, le principe des pouvoirs implicites et le rôle de la pratique institutionnelle[7] - mais leur application dans un contexte historique inhabituelle a généré les résultats sensibles de leur interprétation.

Se penchant vers une analyse complète de nuances lexicales existantes derrière les formulations juridiques, le juge roumain démontre son rattachement à l'idée de justice, qui n'est pas né du lien patriotique avec l'Etat demandeur, sinon du goût découvert pour l'étude de ces documents.[8]

Le juge Negulescu suggérait comme principale méthode d'extraction de l'intention réelle des parties, l'étude des dispositions légales pertinentes d'un cert traité en conjonction avec toute autre disposition étroitement lié et avec laquelle forme un tout indivisible. Utilisant ce raisonnement, il arrive à appliquer les articles 52-55 du traité de Berlin, en insistant sur le caractère définitif du droit de la Roumanie à faire partie de la Commission Européenne qui se prolonge *jusqu'à Galatz*, et sur le principe consacré en faveur de la Commission, dans ces limites, d'agir en toute indépendance des autorités locales.

Selon le juge, les Grandes Puissances ont agi *ultra vires* pendant la Conférence de Londres et ne pouvaient pas modifier l'article 55 du traité de Berlin qui a fixé a Galatz la limite de séparation entre les deux Commissions.[9] Il affirme que " [c]e n'est pas seulement la qualité de Puissance riveraine de la Roumanie qui, en vertu de l'article 55 du Traité de Berlin, empêchait les Puissances d'étendre la compétence de la Commission européenne jusqu'à Brăila, c'est encore la qualité de membre de la Commission européenne, accordée à la Roumanie en vertu de l'article 53 du Traité de Berlin, qui devait empêcher les Puissances, réunies à la Conférence de Londres, de procéder en dehors de la Roumanie à l'extension des pouvoirs de la Commission européenne sur le secteur en litige.»[10]

En reconnaissant à travers son opinion dissidente l'importance indubitable des principes énoncés par la Cour, Demetre Negulescu se concentre uniquement sur cette problématique spécifique qui génère l'ensemble de son raisonnement, à savoir la mesure dans laquelle les décisions prises lors des Conférences de Berlin et de Londres peut être invoqué contre la Roumanie. Bien-sûr, il apporte des preuves à l'appui de son analyse, en se concentrant en fait, précisément sur le manque de l'acceptation tacite visée par l'avis de la Cour.

Parmi les premiers éléments analyses se trouve l'existence ou non d'un mandat remis par la Roumanie, en faveur des Hautes Puissances, y compris dans l'article 54[11] du Traite de Berlin, d'étendre la compétence territoriale de la Commission Européenne au-delà des limites déjà fixe par le traite lui-même.

Le juge roumain a élu au moment de l'avis de faire une interprétation grammaticale des expressions utilisées et, en corroboration avec les autre articles du

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[7] Alina Miron, *The modernity of the 1927 PCIJ Advisory Opinion on the Jurisdiction of the European Commision of the Danube between Galatz and Braila*, en Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Ed. Hamangiu, 2014, pp 69-88.

[8] En 1936, le juge Demetre Negulescu a publie en 57 RCADI l'etude "*L'evolution de la procedure des avis consultatifs de la Cour Permanente de Justice Internationale*".

[9] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 91.

[10] Idem.

[11] «Une année avant l'expiration du terme assigné à la durée de la Commission européenne, les Puissances se mettront d'accord sur la prolongation de ses pouvoirs et sur les modifications qu'elles jugeraient nécessaire d'y introduire. »

traite invoque pertinents dans l'affaire, conclu que "L'article 54 du Traité de Berlin conférait donc aux Puissances un double pouvoir : celui de prolonger la durée de la Commission européenne et celui de modifier l'ensemble des fonctions de cette Commission. Les mots « modifications des pouvoirs » ne se rapportent donc pas à l'extension territoriale de la compétence. "

A son avis, on ne peut pas considérer que la souveraineté de la Roumanie a été encore diminuée par l'expression « modifications des pouvoirs », même si, dans le contexte d'adoption du traite de Berlin, la Roumanie été représentée par la Sublime-Porte pour la question du Danube qui se réfère à son territoire. Plus que ça, devenue complètement indépendante, en vertu de l'article 43 du même Traité, elle aurait dû être appelée au Traité de Londres en considération de cette nouvelle qualité.

En outre, en s'appuyant sur son expertise en droit internationale publique, le juge propose une interprétation des textes juridiques en considérant le statut de la Roumanie dans la présente problématique- Puissance riveraine et en même temps membre de la Commission Européenne - et arrive a parler d'un droit même de veto dans les mains de cet état : « Ce n'est pas seulement la qualité de Puissance riveraine de la Roumanie qui, en vertu de l'article 55 du Traité de Berlin, empêchait les Puissances d'étendre la compétence de la Commission européenne jusqu'à Braïla, c'est encore la qualité de membre de la Commission européenne, accordée à la Roumanie en vertu de l'article 53 du Traité de Berlin, qui devait empêcher les Puissances, réunies à la Conférence de Londres, de procéder en dehors de la Roumanie à l'extension des pouvoirs de la Commission européenne sur le secteur en litige. Sur ce secteur, en effet, l'article 55 du Traité de Berlin confie l'élaboration des règlements à la Commission européenne, assistée par les Puissances riveraines ; le veto de la Roumanie dans la Commission européenne devait enlever tout caractère de règlement à la proposition inspirée par l'Autriche-Hongrie. »[12]

En se réfèrent a la Conference de Londre, le Juge Negulescu amène en discussion l'existence de certaines lettres échangées entre les représentants des Etats visée par les travaux de la Conférence de Londre, en cherchant de démontrer les intentions de l'époque vis-à-vis des pouvoirs reconnues a la Roumanie et ses arguments dans la matière. Quand il constate une coalisation des états devant l'idée de traiter la Roumanie sur un pied d'égalité décide de publier le contenu de ces lettres.

Au-delà de leur valeur documentaire, il utilise les lettres mentionnées pour établir le réel motif d'exclusion de Roumanie du Congrès, en statuant : « ce n'est pas le principe du Concert européen qui a été le motif de l'exclusion de la Roumanie du Congrès ; le véritable motif doit être cherché, d'une part, dans le désir de certaines Puissances d'étendre jusqu'à Braila la compétence de la Commission européenne ; d'autre part, dans le désir de l'Autriche-Hongrie de voir adopté par la Conférence le Règlement 'de navigation et de police fluviale depuis les Portes-de-Fer jusqu'à Braila »[13].

Du point de vue de notre expert, c'est justement ce Règlement celui qui divise le régime du fleuve en deux parties distinctes et le but de cette séparation était d'avantager l'Autriche-Hongrie au détriment des autres États riverains. Il justifie son raisonnement pratique en expliquant que « les riverains de l'aval des Portes de- Fer sont exclus de toute surveillance de la navigation d'amont et la réciprocité est supprimée, ce qui donne toute prépondérance à l'Autriche-Hongrie. La Roumanie, présente à la Conférence, aurait, par son veto, empêché certaines Puissances d'arriver au résultat désiré par elles. »[14]

Comme on a déjà mentionné en haut, la Cour a identifié, en donnant son avis, des très importants principes applicables dans l'espèce et qui sont illuminatives dans la matière, en considérant un contexte historique dans lequel le droit des organisations internationales été au début de son contournement.

Dans le même sens, en identifiant les limites d'application des droits des organisations internationales- en étroite liaison avec ses fonctions et les limites de la

[12] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 92.
[13] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 109.
[14] Idem.

volonté des parties au moment de leur création- le juge applique un raisonnement audacieux et qualifie la Commission Européenne comme un organisme international avec sa propre souveraineté sur le territoire de l'État roumain, jouissant d'un pouvoir législatif pour l'élaboration des ses règlements, un pouvoir exécutif pour leur exécution y encore plus impactant, d'un pouvoir judiciaire-en vue de rendre les sentences en son propre nom. Heureusement il trouve le contrepoids de cet ligne d'argumentation dans les mêmes disposition du traité de Berlin : « Mais tous ces droits, qui lui sont conférés et qu'elle peut exercer conformément à l'article 53 du Traité de Berlin « en complète indépendance de l'autorité territoriale », elle ne les a et ne peut les exercer que dans les limites des traités et conventions internationales qui l'ont créée. Elle ne peut, par sa propre volonté, ni étendre ni diminuer ses propres pouvoirs. »[15]

De ça relève encore plus l'importance de la conclusion qu'il tire et qui démontre son opinion différente à la majorité des juges au moment de l'édiction de l'avis par la Cour. En tant que la Cour Permanente fait permanemment référence au consentement de la Roumanie- consentement donné pour l'existence de la Commission, consentement pour sa mission et consentement tacite quant au ses pouvoirs le juge Negulescu commence par l'idée que « même si la Commission européenne a exercé dans le passé des situations de fait, indépendantes de l'état de droit, il est facile de démontrer qu'une règle coutumière n'a pas pu se former pour obliger la Roumanie à subir, dans le secteur contesté, une limitation de son droit de souveraineté»[16] .

Selon la CPJI, la participation à des organisations internationales dotées de pouvoirs pour créer de nouvelles obligations juridiques était simplement une autre forme d'engagement international, qui, loin d'être un « abandon de (…) souveraineté»[17], été un attribut implique par elle[18]. N'acquiesçant pas à cette opinion, le juge Negulescu a dédié son temps à démontrer la véridicité de cette affirmation, en donnant comme exemple d'objection persistante le proteste constant du délègue roumain et les sentences rendues par les autorités roumaines dans le secteur contesté prouvant que la Roumanie n'a jamais reconnue la légitimité d'un droit dans les mains de la Commission européenne.

L'importance de son raisonnement juridique novatoire est soulignée encore plus loin, quand il utilise la jurisprudence de la Cour pour le démontrer. Il affirme que « [m]ême si la Roumanie s'est abstenue d'exercer sa juridiction pendant un certain temps, on ne peut dire qu'elle ait renoncé à son droit en faveur de la Commission européenne ; car, ainsi que la Cour l'a établi dans l'affaire du Lotus (p. 28), « c'est seulement si l'abstention était motivée par la conscience d'un devoir de s'abstenir que l'on pourrait parler de coutume internationale. » »[19]

La certitude du juge roumain quant à la véridicité de son raisonnement lui amène à faire référence au Protocole interprétatif arrêté le 6 mai 1921 par la Commission européenne du Danube, pour l'interprétation de l'article 6 du Statut du Danube, signe par les représentants de la France, de l'Italie, de la Grande-Bretagne et de la Roumanie. Voici les dispositions qu'il considère pertinentes : «Il est donc clairement entendu que les pouvoirs de la Commission ne sont, en vertu de cette disposition, ni augmentés ni diminués, et qu'ils doivent continuer à s'exercer sur le fleuve, de la même manière que par le passé, en conformité avec les traités, actes internationaux et règlements de navigation auxquels tous les États représentés ont adhéré. Il est également entendu qu'entre Galatz et Braïla la Commission Européenne

[15] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 111.
[16] Idem.
[17] CPJI, Arret du 17 Aout 1923, S.S. Wimbledon, Series A, No.1, page 25.
[18] Plusieurs detailles dans Alina Miron, *The modernity of the 1927 PCIJ Advisory Opinion on the Jurisdiction of the European Commision of the Danube between Galatz and Braila*, en Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Ed. Hamangiu, 2014, pp 69-88.
[19] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, page 101

continuera, comme par le passé, à entretenir le chenal navigable et son service de pilotage. »[20]

Prenant en considération tous ces éléments et faisant même une comparaison entre les dispositions du Statut du Danube et celles du Traité de Versailles, ayant le but de vérifier quelle était la réelle volonté avant-guerres (maintenant invoque très souvent), le juge Negulescu offre ses propres réponses aux questions adresses a la Cour, repris en bas :

1. « a) Que, selon le droit en vigueur, la Commission européenne ne possède aucune compétence sur le secteur Galatz- Braïla.

b) Que les compétences de la Commission européenne s'étendent sur le bas Danube jusqu'à l'aval de Galatz et à l'exclusion de ce port.

2. Que le secteur Galatz-Braïla et le chenal navigable qui traverse les ports de Galatz et de Braïla sont soumis à la compétence de la Commission internationale du Danube.

3. Que la ligne de démarcation entre la compétence de la Commission européenne et celle de la Commission internationale doit être placée au 71ime milliaire »[21] (terme qui correspond aux embouchures du Prut).

Devant toute l'amplitude de son travaux, la précision avec laquelle Demetre Negulescu a analysé les documents pertinentes et les opinions des parties et la transparence prouvé tout au long du son raisonnement logique, il nous reste seulement a reconnaître la valeur de ce document, tout à fait marquant pour l'époque, et de constater à travers de cet exemple précis le motif pour lequel la Statut de la Cour Internationale de Justice reconnait la doctrine comme source du droit international.

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[20] Dispositions du Annexe II au Protocole no 68- Protocole interprétatif de l'article VI du Statut du Danube, arrêté par la Commission européenne du Danube, cite dans l'opinion dissidente du juge Demetre Negulesco dans l'Avis consultative de 1927, page 37.

[21] CPJI, Opinion dissidente du Juge Demetre Negulesco, Series B, no 14, pages 137-138.