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CUPRINS

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The present issue has the honor to host, in the section *Articles*, two contributions. One is signed by Mr. Philippe Couvreur, the Registrar of the International Court of Justice, and presents an oveview of the whole activity of the World Court at its 70th anniversary, which was celebrated in 2016. This text is adapted upon a presentation during a conference organized in Bucharest, on 29 May 2015, on the issue of the acceptence by Romania of the compulsory jurisdiction of the ICJ. The second contribution is signed by Victor Stoica on the topic of cessation of the international wrongful act in the jurisprudence of the ICJ.

In the section *Commentaries regarding the Activities of International Bodies in the Field of International Law*, Senior Lecturer Dr. Ion Gâlea presents a critical analysis on the issue of activating the ICC jurisdiction on the crime of aggression.

In the section *Events of Relevance in the Romanian Practice of Implementing International Law*, we continue to present such events unfolded during during the first semester of 2017, with focus on the official positions of the Romanian authorities.

The section *PhD and Master Candidate's Contribution* hosts two interesting contributions: the first one is an analysis of the advantages and disadvantages of transparency and public participation in investment arbitration proceedings, by Bogdan Ovidiu Biriș, and the second one is a paper by Radu Șerbănescu which debates the instances when cyber attacks might trigger an international armed conflict.

I hope this new on-line issue of the RJIL will be found attractive by our constant readers, and all those interested in international law will enjoy these new contributions[1] of the Romanian and foreign scholars and experts in this field.

Professor dr. Bogdan Aurescu

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

Abrevieri / Abbreviations

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

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

CAHD – 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

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

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

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

UE / EU – Uniunea Europeană / European Union

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

UNESCO – Organizaţia Naţiunilor Unite pentru Educaţie, Ştiinţă şi Cultură / United Nations Educational, Scientific and Cultural Organization

Articole / Articles

L'œuvre de la CIJ à la Veille de Son 70e Anniversaire. Son Rôle dans la Réalisation des Buts et Principes des Nations Unies

Philippe COUVREUR[1]
Greffier de la Cour Internationale de Justice

I. Introduction

La Cour internationale de Justice (CIJ) fut créée en 1945, en vertu de la Charte des Nations Unies et du Statut qui lui est annexé, pour constituer l'organe judiciaire principal de l'Organisation des Nations Unies. Mais il est possible de faire remonter la véritable date de naissance de la Cour de La Haye plus avant, en 1920, lorsque fut inscrit à l'article 14 du Pacte de la Société des Nations le principe de la création d'une Cour permanente de Justice internationale (CPJI) appelée à connaître « de tous différends d'un caractère international que les Parties lui soumettront » et à donner aussi, selon le vœux du Président Wilson, « des avis consultatifs sur tout différend ou tout point dont la saisir[ait] » le Conseil ou l'Assemblée de la Société.

Compte tenu du lien de continuité historique et juridique qui existe entre les deux Cours, on ne saurait célébrer le soixante-dixième anniversaire de la séance inaugurale officielle de la CIJ, tenue le 18 avril 1946, sans mettre en perspective l'œuvre de la CIJ avec celle accomplie par sa devancière. A cet égard, on ne peut non plus manquer de souligner que la décision de la Roumanie d'accepter aujourd'hui la compétence obligatoire de la Cour actuelle, en vertu de l'article 36, paragraphe 2, du Statut, s'inscrit dans la

[1] Le présent texte fait suite à une intervention de l'auteur lors de la conférence, marquant l'acceptation par la Roumanie de la compétence obligatoire de la Cour internationale de Justice, qui s'est tenue à Bucarest le 29 mai 2015. L'auteur souhaite remercier les organisateurs de cette conférence, et tout spécialement M. le Ministre des affaires étrangères, S.E. M. Bogdan Aurescu, pour leur aimable invitation. Le texte publié ici reprend certains développements, déjà publiés par l'auteur dans « La Corte Internacional de Justicia: su contribución al Derecho Internacional », *in* José Martín y Pérez de Nanclares (coord.), *España y la práctica del Derecho internacional*, Ministerio de Asuntos Exteriores, Escuela Diplomática, 2014, p. 145. Que le responsable de cette dernière publication soit également remercié ici pour avoir donné son aimable autorisation à cette reprise. Les opinions exprimées dans le présent article sont strictement personnelles.

droite ligne du soutien apporté par la Roumanie à la Cour permanente de Justice internationale dès le début des années 1920.[1]

La Cour permanente a été à tous égards une pionnière. Elle fut un maillon essentiel vers l'affermissement progressif du règlement judiciaire. La création de la CPJI a en effet donné corps aux espoirs, jusqu'alors frustrés ou inaboutis, d'établir un mode de règlement juridictionnel des différends entre Etats radicalement nouveau et plus performant, établi sur une base permanente et ouvert en principe à tous les Etats.

Avec l'établissement de la Cour permanente, une solution a notamment été trouvée aux problèmes éminemment délicats de la composition de l'institution et du mode d'élection de ses membres, problèmes auxquels s'étaient heurtés les précédents projets d'établissement d'une juridiction internationale permanente, en particulier de la Cour de justice arbitrale de 1907. A l'issue de nombreux débats au sein du Comité de juristes chargé d'élaborer le Statut de la future Cour permanente, il fut décidé de confier l'élection des juges à l'Assemblée et au Conseil de la SDN à partir d'une liste de personnes présentées par les groupes nationaux de la Cour permanente d'arbitrage (CPA). Ce compromis permettait à la fois de satisfaire le principe de l'égalité des Etats, représentés au sein de l'Assemblée, et de dissiper la crainte des grandes puissances d'avoir à se soumettre aux décisions d'une Cour dont la composition ne tiendrait pas compte de la prépondérance de leurs intérêts et de leurs responsabilités, telle que reflétée au sein du Conseil. Le rôle attribué aux groupes nationaux de la CPA est un reliquat de la proposition du président du Comité, le Baron Descamps, qui tendait à leur confier l'élection des Juges, proposition contre laquelle s'était élevé le membre français, M. de Lapradelle, qui considérait qu'il eût été impossible d'ignorer les nouveaux organes mis en place par le Pacte. Le mode d'élection devait également garantir l'indépendance et les plus hautes qualifications individuelles des juges ainsi que l'universalité de la Cour, les personnes appelées à en faire partie devant assurer dans l'ensemble, selon le Statut, « la

[1] Membre de la Société des Nations, la Roumanie a ratifié le protocole de signature du Statut de la CPJI le 8 août 1921. La Roumanie a signé la disposition facultative le 8 octobre 1930 et l'a ratifiée le 9 juin 1931.

La Roumanie avait accepté, pour une durée de 5 ans, la compétence de la Cour « sous réserve des matières soumises à une procédure spéciale ou à convenir [et] de la faculté pour la Roumanie de soumettre le différend préalablement à tout recours à la Cour, au Conseil de la Société des Nations », et « à l'exception *a)* des questions de fond ou de procédure pouvant amener directement ou indirectement la discussion de l'intégrité territoriale actuelle et des droits souverains de la Roumanie, y compris ceux sur ses ports et sur ses voies de communication ; *b)* des différends relatifs à des questions qui, d'après le droit international, relèvent de la juridiction intérieure de la Roumanie ». La déclaration fut renouvelée une fois, le 4 juin 1936, pour une durée de 5 ans.

représentation des grandes civilisations et des principaux systèmes juridiques du monde » (article 9 du Statut). La première composante fut ajoutée par le Comité de juristes ; la seconde simplement empruntée aux Conventions de La Haye pour le règlement pacifique des conflits internationaux de 1899 et 1907. Comme le souligna le Comité de juristes, c'était « à [ces] condition[s] seulement que, dans la Société universelle des Nations, la Cour permanente de Justice internationale serait vraiment une Cour du Monde ». Les solutions ainsi trouvées en 1920 ont globalement répondu aux attentes, ce dont a témoigné leur maintien sans changement dans le Statut de la CIJ en 1945 (le nombre de juges titulaires étant toutefois passé de onze à quinze en 1931, ce qui fut formellement confirmé dans le Statut révisé de 1936).

Il en est allé de même s'agissant de la question de la juridiction obligatoire de la Cour. On sait que le Conseil et l'Assemblée de la SDN jugèrent contraire au Pacte, et en conséquence rejetèrent, la proposition du Comité de juristes visant à établir la compétence obligatoire de la CPJI pour connaître des différends juridiques entre Etats parties à son Statut. La solution de rechange fut d'ouvrir autant que se pouvait la compétence ratione materiae de la Cour en offrant à ces Etats la faculté de lui conférer une compétence obligatoire, par la voie de déclarations générales, à l'égard de toutes ou certaines catégories de différends d'ordre juridique, sur une base de réciprocité. Cette solution consacrée à l'article 36, paragraphe 2, du Statut de la Cour permanente a été reprise en substance en 1945 dans le Statut de la présente Cour. Les auteurs du Statut de la CPJI avaient par ailleurs veillé à ce que la Cour puisse aussi connaître de toutes les affaires que les parties désireraient lui soumettre sur la base des clauses compromissoires, contenues dans les traités de paix, qui renvoyaient la solution de différends sur telle ou telle question à la compétence obligatoire de la Cour.

Enfin, c'est dans le Statut de la Cour permanente de Justice internationale que furent identifiées les différentes sources du droit international qu'il reviendrait à la Cour d'appliquer. La liste de ces sources figure, sans modification, à l'article 38 du Statut de la Cour actuelle. L'apport de la création de la CPJI fut, sur ce point, d'établir l'existence, outre des conventions et de la coutume internationale, des principes généraux de droit. La reconnaissance de cette source du droit visait à pallier le risque, pour la juridiction permanente, de se trouver dans l'incapacité de régler certains litiges, au cas où celle-ci aurait du se confiner à une application stricte des sources de droit international jusqu'alors généralement admises (conventions et coutume). Le Comité de juristes, chargé de l'élaboration du Statut de la Cour en 1920, précisa à cette occasion la distinction qu'il y avait lieu de faire entre le recours à l'équité en l'absence de règles de droit applicables, et le recours aux « principes généraux de droit » comme véritable source de droit

positif. Les débats menés au sein de ce Comité mirent en effet en lumière que le juge pouvait appliquer de tels principes sans faire œuvre de création législative. La reconnaissance des principes généraux de droit complétait ainsi la liste des moyens à la disposition du juge pour remplir sa mission. L'article 35 de l'avant-projet du Comité de juristes proposait toutefois une hiérarchisation des sources du droit international, reléguant au troisième plan les principes généraux de droit. La Cour devait, selon le Comité, tenter de régler les différends portés devant elle en appliquant, en premier lieu, les conventions internationales, puis les coutumes internationales et, dans l'hypothèse où le différend ne pourrait toujours pas être résolu, les principes généraux de droit. L'obligation, pour la Cour, de procéder selon cet ordre successif fut écartée lors de l'adoption du Statut par l'Assemblée. En outre, bien que le recours à l'équité n'eût pas été prévu par le Comité de juristes, l'Assemblée décida, à l'issue d'un bref débat, d'ajouter à l'article 38 du projet de Statut, relatif aux sources de droit applicables par la Cour, l'alinéa suivant: «La présente disposition ne porte pas atteinte à la faculté pour la Cour, si les parties sont d'accord, de statuer ex aequo et bono». L'objet de cet ajout était de donner à la disposition un caractère plus souple.

C'est en partie du fait des solutions qui ont été trouvées, sur les différents points qui viennent d'être mentionnés, que la Cour permanente de Justice internationale a été à même de remplir très largement les objectifs poursuivis par l'institution d'une juridiction internationale permanente : offrir aux Etats une enceinte de règlement impartial de leurs différends, accessible à tout moment et efficace, qui jouisse d'une autorité incontestée garantissant à la fois la plus grande sécurité juridique pour les Etats y ayant recours et le développement d'une jurisprudence cohérente et respectée.

La Cour permanente, dont le Statut était entré en vigueur le 1er septembre 1921, après qu'une majorité d'Etats Membres de la S.d.N. l'eût ratifié, a fonctionné effectivement pendant dix-huit ans, depuis son entrée en fonction en 1922 jusqu'en 1940, avant d'être formellement dissoute en 1946. L'expérience accumulée à un rythme soutenu, en un laps de temps aussi bref, a été fondatrice, en dépit d'un contexte politique de plus en plus délicat.

La première Cour de La Haye et ses membres ont notamment jeté les bases d'une véritable procédure judiciaire internationale, en puisant à la fois dans la pratique de l'arbitrage international et dans les principes généraux dégagés des systèmes judiciaires de droit interne. Les travaux conduits pour la préparation du premier Règlement de la Cour, en 1922, comme lors de ses révisions successives, demeurent aujourd'hui encore autant de références bien souvent incontournables pour interpréter et appliquer les textes actuellement en vigueur. A la faveur de dispositions initialement peu détaillées dans son Règlement, la Cour permanente a également développé de

manière empirique certaines de ses procédures, comme par exemple en matière consultative. Le professeur Démètre Negulesco, d'abord juge suppléant (1922), puis juge titulaire (1931) à la CPJI, a consacré un cours demeuré célèbre, à l'Académie de droit international de La Haye, à l'évolution de cette procédure.[1] Plus encore, la pratique procédurale suivie par la Cour permanente en certaines matières pourrait surprendre, aujourd'hui, par sa grande modernité.[2] A cet égard aussi, la procédure devant la CPJI était caractérisée par une remarquable célérité, alors même que la Cour ne siégeait pas en permanence, et cela à une époque qui ne connaissait bien sûr ni les facilités de communication ni les moyens technologiques d'aujourd'hui. La durée moyenne d'une procédure sur le fond, depuis le dépôt de l'acte introductif d'instance jusqu'au prononcé de la décision finale, se situait entre douze et dix-huit mois. Les délais de la procédure écrite étaient particulièrement brefs, avec une moyenne d'un mois et demi pour le dépôt de chaque pièce par les Parties, sans nuire pour autant à la qualité des exposés. La procédure orale se déroulait en outre dans des délais rapprochés, le plus souvent quelques semaines après la clôture de la procédure écrite ; les conseils et avocats plaidaient sans texte et le temps de préparation des répliques était extrêmement bref.

Fait tout aussi remarquable, mais parfois négligé, la Cour permanente a été un rouage particulièrement utile et efficace dans le premier essai d'organisation politique universelle qu'a constitué la Société des Nations. Elle a connu de vingt-neuf procès entre Etats, et a donné vingt-sept avis consultatifs. Sur l'ensemble de la période durant laquelle elle a été en activité (1922-1940), la CPJI a ainsi prononcé, en moyenne, entre 3 et 4 arrêts ou avis consultatifs par an. Par comparaison, un tel rythme n'a été atteint que très récemment, depuis le milieu des années 2000, par la Cour internationale de Justice.

Au-delà d'un strict bilan comptable, la CPJI a surtout participé efficacement au règlement de situations et de différends issus de la première Guerre Mondiale. Sur la base des traités de paix de 1919, qui avaient lié le maintien de la paix au règlement judiciaire des différends, la Cour permanente a connu de nombreuses questions découlant des transferts territoriaux opérés par ces traités. Cette tâche importante représenta près de la moitié des affaires portées devant la Cour, soit 14 affaires sur un total de

[1] D. Negulesco, « L'évolution de la procédure des avis consultatifs de la Cour permanente de Justice internationale », *R.C.A.D.I.* 1936, vol. 57, pp. 5-96.

[2] Ph. Couvreur, « Regards sur la Cour permanente de Justice internationale" in *The Global Community. Yearbook of International Law and Jurisprudence Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo*, New York, Oxford University Press USA, 2013, pp. 101-115.

29, et plus de la moitié des avis consultatifs, soit 19 avis sur 27. Nombre des décisions de la Cour permanente ont ainsi porté sur certaines conséquences concrètes du règlement de la paix de 1919/1920, touchant par exemple aux biens de particuliers ou aux droits de minorités nationales. On doit également souligner, dans ce contexte, le fréquent recours à la fonction consultative de la Cour permanente par le Conseil de la SDN. Il était de pratique courante pour celui-ci, de sa propre initiative ou à la demande des Etats intéressés,[1] de saisir la Cour de demandes d'avis consultatifs afin de pouvoir plus aisément résoudre des questions ou différends juridiques dont il était saisi. Le Conseil imposait ensuite très souvent, par la voie politique, la solution identifiée dans l'avis. Le contraste est assez net avec la pratique du Conseil de sécurité, qui n'a sollicité qu'une seule fois, depuis 1946, un avis consultatif de la Cour internationale de Justice.

Il n'est par ailleurs nul besoin de rappeler ici l'importante contribution apportée par la Cour permanente sur le fond même du droit international, en clarifiant, dans ses décisions, maintes règles fondamentales de ce droit : que l'on songe notamment à sa jurisprudence, en matière de droit des traités ou concernant l'engagement de la responsabilité des Etats, à laquelle la Cour actuelle continue de se référer fréquemment. Les jalons posés par la Cour permanente ont ainsi sans aucun doute répondu à l'espoir qui pouvait être placé dans l'institution d'une juridiction permanente à compétence générale et à projection universelle, mieux à même, que ne l'étaient jusqu'alors les tribunaux arbitraux, d'assurer l'édification d'une jurisprudence cohérente, et donc de combler les aspirations des Etats à plus de prévisibilité et de sécurité juridique.

Témoin de la confiance qu'inspirait la CPJI aux Etats, et plus largement de l'engouement pour le règlement juridictionnel des différends sous ses différentes formes à la même époque, le nombre d'Etats ayant souscrit à la déclaration d'acceptation de la compétence obligatoire de la Cour permanente atteignit un record au milieu des années 1930 : quarante-deux Etats, sur un ensemble de cinquante-cinq Etats membres de la Société des Nations ou

[1] Comme on le sait, la Roumanie a été en partie à l'origine de la demande d'avis consultatif adressée à la Cour permanente au sujet de la *Compétence de la Commission européenne du Danube (1927)* et relative au différend qui s'était fait jour sur ce point entre la France, la Grande-Bretagne, l'Italie et la Roumanie. La voie consultative constitua une alternative à l'introduction d'une affaire contentieuse entre la Roumanie et les Etats parties à la Convention de 1856 ayant établi la Commission du Danube.

On rappellera par ailleurs que la Roumanie avait souhaité être entendue dans la procédure consultative relative à l'*Acquisition de la nationalité polonaise*, mais que le délai fixé pour cette audition avait été jugé trop court par la Roumanie et qu'il n'avait pas été possible de le prolonger compte tenu du souhait du Conseil que la question fût résolue rapidement, *Série B, n°7*, p. 9.

signataires du Protocole établissant la CPJI, soit plus de 70 % d'entre eux, étaient liés par la déclaration facultative à la date du 15 juin 1935 ; à titre de comparaison, à ce jour seuls 35 % des Etats Membres de l'Organisation des Nations Unies (72 Etats, avec à présent la Roumanie, sur 193) ont fait une telle la déclaration. Des centaines de traités conclus à la même époque contenaient des clauses compromissoires prévoyant la juridiction de la Cour.

Naturellement, la crise des années 1930, l'effondrement de la Société des Nations et le cataclysme mondial qui s'en est suivi ont pu conforter les sceptiques qui ne voyaient dans l'institutionnalisation de la justice internationale qu'un doux rêve d'utopistes, inapte à résoudre les plus graves crises internationales. La CPJI avait néanmoins fait la preuve de l'utilité du règlement judiciaire, à côté des autres méthodes, arbitrales ou diplomatiques, de solution des litiges internationaux. Et dès les premiers projets d'édification d'une nouvelle organisation internationale, à la fin de la seconde Guerre Mondiale, l'idée de rétablir une juridiction internationale permanente, sous la même forme ou sous une nouvelle, ne fut jamais remise en cause.

De fait, en dépit de la rupture, historique et juridique, représentée par la création de l'Organisation des Nations Unies en lieu et place de la défunte Société des Nations, le Statut de la CIJ a été établi sur la base de celui de sa devancière (article 92 de la Charte) et une continuité a été assurée entre les deux Cours, comme en témoignent, par exemple, les articles 36, paragraphe 5,[1] et 37[2] du nouveau Statut. La page qui a été tournée en 1945, dans l'évolution des relations internationales comme dans l'organisation du maintien de la paix et de la sécurité internationales, a toutefois placé la Cour face à un monde profondément transformé et devant des réalités institutionnelles nouvelles. Avec l'entrée en fonction de la nouvelle Cour, en 1946, un nouveau chapitre de l'histoire de la Cour de La Haye s'est ouvert.

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[1] « Les déclarations faites en application de l'Article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes. »

[2] « Lorsqu'un traité ou une convention en vigueur prévoit le renvoi à une juridiction que devait instituer la Société des Nations ou à la Cour permanente de Justice internationale, la Cour internationale de Justice constituera cette juridiction entre les parties au présent Statut. »

Depuis 1946, la CIJ a rendu[1] 118 arrêts et donné vingt-sept avis consultatifs. Elle a su s'adapter aux évolutions majeures des relations internationales. Sa composition s'est diversifiée pour lui permettre de mieux refléter l'accroissement massif du nombre d'Etats de la communauté internationale. La Cour était au service de cinquante-et-un Etats à sa création. Elle est actuellement la Cour de cent-quatre-vingt-treize justiciables. Les questions dont la Cour a eu à connaître ont rapidement dépassé le cadre européen dans lequel la Cour permanente de Justice internationale était principalement confinée. L'examen du rôle de la Cour révèle l'universalité véritable du recours à ses services pour le règlement des différends internationaux. Près de 90 Etats, provenant de toutes les régions du monde, ont été parties à des affaires devant la Cour. Elle a ainsi connu à la fois de différends qui concernaient des Etats d'une même région (européens (plus d'une trentaine), africains (près d'une vingtaine), latino-américains (près d'une quinzaine), ou asiatiques (une dizaine)), et de différends de caractère mixte ou « intercontinental » (une quarantaine).

Il n'est pas possible, dans les limites de la présente contribution, de retracer toute l'histoire de l'activité judiciaire de la CIJ en près de soixante-dix ans. Cette histoire n'est nullement linéaire, et la nature des questions qui ont été soumises à la Cour, comme la société internationale, a évolué au cours du temps. L'anniversaire que l'on s'apprête à célébrer fournit néanmoins l'occasion de faire un bilan, nécessairement sommaire et certainement incomplet, du rôle qu'a joué la Cour internationale de Justice, dans l'accomplissement de ses fonctions judiciaires, au service des buts et principes des Nations Unies.

II. La CIJ et les Buts des Nations Unies : Maintien de la Paix et de la Sécurité Internationales et Règlement Pacifique des Différends

En tant qu'organe principal des Nations Unies, la Cour est une partie prenante dans la réalisation du premier des buts de l'Organisation, à savoir le maintien de la paix et de la sécurité internationales par le règlement pacifique, conformément aux principes de la justice et du droit international, des différends de caractère international (article 1er, paragraphe 1, de la Charte des Nations Unies). Le rôle qu'a joué la Cour à cet égard a néanmoins varié tout au long de son histoire. Ainsi, s'agissant des débuts de la nouvelle Cour, il y a lieu de rappeler le contexte politique de guerre froide et de coexistence plus ou moins pacifique comme un facteur explicatif du rare recours au règlement judiciaire des différends.

[1] La situation en mai 2015.

C'est essentiellement à travers la clarification et le renforcement du droit des Nations Unies que la Cour a apporté, dans un premier temps, sa contribution aux objectifs de l'Organisation. Dans une séquence unique d'avis consultatifs, la Cour a par exemple confirmé que l'Organisation des Nations Unies était revêtue de la personnalité juridique internationale, pouvait demander des réparations et disposait, pour accomplir sa mission, de pouvoirs implicites, en sus des pouvoirs qui lui étaient expressément conférés.[1] Elle a interprété et précisé les conditions d'admission d'un Etat aux Nations Unies et la compétence de l'Assemblée générale à cet égard.[2] Elle a affirmé en outre que les contributions calculées par l'Assemblée générale s'imposent aux Etats Membres, qui doivent verser leur quote-part, y compris pour couvrir les dépenses qui résultent d'opérations de maintien de la paix.[3] Elle a également souligné le pouvoir du Conseil de sécurité d'adopter des décisions obligatoires pour tous les Etats membres des Nations Unies,[4] et reconnu la force normative des résolutions de l'Assemblée générale.[5]

Ces avis consultatifs ont contribué au renforcement de l'Organisation de façon non-négligeable. La Cour participait de la sorte au règlement pacifique des différends, en qualité d'organe des Nations Unies, en œuvrant de manière à ce que les autres organes puissent atteindre les buts visés par la Charte avec le plus d'efficacité possible. Cet aspect de l'activité de la Cour n'a pas été délaissé ultérieurement, comme en ont témoigné les procédures consultatives relatives à la *Licéité de l'emploi ou de la menace de l'arme nucléaire*,[6] ou aux *Conséquences de l'édification d'un mur dans le territoire palestinien occupé*.[7] Les vœux fréquemment exprimés que les organes des Nations Unies recourent plus souvent à la fonction consultative n'ont toutefois pas produit les effets escomptés. Cela est particulièrement vrai

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[1] *Réparation des dommages subis au service des Nations Unies, avis consultatif,* C.I.J. Recueil 1949, p. 174.

[2] *Conditions de l'admission d'un Etat comme Membre des Nations Unies (article 4 de la Charte), C*.I.J. Recueil 1948, p. 57 ; *Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies,* C.I.J. Recueil 1950, p. 4.

[3] *Certaines dépenses des Nations Unies (Article 17, paragraphe 2, de la Charte*), *avis consultatif,* C.I.J. Recueil 1962, p. 151.

[4] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif,* C.I.J. Recueil 1971, p. 16.

[5] *Sahara occidental, avis consultatif,* C.I.J. Recueil 1975, p. 4.

[6] *Licéité de l'emploi ou de la menace de l'arme nucléaire, avis consultatif,* C.I.J. Recueil 1996 (I), p. 226.

[7] *Conséquences de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif,* C.I.J. Recueil 2004 (I), p. 130.

s'agissant du Conseil de sécurité, qui, comme il a déjà été rappelé, n'a saisi la Cour que d'une seule demande d'avis consultatif, il y a plus de quarante ans.[1]

Pour ce qui est de sa compétence contentieuse, les grandes crises internationales qui posaient des problèmes de sécurité immédiats ont, pendant des années, largement échappé à l'examen de la Cour faute, chez les Etats, d'une volonté politique de la saisir des aspects juridiques de ces problèmes. Quoi qu'il en soit, lorsque la Cour a été saisie, elle a joué pleinement son rôle.

Jusque dans les années 1970, les arrêts rendus concernaient essentiellement des questions de délimitation territoriale et de protection diplomatique. A cet égard, la contribution de la Cour à réalisation des buts des Nations Unies était de nature plutôt préventive. En effet, les questions de territoire ou de traitement des étrangers et de leurs biens sont, à l'évidence, à la source de nombreux conflits. Les arrêts de la Cour qui tranchaient ces questions ont été exécutés par les parties sans difficulté particulière. Les différends en cause étaient ainsi définitivement réglés et les parties étaient satisfaites. La contribution de la Cour à la prévention des conflits, si elle n'était pas spectaculaire, n'en était pas moins efficace et effective, que ce soit en résolvant ce type de différends ou, plus généralement, en développant le droit international, comme il sera exposé un peu plus loin.

Un changement important est survenu à la veille des années 1980, lorsque la Cour a commencé à connaître de différends faisant planer des menaces plus immédiates à la paix et à la sécurité internationales. Les affaires du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* (1979-1980), des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (1984-1986), et l'affaire du *Différend frontalier (1983-1986)*, qui faisait suite à la « guerre de noël » entre le Burkina Faso et le Mali, ont donné l'occasion à la Cour d'exercer ses fonctions judiciaires dans des situations de crise internationale aigue. La Cour a notamment affirmé que le recours parallèle à des modes de règlement politique ne faisait pas obstacle à ce qu'elle remplisse ses fonctions. Elle a ainsi clarifié les relations qu'entretiennent les divers modes de règlement pacifique des différends en mettant en exergue leur caractère complémentaire. En outre, elle a souligné que, dans le domaine du maintien de la paix et de la sécurité internationale, l'article 24 de la Charte conférait au Conseil une responsabilité principale, mais non exclusive. La Cour a ainsi déclaré que « [a]lors que l'article 12 la Charte interdit expressément à l'Assemblée générale de faire une recommandation au sujet d'un différend ou d'une situation à l'égard desquels

[1] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité,* C.I.J. Recueil 1971, p. 16.

le Conseil remplit ses fonctions, ni la Charte ni le Statut n'apportent de restriction semblable à l'exercice des fonctions de la Cour».[1]

La Cour a en outre, dans ce contexte, été appelée à indiquer des mesures conservatoires d'une portée étendue, y compris d'ordre militaire, comme ce fut le cas dans l'affaire du *Différend frontalier (Burkina Faso/Mali)*. Elle a, par la suite, expressément déclaré la nature obligatoire de telles mesures.[2]

Depuis 1986, cette tendance à voir portées devant la Cour des différends juridiques à haute densité politique s'est confirmée. La Cour a ainsi été saisie d'affaires relatives à certains des conflits parmi les plus graves de la dernière décennie, que ce soit la crise des grands lacs, en Afrique, ou les guerres en ex-Yougoslavie. Dans les affaires relatives aux *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)* et de l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie et Monténégro)*, notamment, la Cour est non seulement intervenue de manière urgente pour faire entendre la voix du droit, alors même qu'étaient commises sur le terrain des atrocités, mais également à l'issue de ces conflits, pour établir la responsabilité juridique des Etats concernés, et ouvrir ainsi la voie à la restauration de relations amicales entre les Parties.

Par ailleurs, la Cour a été saisie de nombreux différends, qui, pour ne pas concerner directement ou formellement l'usage de la force, n'en étaient pas moins susceptibles d'y mener, ou s'étaient cristallisés dans un contexte d'incidents armés, comme ce fut le cas encore récemment dans le Caucase,[3] et en Asie, à l'occasion des vives tensions créées entre le Cambodge et Thaïlande en 2011 par la question du *Temple de Préah Vihéar*. Dans cette dernière affaire, relative à l'interprétation de son arrêt au fond de 1962, la

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[1] *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt,* C.I.J. Recueil 1980, p. 22, par. 40. V. aussi *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt,* C.I.J. Recueil 1984, pp. 433-434, par. 93.

L'article 12 se lit comme suit :

> «1. Tant que le Conseil de sécurité remplit, à l'égard d'un différend ou d'une situation quelconque, les fonctions qui lui sont attribuées par la présente Charte, l'Assemblée générale ne doit faire aucune recommandation sur ce différend ou cette situation, à moins que le Conseil de sécurité ne le lui demande. (…) ».

[2] *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt,* C.I.J. Recueil 2001, p. 506, par. 109.

[3] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt,* C.I.J. Recueil 2011, p. 70.

Cour a indiqué des mesures conservatoires sans précédent, en imposant le retrait des forces armées des deux Parties d'une zone démilitarisée à cheval sur leurs territoires respectifs, définie par la Cour elle-même.[1]

L'élargissement du champ opérationnel de la Cour ne l'a bien entendu pas empêchée de développer, en parallèle, sa jurisprudence dans ses domaines d'activité plus traditionnels. Ainsi, s'agissant des différends territoriaux, elle a confirmé et précisé, dans de nombreuses décisions ultérieures, les principes fondamentaux arrêtés dans son arrêt *Burkina Faso/Mali*, par exemple en ce qui concerne les relations entre « titres » et « effectivités ».[2] Pour ce qui est des délimitations maritimes, elle a réconcilié les critères « équidistance/circonstances spéciales » (mer territoriale) et « principes équitables/circonstances pertinentes » (plateau continental et zone économique exclusive) et jeté les bases d'une véritable « méthode ordinaire » de délimitation :[3] l'arrêt rendu dans l'affaire de la *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, adopté à l'unanimité et sans aucune opinion ou déclaration, est à cet égard exemplaire.[4] Enfin, la Cour a eu l'occasion de revisiter, à l'aune du droit contemporain, les critères d'exercice de la protection diplomatique qu'elle avait dégagés dans l'affaire de la *Barcelona Traction*.[5]

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[1] *Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du Temple de Préah Vihéar (Cambodge c. Thaïlande) (Cambodge c. Thaïlande), mesures conservatoires, ordonnance du 18 juillet 2011,* C.I.J. 2011, p. 537. Les tensions à l'origine de l'indication de cette mesure avaient été par ailleurs préalablement portées devant le Conseil de sécurité, qui avait fait une déclaration à la presse à ce sujet («sur la situation à la frontière entre le Cambodge et la Thaïlande») en février 2011.

[2] *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)),* C.I.J. Recueil 1992, p. 350 *; Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt,* C.I.J. Recueil 2002, p. 625 *; Différend frontalier (Bénin/Niger), arrêt,* C.I.J. Recueil 2005, p. 90 *; Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt,* C.I.J. Recueil 2008, p. 12 *; Différend Frontalier (Burkina Faso/Niger), arrêt,* C.I.J. Recueil 2013, p. 44.

[3] *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt,* C.I.J. Recueil 1993, p. 38 *; Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt,* C.I.J. Recueil 2001, p. 40 *; Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée Équatoriale (intervenant)), arrêt,* C.I.J. Recueil 2002, p. 303 *; Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt,* C.I.J. Recueil 2009, p. 61 *; Différend territorial et maritime (Nicaragua c. Colombie), arrêt,* C.I.J. Recueil 2012, p. 624.

[4] *Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt,* C.I.J. Recueil 2009, p. 61.

[5] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt,* C.I.J. Recueil 2010, p. 651, par. 21 ; p.655, par. 34 ; et p. 658, paras. 43 et 44.

III. La CIJ et les Principes des Nations Unies : le Renforcement et le Développement de la Primauté du Droit à l'Echelle Internationale

Au-delà de la participation directe de la Cour à la réalisation des buts de l'Organisation des Nations Unies, la jurisprudence que la Cour a développée en près de soixante-dix ans d'existence, au fil de l'évolution des besoins de la société internationale, a contribué de manière unique à l'affirmation et au renforcement du droit dans les relations internationales. Pour reprendre une terminologie devenue très en vogue ces dernières années, la Cour a rempli, et continue de remplir, un rôle irremplaçable dans la « promotion de l'état de droit » au plan international.[1] Celui-ci peut être apprécié, brièvement, à la lumière de trois piliers essentiels de l'état de droit au niveau international.

En *premier* lieu, toutes les activités de la Cour sont orientées vers la promotion de l'état de droit en ce sens qu'elles visent à assurer le respect du droit et de la justice dans la société internationale. Les prononcés de la Cour offrent à cet égard, en de nombreuses matières, une référence pouvant servir, s'agissant tant des Etats que des organisations internationales, à « guider leurs activités et conférer certitude et légitimité à leurs actions ».[2] On a déjà rappelé plus haut le concours apporté par la Cour, à travers ses avis consultatifs, à l'affirmation de la prééminence du droit comme instrument d'un fonctionnement efficace des organisations internationales ; comme elle l'a dit dans le premier avis consultatif qu'elle a rendu, « le caractère politique d'un organe ne peut jamais le soustraire à l'observation des dispositions conventionnelles qui le régissent, lorsque celles-ci constituent des limites à son pouvoir ou des critères à son jugement ».[3]

En exerçant sa compétence contentieuse, la Cour a, de plus, précisé nombre de principes essentiels du droit international, tels qu'ils sont notamment inscrits dans la Charte des Nations Unies. On pense naturellement aux apports particulièrement marquants de la jurisprudence de la Cour en matière d'interdiction du recours à la force et de légitime défense. Dans la toute première affaire contentieuse dont elle a été saisie, celle du *Détroit de Corfou*, la Cour a affirmé que la politique de force «qui, dans le passé, a donné lieu aux abus les plus graves … ne saurait, quelles que soient les déficiences présentes de l'organisation internationale, trouver aucune place dans le droit

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[1] *Déclaration de la Réunion de haut niveau de l'Assemblée générale sur l'état de droit aux niveaux national et international*, 24 septembre 2012, A/RES/67/1.

[2] Cf. la résolution précitée, par. 2.

[3] *Conditions de l'admission d'un Etat comme Membre des Nations Unies (Charte, art. 4), avis consultatif,* C.I.J. Recueil 1948, p. 64.

international»[1]. Dans son arrêt de 1986 en l'affaire relative aux *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, la Cour a eu l'occasion d'examiner en détail les règles internationales en la matière, et a pu ainsi déterminer leur caractère coutumier et préciser les conditions du recours à la légitime défense.[2] Elle a confirmé ces règles dix ans plus tard dans le cadre de son avis consultatif concernant la *Licéité de la menace ou de l'emploi d'armes nucléaires*.[3] La Cour a encore été appelée à se pencher sur des questions relatives à l'emploi de la force et à la légitime défense dans l'affaire des *Plates-formes pétrolières*[4], dans la procédure consultative afférente aux *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*,[5] ainsi que dans l'affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*.[6]

On doit également évoquer ici la jurisprudence de la Cour en matière de droits de l'homme, dont le respect et le développement figurent parmi les buts des Nations Unies (article 1, paragraphe 3, et article 55 de la Charte). Bien que la compétence de la Cour soit limitée à des différends inter-étatiques et à des questions juridiques intéressant principalement les activités des organisations internationales, elle a été amenée à souligner en diverses occasions l'importance des droits fondamentaux de la personne humaine,[7] et à sanctionner effectivement leur existence et leur portée au plan international.[8] La contribution de la Cour à la réalisation concrète de la

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[1] *Détroit de Corfou, fond, arrêt,* C.I.J. Recueil 1949, p. 35.

[2] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt,* C.I.J. Recueil 1986, pp. 92-94.

[3] *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif,* C.I.J. Recueil 1996 (I), pp. 244-247, paras. 40-48.

[4] *Plates-formes pétrolières, (République islamique d'Iran c. Etats- Unis d'Amérique), fond, arrêt,* C. I. J. Recueil 2003, pp. 180-183, paras. 37-42.

[5] *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif,* C.I.J. Recueil 2004 (I), p. 194, par. 139.

[6] *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt,* C.I.J. Recueil 2005, pp. 223-227, paras. 148-165.

[7] *Barcelona Traction, Light and Power Company, Limited, arrêt,* C.I.J. Recueil 1970, p. 32, par. 34 ; *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif,* C.I.J. Recueil 1971, p. 57, par. 131, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif,* C.I.J. Recueil 2004 (I), p. 199, par. 157.

[8] Concernant, par exemple, le caractère impératif de l'interdiction de la torture, v. *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt,* C.I.J. Recueil 2012, p. 457, par. 99.

protection des droits des individus a été notamment illustrée par les affaires *LaGrand* et *Avena*, dans lesquelles elle a reconnu que l'article 36 de la convention de Vienne sur les relations consulaires conférait directement des droits aux individus (sans toutefois se prononcer sur leur nature de « droits de l'homme »), et que l'Etat pouvait les faire valoir devant la Cour parallèlement à la violation de ses droits propres.[1] L'affaire *Ahmadou Sadio Diallo* a également donné l'occasion à la Cour de mesurer l'extension contemporaine du champ d'application de la protection diplomatique, laquelle, « à l'origine limité[e] aux violations alléguées du standard minimum de traitement des étrangers, s'est étendu[e] par la suite pour inclure notamment les droits de l'homme internationalement garantis ».[2]

Il serait possible de se référer encore aux décisions de la Cour touchant au droit de la décolonisation, au droit international humanitaire, ou encore au droit international de l'environnement. Dans ces différentes branches du droit international, la Cour a été conduite à souligner et à sanctionner certaines des valeurs qui sont au cœur des préoccupations de la communauté internationale.

La contribution de la Cour à la promotion de l'état de droit peut, en *deuxième* lieu, se mesurer dans l'influence qu'a exercée sa jurisprudence sur le développement du droit international. En remplissant sa mission d'application du droit international, la Cour a souvent joué un rôle important dans la cristallisation de nouvelles normes du droit international. L'influence de la Cour a été particulièrement manifeste dans la définition des principes applicables en matière de délimitation du plateau continental et de la zone économique exclusive. La Cour a également joué un rôle central dans l'établissement et le développement des principes présidant à l'engagement et à la mise en œuvre de la responsabilité internationale des Etats. Dans ces deux domaines, en particulier, les travaux de codification ont largement bénéficié de la jurisprudence de la Cour et des solutions dégagées par cette dernière à l'occasion de différends qui lui avaient été soumis. Et naturellement, la Cour a aussi, à son tour, pu trouver dans les grandes codifications menées à bien dans le courant du XXe siècle certains des principes et règles dont elle a confirmé la valeur juridique coutumière.

Enfin, et *troisièmement*, au-delà du respect et du développement du droit international, la Cour a une responsabilité particulière de veiller à la cohérence et à l'unité du droit international, composantes certainement tout aussi essentielles de l'édification d'une société internationale fondée sur le

[1] *LaGrand (Allemagne c. États-Unis d'Amérique), arrêt,* C.I.J. Recueil 2001, p. 494, par. 77; *Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique), arrêt,* C.I.J. Recueil 2004, p. 36, par. 40.

[2] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), exceptions préliminaires, arrêt,* C.I.J. Recueil 2007, p. 599, par. 39.

droit. Sa nature singulière de plus haute juridiction mondiale et son universalité imposent à la Cour un tel devoir. La CIJ est ainsi non seulement l'organe judiciaire principal des Nations Unies, mais également comme elle l'a elle-même indiqué, « l'organe du droit international »,[1] dont les décisions et la jurisprudence sont revêtues d'une autorité et d'une légitimité particulières. Ses arrêts comme ses avis consultatifs constituent un instrument unique pour connaître le droit et un guide pour son application. La tâche de la Cour a cependant évolué en ce domaine depuis 1945, compte tenu tant de la complexité croissante de la société internationale que de la multiplication des organisations et autres instances investies de missions de production et d'application du droit. La jurisprudence récente de la CIJ témoigne à cet égard de sa préoccupation de tenir compte de la création de nouveaux organes juridictionnels, tant à l'échelle internationale que régionale, qui ont pu être appelées à interpréter et appliquer les règles dont elle-même doit également connaître. Dans son avis consultatif sur les *Conséquences de l'édification d'un mur dans le territoire palestinien occupé,* la Cour a ainsi eu l'occasion d'examiner les vues du Comité des droits de l'homme quant à l'exercice par les Etats de leur compétence hors de leur territoire national, et de conclure, dans le même sens que le Comité, que les dispositions du Pacte international relatif aux droits civils et politiques s'appliquent aux Etats dans une telle hypothèse.[2] Par ailleurs, dans ses arrêts relatifs à l*'Application de la convention pour la prévention et la répression du crime de génocide* (*Bosnie-Herzégovine c. Serbie)* et *(Croatie c. Serbie*), la Cour s'est référée aux observations du Tribunal pénal international pour l'ex-Yougoslavie concernant, entre autres, l'intention spécifique de détruire en tout ou en partie le groupe visé qui est requise pour qualifier le crime de génocide (*dolus specialis*).[3] A cet égard, dans l'arrêt *Croatie c. Serbie*, la Cour s'est encore référée aux vues dudit Tribunal en ce qui concerne le critère à appliquer pour admettre la preuve indirecte d'une intention génocidaire en procédant par voie de déduction.[4] Dans un contexte différent, en l'affaire *Ahmadou Sadio Diallo*, la Cour a aussi été amenée à se référer aux décisions d'autres juridictions internationales, et en particulier à la jurisprudence des principaux

[1] *Détroit de Corfou, fond, arrêt, C.I.J. Recueil 1949*, p. 35.

[2] *Conséquences de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif*, C.I.J. Recueil 2004 (I), p. 179, par. 109.

[3] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie), fond, arrêt,* C.I.J. Recueil 2007, p. 121, par. 188 ; *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), arrêt du 3 février 2015*, par. 142.

[4] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), arrêt du 3 février 2015*, par. 148.

organes juridictionnels régionaux de droits de l'homme (la Commission africaine des droits de l'homme et des peuples, la Cour européenne des droits de l'homme et la Cour interaméricaine des droits de l'homme) relative aux conditions d'expulsion des étrangers.[1]

Sans jamais abdiquer son propre jugement et la mission qui lui est spécifiquement assignée, la Cour est de la sorte en mesure d'assurer que les progrès du droit dans la société internationale ne se fassent pas au prix d'une plus grande instabilité et insécurités juridiques : pour reprendre les termes de la Cour, « [i]l en va de la nécessaire clarté et de l'indispensable cohérence du droit international ; il en va aussi de la sécurité juridique, qui est un droit pour les personnes privées bénéficiaires des droits garantis comme pour les Etats tenus au respect des obligations conventionnelles ».[2]

IV. Conclusion

Le bilan très sommaire qui vient d'être dressé appellerait sans doute de tracer quelques perspectives d'avenir pour la Cour internationale de Justice. Sans s'y aventurer, il est néanmoins possible de formuler deux courtes observations en forme de prolongement à ce bilan.

Tout d'abord, l'exercice de sa fonction par la juridiction internationale permanente repose toujours sur le consentement des Etats, lequel implique le respect et l'exécution immédiate, pleine et entière des décisions de la Cour dans les affaires auxquelles ces Etats sont parties. Aussi doit-on se réjouir que l'absence de caractère à strictement parler « exécutoire » des décisions de la Cour — qui n'empêche pas la possible intervention du Conseil de sécurité en vertu de l'article 94, paragraphe 2, de la Charte —, n'ait quasiment jamais eu de répercussions, en pratique, sur la bonne exécution de ses décisions par les Etats concernés. Cette preuve de l'efficacité de la juridiction internationale, et donc de la réalité de sa contribution au respect effectif de l'état de droit au niveau international, doit être soulignée.

Ensuite, le succès d'une juridiction internationale repose sur la confiance des Etats dans la capacité de celle-ci de mener à bien sa mission avec célérité, économie et efficacité. La CIJ a, de ce point de vue aussi, donné la preuve qu'elle était en mesure de répondre aux aspirations des Etats, en réformant régulièrement ses méthodes de travail et en adaptant son fonctionnement aux nouvelles réalités, pour faire face à une charge de travail et à une complexité de celui-ci en constante augmentation au cours du temps.

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[1] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt,* C.I.J. Recueil 2010, pp. 664-667, paras. 67-74.

[2] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt,* C.I.J. Recueil 2010, p. 664, par. 66.

Ce double constat confirmerait, s'il en était besoin, le bilan de santé positif d'une institution judiciaire qui fête ses soixante-dix années d'existence.

Cessation of the International Wrongful Act before the International Court of Justice

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Abstract: *This article studies the manner in which cessation is interpreted and how it currently applies before the International Court of Justice. The difference between various scholar opinions and the approach that the International Court of Justice has towards this remedy is relevant because coherence and predictability is relevant for both the practitioners and for academics.*

Key-Words*: State Responsibility, remedies, cessation, ICJ*

1. Introduction

Cessation has been often ignored by the doctrine, because of its special characteristics related to the manner in which this remedy manifests its effects. Its interpretation and clarification have led to certain confusions which determined its assimilation with other remedies such as restitution or satisfaction. The conclusion that confirms this view is best represented by the words of Special Reporteur Arangio-Ruiz, which expressed the following opinion:

> *"Except for some valuable thoughts expressed on it by the previous Special Rapporteur this remedy has indeed rarely been the specific object of study; and when it is considered, it is often done within the framework and for the purposes of a discussion aimed at determining, obversely, the notion of restitutio in integrum rather than for the purpose of determining the concept of cessation per se, as a remedy*

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with a role of its own'."[1]

The Special Raporteur considers, therefore, that cessation is a veritable remedy and that its analysis should not be focused on its interaction with other remedies but rather in an isolated manner. However, one of the main differences is that out of all the remedies that are available before the International Court of Justice, cessation implies a negative action respectively, as opposed to restitution in kind, compensation and satisfaction, which imply a positive approach. Crawford confirms this view, and concludes that *"these paragraphs can be seen to address the negative and positive aspects of future performance respectively. Article 30(a) is concerned with securing an end to wrongful conduct"*.[2]

Certain authors agree with the above mentioned conclusion, and, as a consequence, consider cessation as being the a fundamental type of relief.[3] More so, opinions have been expressed in the sense that *"in practice, cessation is often the primary remedy sought."*[4] This finding substantiates the fact that the primacy of restitution in kind as a remedy before the International Court of Justice is often an exaggeration.

On the other hand, another relevant issue with respect to cessation is its interaction with restitution and satisfaction. This issue is most relevant regarding the interpretation and clarification of the notion of cessation. Several opinions exist which seem to underestimate cessation as remedy before the International Court. Thus, it has been argued that, at times, *"the cessation of the wrongful act may correspond to a form of restitution since its aimed at the restoring the situation as it existed prior to the wrongful act"*.[5]

However, as mentioned above, we consider that cessation is an independent remedy, even if it might contain certain similarities with others. We therefore

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[1] Preliminary report on State Responsibility, Mr. Gaetano Arangio-Ruiz, Special Rapporteur Topic: State responsibility Extract from the Yearbook of the International Law Commission: 1988, vol. II(1), p. 13.

[2] James Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, p.459.

[3] Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 2015, p.38.

[4] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, Edward Elgar Publishing, 2012, p. 296.

[5] Philippe Cuouvreur, *The International Court of Justice and the Effectiveness of International Law*, Brill/Nijhoff, 2017, p. 233.

agree with the conclusion that it *"is considered a fortunate development that the ILC clearly endorsed the idea that cessation is an autonomous legal consequence of an internationally wrongful act and a very important one at that, as it is stressed by the fact that in the 2001 articles the provision containing cessation comes directly after that on the continued duty of performance and precedes that concerning reparation"*[1] and furthermore, with the conclusion that "*both cessation of the violation and guarantees of non-repetition are appropriate remedies under international law."*[2]

2.1. The definition of cessation

There is less to no controversy with respect to the definition of cessation. Thus, the conclusion that *"Cessation consists in what Special Raporteur Riphagen called "an obligation to stop the breach"*[3] seems a reasonable one, and it contains no need for a special analysis, or further arguments. Several definitions have been provided by the doctrine and by the International Court in this sense. The conclusion of Judge Tomka in his Separate Opinion from the Avena Case, is relevant from the perspective of the definition of cessation:

> *"I consider that the fact that individual cases are still pending before the United States courts is not pertinent to the obligation of cessation. It is the continuing nature or otherwise of the violation which determines whether the obligation of cessation exists. The Court can only order the cessation of a wrongful act if that act continues."*[4]

What it, however, relevant to note is the the Commentary of the Draft Articles on State responsibility does not provide any definition of this remedy.[5] This might have occurred due to the fact that the drafters of the Articles intended to leave the means on interpreting this notion to the state parties of the dispute or to the International Courts and Tribunals which decided to refer to this

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[1] Juan Jose Quintana, *Litigation at the International Court of Justice: Practice and Procedure*, Brill Nijhoff, 2015, p. 1153.

[2] Adrienne M. Tranel, "The Rulling of the International Court of Justice in the Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence", in *American University International Law Review*, 2005, Volume 20, Issue 2, Article 4, p. 450.

[3] Juan Jose Quintana, *Litigation at the International Court of Justice: Practice and Procedure*, Brill Nijhoff, 2015, 1150.

[4] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Separate Opinion of Judge Tomka, paragraph 19, p. 90.

[5] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, pp. 88-91.

remedy. Even if cessation has not necessarily been defined, it is clear that *"the recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued"*.[1]

The Court determined that it has an inherent power to find that cessation is applicable before it, and further established that two conditions should be met for it delivering a judgment in this respect, as such:

> *"The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued."*[2]

Furthermore, it is also relevant to point out that in this case the Tribunal concluded that *"the power to order the cessation of an illegal behaviour was inherent in the powers of a competent Tribunal"*.[3]

2.2. The characteristics of Cessation

The ILC Articles contains provisions related to cessation and guarantees of non-repetition within Article 30. These two remedies are linked by the above mentioned draft articles which provides:

> *"The State responsible for the internationally wrongful act is under an obligation:*
>
> *(a) to cease that act, if it is continuing;*
>
> *(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."*

Thus, we can conclude that cessation and assurances/guarantees of non-repetition are circumstantiated depending upon the nature of the illegal act,

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[1] James Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, p. 265.

[2] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Reports of International Arbitral Awards, 30 April 1990, Volume XX, pp. 215-284, p. 270.

[3] Cristoph Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration", *Arbitration International*, Volume 20, No. 4, LCIA, 2004, p. 328.

i.e. whether the act is of a continuing nature or whether the act has stopped. Therefore, if the act is of a continuing nature the state has the right to request the International Court to deliver a judgment providing for cessation; *"as stated by the tribunal in the Rainbow Warrior arbitration, for an order of cessation there are 'two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued'. The second condition is self-explanatory."*[1]

The Commentary of the ILC Articles also mentions that the obligation to cease the continuous breach of an international obligation is the first requirement for eliminating the consequences of that breach. Thus, the ILC Articles confirm implicitly that cessation represents an autonomous remedy of international law, since it contributes to the restoration of the *status quo ante.*

> *"Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct."* [2]

Furthermore, the Commentary of the ILC Articles mentions the following, with respect to the function of cessation as a remedy:

> *"The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law."*[3]

The main feature of cessation is that it is focused on obligations that are of a continuing nature. Thus, we agree with the conclusion that *"the distinguishing feature of cessation as a remedy is that it is called to play a role in the context of a breach of an obligation that is of a continuing nature – in the sense that the breach persists on the date of the delivery of the decision. As a result, if the breach of an international obligation occurred in the past and has come to an end by the time of the rendering of the decision the Court will find no*

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[1] James Crawford, *State Responsibility : The General Part* ,Cambridge University Press 2013, p. 462.

[2] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 89.

[3] Ibid.

cause to order its cessation".[1] Therefore, the International Court can order cessation only in the situation in which the breach is contemporary with the moment in which the judgment is delivered. Consequently, the Responding state can prevent such an award by ceasing the act during the proceedings. This is a distinctive feature of cessation, as opposed to compensation, for example.

This conclusion has been confirmed by the International Court of Justice in several cases. Thus, the International Court has determined that cessation represents a remedy in the Dispute related to Navigational and Related Rights, case in which it determined that *"the cessation of a violation of a continuing character and the restoration of the legal situation constitute an appropriate form of reparation for the injured state".*[2]

Thus, for the Court to order cessation it must first find that the responding State is breaching an international obligation at the time of the rendering of the judgment. If the state has stopped breaching the obligation before the judgment is issued, the request for cessation would become moot. It is therefore a veritable prerequisite that must be met for cessation to be granted by the International Court. *"It is the continuing nature or otherwise of the violation which determines whether the obligation of cessation exists. The Court can only order the cessation of a wrongful act if that act continues".*[3]

2.3. The Interaction between Cessation and Other Remedies

The interaction that cessation has with reparation in general and with other remedies in particular is probably the most controversial issue with respect to this remedy. Certain authors have gone as far as concluding that cessation is not reparation at all, providing the following arguments in this respect:

> "*In the field of doctrine, Professor Dominicé has rightly observed that "the obligation to bring an illegal situation to an end is not reparation, but a return to the initial obligation", adding that "if one speaks, regarding this type of circumstance, of an obligation to give (in the general sense) restitutio in integrum, it does not actually mean*

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[1] Juan Jose Quintana, *Litigation at the International Court of Justice: Practice and Procedure*, Brill Nijhoff, 2015, p. 1150.

[2] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports, 2009, p. 267.

[3] Juan Jose Quintana, *Litigation at the International Court of Justice: Practice and Procedure*, Brill Nijhoff, 2015, p. 1150.

> *reparation. What is required is a return, to the situation demanded by law, the cessation of illegal behaviour. The victim State is not claiming a new right, created by the illegal act. It is demanding respect for its rights, as they were before the illegal act, and as they remain".*[1]

Also, as mentioned above, the interaction of cessation with remedies such as restitution, satisfaction and specific performance proves to be of relevance as certain different opinions have been expressed in the sense that the above remedies encompass to certain degree, or, in other words, imply, cessation of the wrongful act.

a) Cessation and Restitution

The relationship between cessation and other remedies such as restitution has been constantly under the scrutiny of the doctrine. For example, Crawford considers that cessation and restitution are similar with respect to their final scope and argues that *"often, the result of restitution will be indistinguishable from that of cessation."*[2] On the other hand Julio Barboza is more drastic in his interpretation of cessation and considers that *"cessation is but a form of restitution and assurances and guarantees of non-repetition also imply some form of reparation for a moral damage, then only by causing a material or moral injury would the breach of an obligation produce some legal consequence according to the draft articles."*[3] Other opinions are even more drastic. Thus, Gideon Boas concludes that in certain situations cessation and restitution are identical, implying that a request for one would imply the other. He concludes that "*in some cases cessation might be indistinguishable from restitution, especially where the wrongful conduct is an omission."*[4]

While we might consider the first conclusion related to the scope of these remedies, as having certain merit, the second one expressed by Barboza and

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[1] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports, 2009, p. 269.

[2] James Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, p. 465.

[3] Julio Barboza,"Legal Injury: The Tip of the Iceberg in International Responsibility", in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, p. 9.

[4] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, Edward Elgar Publishing, 2012, p. 296.

Boas, seems too drastic in its implication that cessation should not even be a remedy as, it has identical characteristics with restitution.

We consider the second argument as being over reaching. Should the wrongful act be an omission, a request for restitution would be redundant, and at times even moot, as the respondent would not have anything material or legal to restore. A claim for restitution would therefore be without a precise object, in our view. Furthermore, should the act be an omission, the request for cessation would also seem moot as the respondent would not have to stop any legal action, but he would have to perform a certain action. Therefore, in the situation that the illegal act is an omission, we consider that the appropriate cause of action would be specific performance and not cessation or restitution. This conclusion is confirmed by the following:

> *"I respectfully beg to disagree on this point: the breach of the obligation has been completed as soon as the date on which the obligation is due has passed without the obligation having been complied with. That obligation, moreover, can never be fulfilled because the date is a fundamental part of the obligation."*[1]

We therefore consider that the approach of Christine Grey is more relaxed and preferable in the same time when she argues that there is some uncertainty as to the relationship between restitution, specific performance and cessation.[2] We therefore agree with her conclusion that there rather is a relationship between cessation and restitution rather than them being identical.

The judgment of the Tribunal in the Rainbow Warrior Case might have contributed to the contemporary misinterpretation of cessation and further confusion between cessation and restitution. Grey also confirms this view, and concludes that the Rainbow Warrior Tribunal misinterpreted the requests of the parties, as such:

> *"New Zeeland expressly sought restitution and apparently understood this as including an order for specific performance of a treaty; it said that any other remedy would be inappropriate in this*

[1] Julio Barboza,"Legal Injury: The Tip of the Iceberg in International Responsibility", in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, p. 14.

[2] Christine Gray, *Judicial Remedies in International Law*, Clarendon Press/Oxford, 1996, p. 61.

case. But the tribunal perversely regarded this as a request for the cessation of the wrongful act."[1]

Furthermore, in the Wall Advisory Opinion, cessation was also addressed and granted by the International Court. The International Court concluded that Israel should demolish the Wall, and that, should it fail to do so, the international obligation would be continuingly breached. One very relevant issue with regards to the difference between cessation and restitution is that the first cannot be avoided by the responding party due to material impossibility. Thus, *"in contrast to the absolute obligation of cessation, restitution may not be required if the burden is out of proportion to the benefit, at least according to the ILC articles on state responsibility. Placing the dismantling as an obligation of cessation avoids allowing Israel to pay for the breach by providing compensation in lieu of restitution".*[2] Cessation, therefore, can repair in certain cases what restitution is not able to.

b) Cessation and Specific Performance

Cessation and specific performance are indeed both part of the general principle of *pacta sunt servanda*. Crawford addresses this issue when concluding that *"one issue raised in the drafting of Article 30(a) was the distinction between the obligation of cessation and the continued duty of performance of the underlying obligation, specifically whether the former is merely a function of the latter."*[3] Thus, one might indeed consider that a duty of performance would imply a duty to cease the breach of an obligation. However, this is not necessarily the case. Crawford further quotes the Commentary of the ILC Draft Articles on State Responsibility, as such, without any further explanation related to the distinction between cessation and specific performance:

> *"There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary*

[1] Christine Gray, "Choice between Restitution and Compensation", *European Journal of International Law*, Vol. 10, No. 2, pp. 413-423, p. 420.

[2] Pierre d'Argent, "Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion", in Pierre-Marie Dupuy et al. (eds.), *Common Values in International Law, Essays in Honor of Christian Tomuschat*, Kehl, 2006, p. 463.

[3] James Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, p.264.

> *obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14."*[1]

Indeed, the conclusion of the Commentary of the ILC Draft Articles on State Responsibility has merit. We consider that the distinction between cessation and specific performance is further demonstrated by the fact that article 48(1) b of the ILC Articles which gives a State the possibility of choosing between these two remedies as such:

> *"2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:*
> *(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and*
> *(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State"*

As mentioned at the beginning of this section, both cessation and specific performance are part of the general principle of *pacta sunt servanda*. However, the manner in which this principle is respected differs when considering these two remedies. The conclusion that *"the obligation of cessation is crucial to the international rule of law and the underlying principle of pacta sunt servanda. As a wrongful act does not affect the States continued duty to to perform its obligation, a state is under a duty to cease its act if it is continuing"*[2] confirms the view that cessation and specific performance apply differently, the first being conditioned upon a breach while the latter overarches the behaviour of the parties throughout the performance of the treaty whether there is a breach or not. This conclusion is also established by article 29 of the Articles on State Responsibility provides the following:

> *"The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to*

[1] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 89.

[2] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, Edward Elgar Publishing, 2012, p. 296.

perform the obligation breached."[1]

It is therefore our opinion that even if cessation and specific performance represent two different faces of the same coin, they are different in scope, one being conditioned upon a breach while the other remaining in force throughout the performance of a treaty.

c) Cessation and Satisfaction

The characteristics of cessation have often led to the conclusion that this remedy is rather a form of satisfaction than an independent remedy. Thus, arguments could be expressed in the sense that under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, cessation is a form of satisfaction and that the ILC Articles contain different provisions in this respect.

However, we consider that the ILC Articles contain the preferable provision and that, as a consequence, cessation should not be confused with satisfaction first of all, due to the fact that the means of implementing these two remedies differs fundamentally. While satisfaction implies that the Respondent should present apologies and acknowledge the breach of the international obligation, cessation implies that the Respondent should act in a manner which would stop the continuous breach of the said obligation. Of course, should the Respondent cease the breach, it necessarily means that it would implicitly acknowledge the breach, and therefore, certain elements of satisfaction would be present.

It is also relevant to look at the characteristics of the breach when discussing the differences between cessation and satisfaction. Thus, while cessation applies solely to international breaches that have a continuous character, satisfaction is not conditioned as such.

The manner in which these remedies apply is also different. Thus, probably the most relevant conclusion related to cessation is that not any form of cessation means that this remedy is performed. Thus:

"Cessation cannot consist in simply ceasing the wrongful conduct:

[1] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 89.

the concept of cessation works here as a screen behind which another concept hides. The conduct replacing the continuous wrongful act constituting the breach is not at all indifferent to the law; in fact it is utterly relevant. In a case where hostages have been taken, for instance, killing the hostages may be a way to cease the original conduct of retaining them, but cessation within the meaning of Article 30 would not have taken place. Cessation always implies some form of restitution, because it always entails a return, or necessary steps towards the return, to the status quo ante."[1]

2.4. Proceedings before the International Court of Justice

The International Court of Justice has rarely granted cessation as a remedy, even if it has been often requested by the parties in the disputes that were submitted before it. However, certain conclusions can be drawn from these proceedings, that establish the fact that cessation is a remedy before the International Court of Justice.

Thus, in the Dispute Related to Navigational Rights, Costa Rica requested the Court *"to order Nicaragua to cease all the breaches of its obligations which have a continuing character".* Costa Rica substantiated its claim, as such:

"*Costa Rica seeks the cessation of this Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan River, and which also prevents Costa Rica from fulfilling its responsibilities under Article II of the 1956 Agreement and otherwise. In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered."*[2]

The Court found that cessation is a remedy of international law which manifests its effects when the breached international obligation is of a continuing nature. Furthermore, the Court delivered important findings with respect to the origin of the obligation to cease, and concluded as follows, with respect to cessation:

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[1] Julio Barboza,"*Legal Injury: The Tip of the Iceberg in International Responsibility"*, in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, p. 13.

[2] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment, ICJ Reports, 2009, 269.

> *"As far as the first of these three submissions is concerned, it should be recalled that when the Court has found that the conduct of a State is of a wrongful nature, and in the event that this conduct persists on the date of the judgment, the State concerned is obliged to cease it immediately. This obligation to cease wrongful conduct derives both from the general obligation of each State to conduct itself in accordance with international law and from the specific obligation upon States parties to disputes before the Court"*[1]

Furthermore, the Court concluded that cessation is a veritable form of reparation, as such:

> *"As for the second submission set forth in paragraph 147 above, it should be recalled that the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State."*[2]

3. Conclusion

We consider that the following argument best describes de relevance of cessation as a remedy before the International Court of Justice:

> *"The obligation of cessation is crucial to the international rule of law and the underlying principle of pacta sunt servanda."*[3]

Therefore, this remedy should not be underestimated in its relevance from the perspective of reparation or misinterpreted and confused with other remedies such as restitution or satisfaction. Its scope is clearly defined and of utmost importance.

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[3] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, Edward Elgar Publishing, 2012, p. 296.

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Comentarii privind activitatea organizaţiilor internaţionale în domeniul dreptului internațional/ Commentaries regarding the Activities of International Bodies in the Field of International Law

Activating ICC Jurisdiction over the Crime of Aggression: How Should the Statute and the Kampala Amendment Be Interpreted?

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Abstract: *This study follows up on the most difficult question that remained to be solved after the adoption of the Kampala Amendment, that may lead, if not properly addressed, to shaking consensus for the activation of the jurisdiction of the ICC for the crime of aggression. The interpretation problem concerns the "matrix" of establishing jurisdiction, in the case of an alleged crime of aggression related to an act of aggression committed by a State Party to the Rome Statute which has not ratified or accepted the Kampala Amendment, on the territory of a State Party which has ratified or accepted the Kampala Amendment. The study attempts to argue that the problem is linked to the interpretation of the Rome Statute itself and tries to apply the rules of interpretation of the Vienna Convention on the Law of Treaties to the question.*

Key-words: *International Criminal Court, crime of aggression, jurisdiction, Kampala Amendment*

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1. Introduction

The year 2017 should be, according to Amendment adopted by the Kampala Conference,[1] the critical year for deciding on the activation of the jurisdiction of the ICC over the crime of aggression. However, one question, which was left by the ambiguity of the text, may hamper the shaping of consensus among the State Parties for activating the jurisdiction of the Court. The opinions of States and scholars may seem, at a first glance, rather divided. Thus, it would be useful to attempt an in-depth analysis of the question, as well as the "pros" and "cons" to each of the two opposite solutions.

Very simply exposed, the question is the following: *if a case is referred to the prosecutor by a State or proprio motu, would the ICC have jurisdiction on a crime of aggression related to an act of aggression allegedly committed by State A, which is a Party to the Rome Statute,[2] but has not ratified or accepted the Kampala Amendment, against the territory of State B, which is a Party to the Rome Statute and has ratified or accepted the Kampala Amendment*?[3] We will refer to it hereinafter as "the question".

Exposing the question should bear in mind three prerequisites, which would be useful to be presented as introductory elements.

The first is the ambiguity of the Kampala Amendment itself, with respect to the conditions for the ICC to exercise jurisdiction over the crime of aggression. The text can be characterized in many ways, but hardly could one say that it is clear.[4] The ambiguity is largely due to the conditions in which

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[1] International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res.6 (June 11, 2010) (hereinafter „Kampala Amendment").

[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 (hereinafter „Rome Statute"), article 12 (2).

[3] This study represents an extension of a previous article examining the „question", which examines and anticipates a number of arguments presented hereby: Ion Gâlea, "Interpretation of the Kampala Amendments – One of the Key Issues for Activating the Jurisdiction of the ICC over the Crime of Aggression*", Journal of Law and Administrative Sciences*, No.7/2017, p. 175-191; see also Antonio Cassese, Paolo Gaeta, *Cassese's International Criminal Law*, Oxford University Press, 2013, p. 363-364; the question appears only when referral is made by a State or proprio motu, it does not appear when the refferal is made by the Security Council under Chapter VII of the Charter.

[4] Dapo Akande, "What Exactly Was Agreed in Kampala on the Crime of Aggression", *EJIL*:TALK! (June 21, 2010), https://www.ejiltalk.org/what-exactly-was-agreed-in-kampalaon-the-crime-of-aggression/; Astrid Resinger Coracini, "More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression"", *EJIL*:TALK! (July 2, 2010),

the text was negotiated: the compromise was achieved in the early hours of Saturday, 12 June 2017, while the last negotiations were conducted mostly behind the scene. The delegations were presented the final text hours before adoption, as being a last opportunity to avoid a failure of the conference. Sometimes, it is necessary to sacrifice the quality of the text for the sake of consensus. Therefore, it is very difficult to identify what the parties have really wanted to agree.[1]

Second, the peculiarities of the crime of aggression have to be taken into consideration. As put by Claus Kress, the crime of aggression is: "the only crime under international law that requires the commission of certain internationally wrongful conduct by a State."[2] Unlike the other crimes in the Rome Statute – genocide, war crimes, crimes against humanity, in order to have a *crime* of aggression, the Court *must* establish or have otherwise established that an *act* of aggression has been committed. This results clearly from the definition of the crime of aggression: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an *act of aggression* which, by its character, gravity and scale, constitutes a *manifest violation* of the Charter of the United Nations" (emphasis added).[3] Therefore, unlike for the other crimes, the ICC will have to determine, as a preliminary element, that an *act* of aggression has been committed by a State.

Third, the way in which the jurisdiction of the Court operates according to the Rome Statute is very important to be taken into account. The question "could the ICC be competent over an act committed by a national of a non-State Party?" is simply answered by the interaction of articles 12 and 13 of the Statute: i) in case of referrals made according to article 13 a) (State

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https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-thecrime-of-aggression/; Dapo Akade, Antonios Tsakanopoulos, "The Crime of Aggression in the ICC and State Responsibility", *Harvard International Law Journal*, vol. 58, Online Jounal, Spring 2017, p. 36.

[1] Stefan Barriga, Leena Goover, *"*A Historic Breakthrough on the Crime of Aggression*"*, *American Journal of International Law*, 2011, vol. 105, issue 477, p. 517-533, 517. The argument that the negotiations were conducted mainly behind the scene is based on the personal experience of the author, who was alternate representative of Romania to the Kampala Conference.

[2] Claus Kress, "The State Conduct Element*"*, in Claus Kress, Stefan Barriga (ed.), *The Crime of Aggression: A Commentary,* Cambridge University Press, 2017, p. 412; Dapo Akande, Antonios Tsakanopoulos, *loc. cit.* , p. 34.

[3] Article 8 bis of the Kampala Amendment;

referral) or c) (*proprio motu*), the Court shall be competent only if the alleged crime is committed by a national of a State Party or on its territory, or by a national or on the territory of a State that has accepted the jurisdiction of the Court according to article 12 (3); ii) in case of referrals made under article 13 b), by the Security Council, through a Resolution under Chapter VII of the Charter, no further condition is needed. The problem in the case of the crime of aggression, mainly in cases of articles 13 a) and c), is that the ICC is not "judging" solely the conduct of individuals, but that as a preliminary element it *must* determine or have otherwise determined upon the conduct of a State. In the case of "the other crimes", the consent of the State which is not a party to the Statute is not an issue – because it is not the conduct of the State, but only of the individual, which is taken into account. However, things are different in the case of the crime of aggression: it is not only the conduct of the individual which is scrutinized by the Court.

Having in mind these prerequisites, the article attempts to examine the two possible ways of approaching the question. As in the case of many problems in international law, any question of interpretation is subject to opposite "reversible" arguments.[1] Some could argue that the ICC has jurisdiction in the case described by "the question", while some could argue that it has no jurisdiction. Certain States adopted the position that it should be the Court to decide if a case may arise, while other States expressed the view that no decision on the activation on the jurisdiction should be taken if such an important question is left unclear. Thus, it might be appropriate to have an in-depth look on "the question" in order to try to identify the correct interpretative approach that might lead to a solution.

2. The issue of State consent in the case of the crime of aggression

2.1. The general rule in international law

It might appear of secondary importance, but it has to be underlined from the beginning that a fundamental rule of international law is that a State cannot be subject to the jurisdiction of an international court if it has not consented to that respective jurisdiction. This argument might have important relevance in the case of the crime of aggression, because in such case the Court might be called to determine, as a preliminary element, that a State has committed an *act* of aggression. In such case, the Court would indirectly rule upon the

[1] Martti Koskenniemi, "International Law in the World of Ideas", in J. Crawford, M. Koskenniemi (ed.), *The Cambridge Companion to International Law*, Cambridge University Press, 2011, p. 63; Martti Koskenniemi, *From Apology to Utopia. The Structure of the International Legal Argument*, Oxford University Press, 2005, p. 504.

rights and obligations of a State.[1] Thus, as professor Dapo Akande argues, it is a matter of general international law, not of the texts of the Kampala Amendment or the Rome Statute, that the Court should refrain from adjudging upon the rights and obligations of a State which has not consented to jurisdiction.

The International Court of Justice has been confronted with such question in a number of cases. In the well-known *Monetary Gold Case,* the Court has refrained from adjudging a case brought by Italy against the United Kingdom and the United States, for the reason that it involved claims – rights and obligations of Albania, which has not consented to jurisdiction.[2] The Court recalled the principle in the *East Timor Case*,[3] where it ruled that Portugal cannot claim that Australia breached its obligations under international law for the reason that it concluded a delimitation agreement with Indonesia, covering also the territory of the East Timor, because the very subject matter of the dispute involved the alleged illegality of the conduct of Indonesia, a State that has not consented to jurisdiction.

The ICJ was also confronted with the issue of consent in the case of the advisory proceedings. The consent is not relevant as a condition for advisory jurisdiction, but must be taken care by the Court as from the perspective of the propriety of the opinion, when the Court verifies whether „decisive reasons" may prevent it from exercising the advisory function. Thus, in the *Eastern Carelia* case,[4] the Court refrained from giving an opinion on a territorial dispute between Finland and the USSR, as the latter did not consent to the advisory procedure itself, as it was not a member of the League of Nations. The fundamental issue is the need for the Court to avoid that the advisory procedure "circumvents" the conditions for the contentious procedure. As the Court underlined in the *Western Sahara* opinion, "*In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances*

[1] Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, WORKING PAPER, OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT (2010), available at http://www.elac.ox.ac.uk/downloads/dapo akande working paper may 2010.pdf (last visited on 1 July 2017), p. 13.

[2] *Monetary Gold case (Italy v. France, United Kingdom & United States)*, (1954) ICJ Rep, p. 19.

[3] *East Timor case (Portugal v. Australia),* (1995) ICJ Rep, p. 90.

[4] PCIJ, Ser. B, no. 5, 1923, p. 27.

disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction. [1]

Therefore, a very important question that would appear in the case of the crime of aggression would be: would the ICC "circumvent the principle that a State is not obliged to allow its dispute to be submitted to judicial settlement without its consent"?

2.2. The options in the negotiating history of the Kampala Amendment

In order to answer this question, we would need to look back in the "options" for designing the establishment of the jurisdiction of the ICC with respect to the crime of aggression. It has to be reminded that the crime of aggression is defined as "the planning, preparation, initiation or execution, by a person in a position […] of an *act of aggression* […]". One of the fundamental issues is whether the ICC itself or another international body determines, as a preliminary basis, that an act of aggression has been committed.

Two main options appeared even from the early years of the negotiations and persisted up until the last moment of the Kampala Conference.

The first position (referred to as „Option 1"), supported mainly by permanent members of the Security Council, argued that the Security Council must have the exclusive competence over determining the existence of an act of aggression.[2] In the case of Option 1, the Security Council would be called to determine whether an act of aggression exists, and the ICC would only determine whether *an individual:* planned, prepared, initiated or executed the „act" and he/she had a position to effectively control the political or military action of a State.[3] In the case of Option 1, the principle of State consent to international jurisdiction would not be affected: the act of State is "judged"

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[1] *Western Sahara, Advisory Opinion*, ICJ Reports, 1975, p. 25, para. 33.

[2] This competence is provided by artilce 39 of the UN Charter; however, it is debatable whether this competence provided by the Charter is "exclusive".

[3] Stefan Barriga, "Introduction to Negotiation History", in Stefan Barriga, Claus Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012, pp. 1-99, pp.34-35.

by the Security Council, which has its powers conferred by the States according the Charter; the ICC would strictly limit itself in this case to the act of the individual.

The second position (referred to as "Option 2")[1] upheld that the role of the Security Council should not be exclusive: if it has not determined that an act of aggression exists,[2] the ICC itself should determine, as a preliminary element, that an act of aggression has been committed. Of course, bearing in mind the ways in which cases are referred to the prosecutor of the ICC, Option 2 would be relevant in cases provided by articles 13 a) and c) of the Rome Statute (State referral and *proprio motu*), because in the case of the Security Council referral the role of the Council is, in principle, not affected.[3]

The issue of State consent appears as very relevant in the case of this Option 2, because the ICC acts in two steps: first, as a preliminary element, determines the existence of the act of aggression of States, and second, acting on conduct of the individual, determines whether he/she has planned, prepared, initiated or executed the act and whether he/she holds an effectively controlling position. Moreover, the difficulty related to the first (preliminary) phase is that the definition of aggression supposes a degree of gravity: an act which "by its scale and effects is a manifest violation of the Charter". Thus, the ICC would be called, on a preliminary basis, not only to determine whether an illegal use of force occurs, but whether this violation of the Charter is "manifest".[4] In the words of Dapo Akande, the ICC would be called

[1] *Ibid.*, p. 36.

[2] Article 39 of the UN Charter refers to the determination of a „threat to the peace, breach of the peace, act of aggression". The three formulas are regareded as being characterized by an evolutive gravity. While the Council has determined in many instances the existence of "threat to the peace", the "breaches of the peace" were few, while the Council never determined the existence of an "act of aggression"; see, for example, David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter. Legal Limits and the Role of the International Court of Justice*, Kluwer Law International, 2001, pp. 186-189.

[3] However, we have not noted any analysis about what would happen if the Security Council would refer a case or a situation to the prosecutor under article 13 b) without determining the existence of an act of aggression.

[4] Harold Koh, Todd Buchwald, "The Crime of Aggression: The United States Prespective", *American Journal of International Law*, Vol. 109, No. 2 (April 2015), pp. 257-295, p270.

to rule on "a use of force by a state that has not given its consent to the adjudication by the Court on that question".[1]

A third position, which was, however, dropped in the final phases of the negotiations, proposed that the "preliminary" determination of an act of aggression would be done by a third "jurisdictional filter", the International Court of Justice. This proposal, put forward in 2001 by Bosnia and Herzegovina, New Zealand and Romania, stands proof of the importance that States gave to ensuring that acts of States are scrutinized by courts or bodies which have the main power to settle disputes between States.[2]

The final phases of the Kampala Conference witnessed the very difficult choice between Option 1 and Option 2. Even if another "pair" of different positions is presented as having occurred within Option 2 - as it will be exposed below, the debate between "camp protection" and "camp consent", as exposed by Stefan Barriga,[3] it would be important to underline that the main concerns of the delegations, up to the very last moment, was related to how would permanent members accept anything else but Option 1.

Finally, the text of the Kampala Amendment draws the balance more towards Option 2, because article 15 bis, applicable in the case of State referrals and *proprio motu* proceedings, provides for the possibility of the Pre-Trial Division of the Court to authorize the formal opening of the investigation, should the Security Council not make a determination of an act of aggression within six months.[4]

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[1] Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, WORKING PAPER, OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT (2010), available at http://www.elac.ox.ac.uk/downloads/dapo_akande_working_paper_may_2010.pdf (last visited on 26 May 2017).

[2] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 276.

[3] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force of the Amendments on the Crime of Aggression*, Belgian Interministerial Commission for Humanitarian Law: Colloquium "From Rome to Kampala", Brussels, 5 June 2012, available at: http://www.regierung.li/media/medienarchiv/icc/2012-6-5_Stefan_Barriga_-_CoA_Exercise_of_Jurisdiction_and_EIF_-_Brussels_Colloquium_-_paginated_02.pdf?t=636294503019761306, p. 12, last visited on 1 July 2017.

[4] Stefan Barriga, Leena Goover, "A Historic Breakthrough on the Crime of Aggression", *loc. cit.*, p. 532.

2.3. The consent and the procedure for the entry into force of the Amendment

The issue of State consent supposed another question: what procedure should be used for the entry into force of the Amendment?

Along the years of the preparations of the Kampala Conference, two views have been expressed with respect to the way in which the amendment would enter into force. On one side, certain States argued that the Amendment should enter into force on the basis of the article 121 (4) of the Rome Statute (which provides: "*Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them*"). On the other side, other States argued that the applicable procedure should be article 121 (5): "*Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory*". It could be noted that while article 121 (4) allows for an uniform solution: the Amendment enters into force at the same moment for all State Parties to the Statute, when not all of them (however, a large number) have ratified or accepted it, article 121 (5) ensures a "consent based approach", meaning that the Amendment applies only to those States that have ratified or accepted it.[1] The advantage of 121 (4) is uniformity, while the disadvantages are: the Amendment would enter into force for States not having ratified or accepted it and relatively long period for gathering seven-eights of the State Parties ratifying. The advantage of 121 (5) is that the Amendment does not enter into force for States not ratifying or accepting it, together with "speed" (the Amendment is "in force" after at least two States ratifying it). Disadvantage: fragmented system – some States will be Parties only to the Rome Statute, while others to the Statute and the Amendment.[2] This "fragmentation" is the cause of generating "the question" put forward under this study.

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[1] Stefan Barriga, "Introduction to Negotiation History", loc. cit., p. 38; R.S. Clark, "Ambiguities in articles 5 (2), 121 and 123 of the Rome Statute*",* Case Western Reserve Journal of International Law, vol 41 (2009), pp. 413-427.

[2] Stefan Barriga, Leena Goover, "A Historic Breakthrough on the Crime of Aggression", *loc. cit.*, p. 524.

The option based on article 121 (4) was supported mainly by African States, most GRULAC States and members of Non-aligned Movement, while 121 (5) was supported by most European States and permanent members of the Security Council.[1] It is true that, it the years of the Princeton process and before the Kampala Conference, Romania expressed a certain preference for 121 (4)[2]. However, during the conference, the general compromise, based on the so-called ABCS proposal, fueled compromise along the application of 121 (5).[3]

The final resolution contains an express reference to article 121 (5). Its application is important from two points of view: i) first, because of the need to identify the correct interpretation of its second phrase: "*In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory*"; ii) second, because it would be needed to underline that the debate concerning whether article 121 (4) or (5) should apply was, in any case, during the Kampala Conference, *secondary* to the stronger debate between adopting a solution based on Option 1 (exclusive role of the Security Council) and Option 2 (jurisdictional filter of the Pre-Trial Chamber of the ICC). Based on impressions of delegations during Kampala, we could affirm that while the issue applying article 121 (5) was generally solved two days before the end of the conference, the issue of the "exclusive" role of the Security Council persisted until the very end (the delegations being even prepared to vote, in the eventuality of a "consensus minus 2" approach).

As a short concluding remark to section I, it should be recalled that "the question" involves the situation of State A, which is a Party to the Statute, but is not a party to the Amendment – and has allegedly committed an act of aggression on the territory of State B, which is a Party both to the Statute and to the Amendment. The consent of State A has not been expressed with respect to the Amendment itself. Therefore, "the question" involves a debate

[1] *Ibid.*

[2] *Ibid.*

[3] In operative paragraph 1 of resolution RC/Res.6, the Review Conference adopted, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court, the amendments to the Statute contained in annex 1 to the resolution, "which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5" - C.N.651.2010.TREATIES-8 (Depositary Notification), 29 November 2010; Sean D. Murphy, "The Crime of Aggression at the ICC*",* in Marc Weller, (ed.), *Oxford Handbook on the Use of Force*, Oxford University Press, 2013, p. 15.

whether the consent of State A could be either "overpassed" or "self-understood", from the interaction of the relevant texts of the Statute and the Amendment. Moreover, because State A is not a party to the Amendment, it is our assumption that the focus of the interpretation should be on the text of the Statute itself (and not on the Amendment), because the Statute is the sole binding instrument for State A.

3. Opposite positions related to "the question"

3.1. Relevant provisions

Before exposing the two opposite positions regarding "the question", it would be useful to present the relevant texts of the Kampala Amendment and of the Rome Statute which would be involved in the interpretation.

We have mentioned before the "ambiguity" of the Kampala Amendment. Some important provisions of article 15 *ter* of the Kampala Amendment (which, we recall, applies in case of State referrals and *proprio motu* proceedings), concern the "conditions" for the exercise of jurisdiction of the Court over the crime of aggression. We expose below the "opt out" (paragraph 4) and the "derogation from article 12 (2) of the Statute" (paragraph 5):

> "*4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.*
> *5. 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*".

We could not avoid quoting the Kampala Amendment, because many arguments for one or another solution regarding "the question" are based on it. However, it could be underlined that, as long as a State has not ratified or accepted the Amendment, the relevant text to be interpreted as regards that State would be the Rome Statute. Nevertheless, the *adoption* of the Amendment and the consensus in Kampala might be relevant for interpretation in accordance with article 31 (3) a) and b) of the Vienna

Convention – subsequent agreements and subsequent practice, relevant for interpretation.

As regards the Rome Statute, it would be useful to quote is article 5 (in its original form):

> "*1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.*
> *2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations*".

Article 12 (1) has also being invoked:

> *"A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5."*

Last but not least, it would be useful to recall that the most "contentious" provision of the Statute which pertains to "the question" is the second phrase of article 121 (5), related to the entry into force of the amendments: "*In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory*".

3.2. The "protective" approach, in favour of establishing the ICC jurisdiction

The argument that in case of an alleged act of aggression committed by a State Party to the Rome Statute which has not ratified or accepted the Amendment against the territory of a State Party having ratified or accepted

the amendment is supported vividly by the Principality of Liechtenstein[1] and the writings of Stefan Barriga[2] (who acted for a long period as Deputy Permanent Representative of Liechtenstein to the United Nations).

The arguments of Liechtenstein rely on: i) the negotiations of the Kampala Amendment and ii) the interpretation of certain articles of the Statute, especially 121 (5).

With respect to the negotiations history, Liechtenstein and Stefan Barriga argue that along the negotiations, two main group of States have been formed: the so-called "camp consent" – a group of States supporting the idea that the Court could not have jurisdiction without the consent of the aggressor State, and the so-called "camp protection" – a group of States supporting the concept that the consent of the aggressor State would not be necessary for the Court to have jurisdiction.[3] Let us remind that the hypothesis of both solutions relies on cases of State referrals and *propro-motu* proceedings.[4]

The "extreme" positions of "camp consent" and "camp protection" were the following: "camp consent" supported the idea that the Court would have jurisdiction only in case of acts of aggression committed by State Parties "provided that they opted-in" (i.e., by ratifying or accepting the Amendment),[5] while "camp protection" sustained that the Court would have jurisdiction even over acts of aggression committed by non-Parties[6] (as is the

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[1] *Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC*, published by the Liechenstein Institute of Self-Determination, Woodrow Wilson School of Public and International Affairs, November 2012, pp. 9-10; see also *Explications relatives aux effets des amendements de Kampala à l'égard les Etats Parties ne les ayant pas ratifiés*, Non-paper distributed by Liechtenstein on 21 April 2017.

[2] Stefan Barriga, Leena Goover, *"*A Historic Breakthrough on the Crime of Aggression*"*, loc. cit., pp. 530-533; Stefan Barriga, "Introduction to Negotiation History*"*, loc. cit., pp. 46-56; for more details, Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force of the Amendments on the Crime of Aggression*, Belgian Interministerial Commission for Humanitarian Law: Colloquium "From Rome to Kampala", Brussels, 5 June 2012, available at: http://www.regierung.li/media/medienarchiv/icc/2012-6-5_Stefan_Barriga_-te_CoA_Exercise_of_Jurisdiction_and_EIF_-_paginated_02.pdf?t=636294503019761306, pp. 12-18, last visited on 26 May 2017.

[3] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 12; Stefan Barriga, *Introduction to Negotiation History*, loc. cit., p. 43.

[4] *Explications relatives aux effets des amendements de Kampala à l'égard les Etats Parties ne les ayant pas ratifiés*, loc. cit., p. 1.

[5] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 12.

[6] *Ibid.*

case for the other crimes, in case of crimes committed by a national of a non-Party on the territory of a State Party). According to Stefan Barriga, two "intermediate", or "milder" positions have been developed out of these "extreme" ones, in an attempt to compromise. Thus, during the Kampala Conference, four States had an important role in achieving a compromise. On one hand, the "ABS group" (Argentina, Brazil, Switzerland), with views closer to "camp protection", made the "big leap" towards "camp consent" by accepting that non-Parties would be excluded from the jurisdiction of the Court.[1] On the other hand, Canada, with a view closer to "camp consent", accepted that State Parties would not have to "opt-in" (i.e., by ratifying or accepting the Amendment), in order to be submitted to the jurisdiction of the Court, but they would have the possibility of submitting an "opt-out" declaration to the Registrar.[2] In the view of Stefan Barriga, the compromise solution that has been achieved in the end is closer to "camp consent", because the consent of any potentially aggressor State can still be safeguarded at any moment, by submitting an opt-out declaration – however, before the aggression is committed.[3]

The main idea that results from this argument is that the *opt-out system is designed essentially for State Parties that have not ratified or accepted the Amendment.*[4] Ratifying or accepting ("opting-in") and submitting a declaration according to article 15 bis (3) ("opting-out"), would create an "opt-in and then opt-out" system, that would not be consistent with the logic of the negotiations.[5] In the words of Barriga, "*it would mean that Camp Protection first came all the way over to Camp Consent, and then went even beyond!*".[6]

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[1] *Ibid.,* p. 13; the lack of effect on non-Parties is now regulated by article 15 bis (4) of the Kampala Amendment.

[2] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 13; the opt-out declaration is now regulated by article 15 bis (3) of the Kampala Amendment.

[3] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 13.

[4] It is true that operative paragraph 1 of Resolution RC/Res.6 adopted by the Review Conference "notes that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance"; however this paragraph does not restrict the opt-out for State Parties that have *not* yet ratified or accepted (or do not intend to ratify or accept).

[5] *Ibid.,* p. 17.

[6] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 17.

The interpretation argument raised by Stefan Barriga and Liechtenstein sustains that the second phrase of article 121 (5)[1] should not be interpreted according to its literal meaning, but in the sense that it does not apply to the case of the crime of aggression. Liechtenstein argues that in Kampala, almost until the end of the Review Conference, two opposite/alternative "Understandings" were proposed with respect to the second phrase of article 121 (5): the so-called "negative understanding", based on the strict literal meaning according to which the consent of States, through ratification or acceptance, would be required for a "new crime" to fall under the jurisdiction of the Court, and the so-called "positive understanding", arguing that in fact the consent of States would not be required, at least in the case of the crime of aggression. Liechtenstein argues that the elimination of both proposals for Understandings when the "opt-out system" was agreed is a strong argument in the sense that the "consent" issue was settled by the mere opt-out system, "which does make sense only when the default position is opted-in".[2]

Stefan Barriga rejects the literal interpretation of the second phrase of article 121 (5), arguing that, in fact, the Court may exercise jurisdiction on the crime of aggression when a State Party not having ratified or accepted the Amendment commits an alleged act of aggression on the territory of a State Party having ratified or accepted the Amendment because all State Parties have accepted the jurisdiction of the Court over the crime of aggression in accordance with article 12 (1) of the Statute.[3] Thus, Stefan Barriga relies the interpretation argument on the contextual interpretation – article 121 (5) should be read in conjunction with article 12 (1) and 5 (2), as well as on interpretation in accordance with the object and purpose of the Statute.[4]

Therefore, according to the argument of Stefan Barriga, the second phrase of article 121 (5) should not apply in the case of the crime of aggression, for the following reasons: i) because according to article 12 (1) all State Parties accepted the jurisdiction of the Court over the crime of aggression, and this article 12 (1) has been "recalled" by the preamble of Resolution RC/Res.6

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[1] "*In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory".*

[2] *Explications relatives aux effets des amendements de Kampala à l'égard les Etats Parties ne les ayant pas ratifiés,* loc. cit., p. 2.

[3] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 14.

[4] *Ibid.*, p. 14-15.

adopted by the Review Conference[1]; ii) because article 5 (2) of the Statute[2] did refer only to the "adoption" of a "provision", but did not "explicitly mention other aspects dealt with by articles 121 and 123, such as entry into force of amendments or the limitation to the Court's jurisdiction under article 121(5), second sentence";[3] thus, the adoption of the Kampala Amendment would be by itself sufficient for the Court to have jurisdiction over the crime of aggression with respect to all State Parties.

Nevertheless, Stefan Barriga acknowledges that there is a "tension" between these arguments and the literal meaning of the second phrase of article 121 (5). The scholar argues that this tension is solved by means of the *lex specialis* reasoning. According to Stefan Barriga: "*Article 121(5), second sentence, is a general provision that applies to a broad range of amendments. It applies for example to entirely new categories of crimes that may be added in the future, such as drug crimes, or terrorist crimes. It also clearly applies to amendments to the definitions of crimes already contained in the Rome Statute, such as the amendments to the definition of war crimes that were also adopted in Kampala. The tension can be resolved if article 12(1) is seen as the lex specialis that prevails over the more general rule of article 121(5), second sentence, but only as far as amendments dealing with the crime of aggression are concerned*."[4]

Another argument in favour of the non-application of the second phrase of article 121 (5) is put forward by Claus Kress and Leonie von Holtzendorff. According to these scholars, four opinions expressed in Kampala with respect to the application of article 121 (5) on the crime of aggression: i) "adoption only" model – arguing that the adoption of the amendment is sufficient for the jurisdiction over the crime of aggression to be exercised; ii) "negative understanding" of article 121 (5) – arguing that the consent through ratification or acceptance is required; iii) "positive understanding" of article 121 (5) – arguing that article 121 (5) does not apply in the case of the crime of aggression, because of the effect of article 12 (1); iv) "the 121 (4) model"

[1] *Ibid.,* p. 15.

[2] The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations

[3] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…, loc. cit.,* p. 15.

[4] *Ibid.,* p. 15.

– arguing that the Kampala amendment does not refer to a mere modification of articles 5, 6, 7 or 8.[1] The final solution did not reside on any of the above, but on a compromise described as "softened consent based regime", meaning that the consent of the potential aggressor is safeguarded only by the possibility to opt-out, the default position being "in".[2]

3.3. The approach based on "consent", against the establishment of the ICC jurisdiction

The United States – even under their position of observer State – have constantly raised during the works of the Assembly of the State Parties the need to bring clarity to "widespread uncertainty about even such basic issues as whether the Court's jurisdiction would apply with respect to Rome Statute parties that do not ratify the amendments".[3] The arguments of the United States have been detailed by Harold Koh and Todd Buchwald – who, even writing in their scholarly capacity, retain their experience as former legal advisor and deputy legal advisor of the US Department of State.[4]

First, Harold Koh and Todd Buchwald are putting forward is one of principle: even if the opinion that States would not have to opt-in by ratifying or accepting the Amendment would be accepted, the "consent of the allegedly aggressor State" would still be required. What differs is the way in which consent is expressed (as, according to the opinion of Stefan Barriga, for

[1] Mark Klamberg, *Article 121 (5)*, in *Commentary to the Rome Statute*, 30 June 2016, CIRLAP, Case Matrix Network, Part 13, online study available at https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-13/#c3891 (last visited on 15 July 2017); Claus Kress, Leonie von Holtzendorff, "The Kampala Compromise on the Crime of Aggression", *Journal of International Criminal Justice, vol.* 8, 2010, pp. 1179-1217, pp. 1196-1205.

[2] Mark Klamberg, *loc. cit.*, p. 2; Clauss Kress, Leonie von Holtzendorff, *loc cit.*, pp. 1213-1214.

[3] Intervention of the United States observer delegation, Fourteenth session of the Assembly of States Parties The Hague, the Netherlands November 19, 2015, Statement of Jane Stromseth, acting head of the State Department's Office of Global Criminal Justice, available at https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_14th_session.aspx (accessed 15 July 2017); see also Statement on behalf of the United States of America, 15th Assembly of State Parties, November 17, 2016, available at https://asp.icc-cpi.int/EN_Menus/asp/sessions/general%20debate/pages/generaldebate_15th_session.aspx (last visited on 15 July 2017).

[4] Harold Koh, Todd Buchwald, 'The Crime of Aggression: The United States Perspective", *loc. cit.*, pp. 273-290; for other opinions supporting this interpretation, see Dapo Akade, Antonios Tsakanopoulos, *loc. cit.*, p. 36; Sean Murphy, *loc. cit.*, pp. 24-26.

example, consent is guaranteed by the possibility to "opt-out")[1]. In the words of Harold Koh and Todd Buchwald, "even among those with the most expansive views of the circumstances of what qualifies as sufficient consent to enable the Court to exercise the Kampala amendments clearly proceed on the basis that the Court cannot exercise its jurisdiction with respect to an act of aggression committed by a state that has not consented to the Court's aggression jurisdiction".[2]

Second, Harold Koh and Todd Buchwald rely on the *travaux préparatoires* of the Rome Statute. They argue that, during the Rome Conference, articles 5, 6, 7 and 8 represented a single provision and article 121 (5) was designed to apply in the same way as all four articles would have represented a single provision: if a new crime is introduced or the definition of an existing crime is modified, State Parties were expected to "opt in", by ratifying or accepting the amendment.[3]

Therefore, no reason appears for the amendment on the crime of aggression, for which the Resolution RC/Res.6 expressly uses the phrase that it is "subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5", to have a different course than the so called "Belgian Amendment", for which the Resolution RC/Res.5/10 June 2010 uses the same phrase. Koh and Buchwald remarked that no argument has been made for the second sentence of article 121 (5) not to apply to the Belgian Amendment.[4]

Third, Harold Koh and Todd Buchwald examine the "negative understanding" and the "positive understanding" of article 121 (5).[5] While the negative understanding is labelled as determining the second sentence of article 121 (5) to mean "exactly what it said"[6], the "positive understanding" is considered as being "inconsistent with what it actually said".[7] The two scholars invoke the rules of interpretation of the Vienna Convention on the

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[1] Harold Koh, Todd Buchwald, "*The Crime of Aggression: The United States Perspective"*, *loc. cit.*, p. 273.

[2] *Ibid.*, p. 276.

[3] *Ibid*, p. 279.

[4] *Ibid.*, p. 288.

[5] *Supra*, note 49.

[6] Harold Koh, Todd Buchwald, *loc. cit.*, p. 282.

[7] *Ibid.*, p. 283.

Law of Treaties to reject the "positive understanding": i) it would be contrary to the "ordinary meaning of the words", as prescribed by article 31 (1); ii) recourse to supplementary means of interpretation, such as the *travaux préparatoires*, should be made only when the interpretation given according to the general rule "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable".[1]

Sean D. Murphy also argue that the same criticism can be brought to the so called "softened consent based regime".[2] He argues: "*Why would States in Rome establish an amendment process that strongly protected their interests for any changes relating to crimes other than aggression (allowing them to avoid exposure to those crimes by non-ratification), but create an amendment process for the crime of aggression that leaves them vulnerable to whatever conditions thought desirable by a two-thirds decision of the Assembly?*".[3] In any case, the peculiar nature of the crime of aggression would have suggested "the need for greater deterrence to state consent".[4]

Fourth, Harold Koh and Todd Buchwald strongly reject the combined interpretation of articles 121 (5), 5 (2) and 12 (1) that would lead to the conclusion that article 121 (5) would not apply because the State Parties have anyway accepted the jurisdiction of the Court on the crime of aggression. According to Koh and Buchwald, if this argument were accepted, it would mean that the "adoption" of the Amendment would be enough for the Court to have jurisdiction: "there would not, insofar as the Rome Statute is concerned, be any need for the aggression amendments to be ratified at all".[5] The two scholars argue that if the "article 5 (2) theory" would be accepted, it would mean the Parties in Rome accepted to agree to "whatever definition and whatever conditions for exercising jurisdiction a two thirds majority would agree". Such result would not stand before any legislature seeking for ratification of the Rome Statute.[6]

Besides the very elaborate arguments of Harold Koh and Todd Buchwald, certain States are willing to put forward much simpler and straight-forward

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[1] *Ibid.*

[2] *Supra,* note 50.

[3] Sean Murphy, *loc. cit.*, pp. 23-24.

[4] *Ibid.*.

[5] Harold Koh, Todd Buchwald, "The Crime of Aggression: The United States Perspective", *loc. cit.*, p. 285.

[6] *Ibid.*, p. 286.

arguments in order to reject the extension of the jurisdiction of the ICC on the crime of aggression to States that have not ratified the Amendment. Thus, it is clear that "adoption" is not enough for the Amendment to have effect, as the Resolution RC/Res.6 clearly provides that it is "subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5". Therefore, the Amendment could have no legal effect on States that have not ratified it, by virtue of the operation of the simplest rules of treaty law: the principle of relativity, enshrined in article 34 of the Vienna Convention on the Law of Treaties,[1] and the general rule on treaty amendment provided by article 40 (4) of the Vienna Convention.[2] Simply argued, the Kampala Amendment could have no effect on States that did not ratify or accept it, and those States would find themselves in the same legal situation as before the Kampala Conference.

4. Issues of interpretation

4.1. General approach

International law never offers a straight-forward answer about how should a text be interpreted. The general rules of interpretation, together with the complementary rules, should apply unitarily, without granting prevalence to one of them.[3] International law does not offer a rigid and absolute interpretation system.[4] One of the most important debates in international law continues to be the tension between the "clarity of the text" and the „need to interpret": while the positivist doctrine relies on the latin dictum "*in claris non fit interpretatio*", the realist school of thought may reasonably argue that

[1] "A treaty does not create either obligations or rights for a third State without its consent".

[2] "The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement" – in our view, article 40 (4) applies as a general rule, when the treaty does not provide otherwise; for example, it would not apply for Amendments to the Rome Statute which follow the procedure under article 121 (4).

[3] Draft articles on the Law of Treaties,1966, Yearbook of the International Law Commission, 1966, vol II, p. 219, para. 8; Mark Villiger, *Commentary to the 1969 Vienna Convention,* Martinus Nijhoff, 2009, p. 435; *Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la Republique française en application du Protocole du 25 septembre 1991 additionel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976,* Sentence Arbitrale du 12 mars 2004, Cour Permanente d'Arbitrage, para. 65; Ion Gâlea, *Dreptul tratatelor,* Ed. CH Beck, 2015, p. 142.

[4] *Lake Lanoux (Spain v.. France),* Award of 16 November 1957, RIAA, vol. XII, p. 281.

the question whether one term has to be interpreted is by itself a matter of interpretation.[1]

Therefore, international law does not interpretation rules that could be regarded as "strict" or "rigid". As recalled by the Special Rapporteur on the law of treaties, Sir Humphrey Waldock, interpretation rules are to be regarded as guidelines, as their application in a particular case depends so much on the appreciation of the context and on the circumstances of the elements that need to be interpreted.[2]

This study would attempt to review the rules of interpretation of the Vienna Convention, from the perspective of identifying an answer to "the question" of exercising jurisdiction in cases of potential acts of aggression committed by State Parties not having ratified or accepted the Amendment on the territory of State Parties which did ratify or accept the Amendment. These rules would include: the general rule of article 31 (1) - i) good faith; ii) ordinary meaning of the words; iii) their context; iv) in the light of the object and purpose of the treaty; the elements to be taken together with the context, such as interpretative agreements, subsequent agreements and subsequent practice, any relevant rule of international law (article 31 (2) and (3)); supplementary means of interpretation (article 32).

Nevertheless, the "evolving" character of interpretation in international law should be taken into consideration. As the International Court of Justice recalled in the case concerning the *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua): "On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law".*[3]

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[1] Statement of Myres McDougal, member of the United States Delegation, during the Vienna Conference on the Law of Treaties; Official Records of the Vienna Conference on the Law of Treaties, 31st Meeting, 19 April 1968, p. 167, para. 41.

[2] Al VI-lea raport al Raportorului Special Humphrey Waldock, doc. A/CN.4/186 and Add.1, 2/Rev.1, 3-7, Yearbook of the International Law Commission, vol. VI, p. 94; Richard Gardiner, *op. cit.*, p. 38.

[3] ICJ Reports, 2009, p. 213, p. 242, para. 64.

Hence, a question of policy would arise: what would be right interpretation that States *should* adopt, by way of, for example, subsequent agreement within the ASP, in order to ensure the correct support and the correct functioning of the ICC? What is more desirable, to have a "more ambitious" jurisdiction over the crime of aggression, but contested by a number of States (including the most relevant permanent members of the Security Council), or to have a "less ambitious", *de minimis,* agreement regarding the functioning of the Court with respect to the crime of aggression, that would not be subject to criticism (except, maybe, that it is not sufficiently ambitious)?

4.2. Rules of the Vienna Convention

The general rule of article 31 (1) refers to four elements: good faith, ordinary meaning of the words, context, and object and purpose of the treaty. It would be useful to approach "the question" from the perspective of each of these. Nevertheless, before providing possible interpreting arguments, we should emphasize that the "main" text to be interpreted is, in our opinion, article 121 (5) of the Rome Statute, because this is the text providing that "the Court shall not exercise jurisdiction...". Thus, interpretation must determine if this text applies to the hypothesis of "the question" or not.

i) Good faith

Good faith is not *per se* a rule of interpretation, but it inspires all methods of interpretation and ensures that no unreasonable result is reached.[1] It is true, good faith would impose that the *travaux préparatoires* would be given sufficient weight. In the case concerning *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain),* the Court interpreted had to interpret the formula: "once that period [of negotiations] has elapsed, the two parties may submit the matter to the International Court of Justice".[2] Bahrain invoked the *travaux préparatoires,* arguing that the words "either of the two parties" have been replaced by "the two parties", meaning that the parties intended to exclude unilateral seizing of the Court.[3] However, the Court rejected the argument of Bahrain and "confined itself to the actual terms of the Minutes as the expression of their common intention".[4] Nevertheless, in his dissenting opinion, Judge Schwebel brought strong criticism to this approach, arguing that rejecting the intention of the parties not to allow

[1] Mark Villiger, *Commentary to the 1969 Vienna Convention,* p. 425.

[2] ICJ Reports, 1995, p. 17.

[3] *Ibid.,* p. 22.

[4] *Ibid.*

unilateral seizing is incompatible with the good faith interpretation. Moreover, Judge Schwebel argued that "*the Court's failure to determine the meaning of the treaty in the light of its preparatory work results, if not in an unreasonable interpretation of the treaty itself, in an interpretation of the preparatory work which is "manifestly ... unreasonable*".[1]

The *Maritime Delimitation and Territorial Questions* can have two possible consequences over the interpretation of the second phrase of article 121 (5) of the Rome Statute. On one hand, the text of the second phrase of article 121 (5) is much clearer than the Doha Minutes: while the Court may be criticized for putting equivalence between "the two parties may submit" with "either of the two parties may submit", it is much clearer that "*In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory"* means what it says, as long as it applies to that amendment. Moreover, the ICJ chose the textual approach in order to solve the issue ("confined itself to the text"). On the other hand, a good faith interpretation would impose a thorough examination of the travaux préparatoires, without relying solely on the textual interpretation.

ii) Ordinary meaning of the words

The textual interpretation of article 121 (5) leads to a firm result: the so-called "negative understanding", with the result that the Court would not have jurisdiction over an alleged crime of aggression committed by a State Party to the Statute which has not ratified or accepted the Amendment.[2]

Moreover, it may be pointed out that the main element to be determined – in relation to the literal interpretation - is whether the crime of aggression is a crime "covered by the amendment" in the sense of article 121 (5), second phrase. Indeed, the ordinary meaning of the words would lead to an affirmative answer, having in mind the fact that Resolution RC/Res.6 clearly provides that the Kampala Amendment is "subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5".

At the same time, it may be pointed out that even if all means of interpretation have equal value, in certain cases the ICJ has regarded first the ordinary

[1] Dissenting opinion of Judge Scwhebel, ICJ Reports, 1995, p. 34.

[2] Harold Koh, Todd Buchwald, "The Crime of Aggression: The United States Perspective", *loc. cit.*, p. 283.

meaning of the words. Thus, in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* the Court judged that "*Interpretation must be based above al1 upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion*", when interpreting a treaty of 1955 between France and Libya.[1]

We are not trying to argue that the literal interpretation should be the only means to follow, but, as it results from the case-law of the ICJ, the Court has given a lot of importance to the meaning of the text.

iii) *Context*
Contextual interpretation in the sense of article 31 (1) of the Vienna Convention involves reading the text in correlation with other relevant articles: a treaty has to be read in its entirety and the meaning must not be extracted only from isolated phrases, which, taken out of their context, might lead to different results.[2]

Therefore, the contextual interpretation imposes that article 121 (5) should be read in conjunction with other articles of the Statute, including 12 (1) and 5 (2), as well as in conjunction with Resolution RC/Res.6 that establishes the procedure to be followed by the Kampala Amendment. The most important question is, nevertheless: what is the result of the correlated reading of these articles? Does article 12 (1) represent a "derogation" from article 121 (5)? Thus, article 121 (5) refers to the procedure of entry into force of the Amendments and establishes a special rule "protecting" States from the exercise of the jurisdiction of the Court, in case when amendments are brought to the Statute, with respect to "crimes covered by those amendments". Meanwhile, article 12 (1) (belonging to Part II – Jurisdiction, admissibility and applicable law) regulates the general principles governing the jurisdiction of the ICC. Moreover, article 5 (2) represents a "postponement" clause related to the definition and conditions for exercise of jurisdiction in the case of the crime of aggression. It would be difficult to

[1] ICJ Reports, 1994, p. 22, para. 41; see also *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports, 1999, p. 1045.

[2] *Competence of the International Labour Organization in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion*, (1922), Ser. B, No. 2, 3, p. 23; *M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea),* International Tribunal for the Law of the Sea, Judgment of 4 December 1997, para. 50; *Land, Island and Maritime Border Dispute (El Salvador/Honduras, Nicaragua intervening),* ICJ Reports, 1992, p. 351.

rely solely on contextual interpretation to argue that article 12 (1) and 5(2) bring a "derogation" from article 121 (5).

iv) *Object and purpose of the treaty*
In our opinion, the object and purpose of the treaty may be a strong argument in favour of the "positive understanding" of the second phrase of article 121 (5). The object and purpose of the treaty confers flexibility and evolutionary character to its words, sometimes departing from the original meaning.[1]

If the debate between "protection" and "consent" is recalled, more arguments could be drawn in the sense that the object and purpose of the Rome Statute is "protection" of mankind against the most heinous crimes. It would be useful to remind, in this sense, two paragraphs of the Preamble of the Rome Statute:

> "*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation;*
> *Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*;"

Thus, the largest jurisdiction of the ICC would be in line with the object and purpose to protect mankind from these most serious crimes.

v) subsequent agreements and subsequent practice
The means of interpretation provided by article 31 (3) a) and b) of the Vienna Convention are relevant for the issue of the crime of aggression, because the main texts to be interpreted are represented by the text of the Rome Statute and because the "relevant" States (the States that have not ratified the Kampala Amendment and allegedly might have committed an act of aggression on the territory of States that have ratified or accepted the Amendment) are *not* bound by the other legal instrument, the Kampala Amendment. Thus, the *travaux préparatoires* of the Kampala Amendment

[1] See, for example, in domestic jurisdictions: *Anonymous v Austria*, Final Appeal/Cassation, B 484/03, ILDC 139 (AT 2004), 16 December 2004, Constitutional Court of Austria, available at Oxford Public International Law (http://opil.ouplaw.com), subscriber, 10 October 2016; *Bayan v. Romulo, Muna v. Romulo and Ople*, Petition for certiorari, mandamus and prohibition, GR no 159618, ILDC 2059 (PH 2011), 1 February 2011, Supreme Court of the Philippines, available at Oxford Public International Law (http://opil.ouplaw.com), subscriber, last visited on 10 October 2016.

are not *travaux préparatoires per se*, from the point of view of interpretation of article 121 (5) of the Statute, because they are not related to the mere text to be interpreted. Their legal qualification should be – in the measure they reflect the consensus of all State Parties – subsequent agreements that may serve for the interpretation of the text. The "form" of the subsequent agreement does not matter,[1] what matters is that it would comprise all parties involved.[2]

As the question "what exactly was agreed in Kampala?" was often put forward,[3] in our opinion, the issue of the "subsequent agreements" should be treated with caution. Therefore: i) it is certain that the parties agreed in Kampala that paragraph 5 of article 121 (5) shall apply to the Kampala Amendment and that the amendment shall be subject to ratification or acceptance; ii) in our opinion, the fact that Resolution RC/Res.6 that adopted the Kampala Amendment recalls, in its first two preambular paragraphs, articles 5 (2) and 12 (1) of the Statute cannot be considered an "subsequent agreement" in the sense that the second phrase of article 121 (5) will not apply to the Kampala Amendment; iii) the fact that paragraph 1 of Resolution RC/Res.6 "notes that any State may lodge a declaration referred to in article 15 bis prior to ratification or acceptance" is to be taken into consideration, but hardly can it be considered an agreement of the State Parties that the "opt-out mechanism" was designed primarily or only for State Parties that did not ratify the Amendment (or that do not intend to ratify the Amendment).

vi) any relevant rules of international law

The rule of interpretation contained by article 31 (3) c) of the Vienna Convention provides that together with the context, interpretation shall take into account "any relevant rules of international law applicable in the relations between the parties". *Inter alia*, the rule may ensure that a treaty is interpreted in such a way that would not be contrary to a principle or rule of customary

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[1] Georg Nolte, "Report 3. Subsequent Agreements and Subsequent Practice*"*, in Georg Nolte (Ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, p. 309.

[2] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 226, para. 83.

[3] Dapo Akande, "What Exactly Was Agreed in Kampala on the Crime of Aggression", *EJIL*:TALK! (June 21, 2010), https://www.ejiltalk.org/what-exactly-was-agreed-in-kampalaon-the-crime-of-aggression/ Astrid Resinger Coracini, More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression", *EJIL*:TALK! (July 2, 2010), https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-thecrime-of-aggression/, last visited on 26 June 2017.

international law: for example, in the *Frente Polisario v. Council*[1] case, the Court of Justice of the European Union applied article 31 (3) c) to an agreement between the EU and Morocco, by taking into account the principle of the rights of peoples to self-determination, to the result that the said agreement could not be applicable to the territory of Western Sahara.[2]

The relevant rule of international law applicable in the case of the Kampala Amendment would be the principle that a state cannot be submitted to an international jurisdiction without its consent. Therefore, the Rome Statute and the Kampala Amendment could not be interpreted as to apply in such a way that would infringe this principle.[3] Nevertheless, the "softened consent based regime" does not propose to supersede the consent of the allegedly aggressor State, but simply assumes that the *consent is "self-understood" or "presumed"*, from the effect of mainly article 12 (1) of the Rome Statute, by which the State Parties accept the jurisdiction of the Court with respect to the crime of aggression.

vii) travaux préparatoires

Even if the *travaux préparatoires* are considered by the Vienna Convention, according to article 32, only belonging to "supplementary means of interpretation", international jurisdictions used this means of interpretation even to identify the correct intention of the parties with respect to important issues: for example, in the *Genocide Case (Croatia v. Serbia),* the ICJ used the *travaux préparatoires* of the Genocide Convention to exclude the so-called "cultural genocide".[4]

The most important criticism that could be brought to the argument based on the *travaux préparatoires* of the Kampala Amendment is that the Kampala Amendment itself is not in force for the States that did not ratify or accept it and is not the "object of the interpretation". Practically, the "softened consent based regime" derives the "consent to jurisdiction" of the State Parties to the Rome Statute from the mere provisions of the Statute, especially article 12

[1] C-104/16P *Council v. Frente Polisario*, Judgment of 21 December 2016, appeal in T-512/12, *Frente Polisario v. Council*, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=186489&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=322530 (last visited on 15 July 2017).

[2] *Ibid.*, para. 86-93.

[3] Dapo Akande, "Prosecuting the Crime of Aggression", *loc. cit.*, p. 13; Dapo Akade, Antonios Tsakanopoulos, *loc. cit.*, p. 36.

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment,* ICJ Reports 2015, p. 3, paras. 134-136.

(1). Therefore, the *travaux préparatoires* of the Kampala Amendment do not represent preparatory works for the purpose of "this" interpretation. Only within the measure that they reflect the agreement of all parties, they can be regarded as subsequent agreements, as presented above.

Moreover, in our opinion, an element of criticism could be brought to the argument of Stefan Barriga, according to which the final result was a compromise between "camp consent" and "camp protection", because, otherwise, "it would mean that Camp Protection first came all the way over to Camp Consent, and then went even beyond".[1] Indeed, the compromise between the ABS group and Canada was an important moment during the Conference, but was achieved on the background of the lack of transparency that characterized the behind-the-scene negotiations. Many delegations were not fully aware about the details of this compromise, because the "matrix" of dilemmas was represented by: i) first and the most important: the option between the exclusive role of the Security Council for determining an act of aggression and allowing a role for the ICC to determine, on a preliminary basis, that such an act was committed (the so-called Option 1/Option 2); ii) second, the dilemma between applying article 121 (4) or 121 (5). Even if the second was solved, the first was not until the very end of the conference: I remember clearly that, as the delegations of the permanent members State Parties indicated that they could not accept anything but Option 1, and delegations were prepared to vote during the afternoon of the last day – hoping for at least a "consensus minus 2" solution. In this context, the "opt in and then out" seemed to the delegations, truly, "a step all the way over to Camp Consent and beyond", but, nevertheless, a reasonable compromise, in order to respond to the concerns of the permanent members and to obtain consensus on "something else than Option 1".

viii) lex specialis

The *lex specialis* is not a rule codified by the Vienna Convention, but is accepted as a customary rule, deriving from general principles of law. It was applied by the Permanent Court of International Justice in the *Mavrommatis Concessions* case.[2]

[1] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…, loc. cit.*, p. 17.

[2] *Mavrommatis Concessions,* PCIJ, 1924 Ser. A, no. 2, p. 31; Mark E. Villiger, *op. cit.*, p. 409.

Nevertheless, the argument that article 12 (1) represents *lex specialis* in relation to article 121 (5) brings some difficulty. The alleged *lex generalis*, article 121 (5), regulates the procedure for amending articles 5-8 of the Rome Statute and establishes a rule for the exercise of the jurisdiction of the Court in case of crimes covered by those amendments. If article 12 (1) would be *lex specialis,* it would mean that it: either establishes a special rule for amending articles 5-8 or establishes a special rule for the jurisdiction of the court. However, the wording of article 12 (1): "*A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5*" appears of the most general character. It might appear difficult to argue that such a text would represent *lex specialis.* Moreover, article 5 (2) merely makes a reference to "*a provision adopted in accordance with articles 121 and 123":* therefore, no intention to derogate from article 121 would appear from this text.

4.3. A clash between values?

The arguments above showed that interpretation could be torn in both directions. Arguments may be presented "in pairs", in both ways. If States would have adopted the "positive" understanding or the "negative" understanding, as proposed during the Kampala Conference, the situation would have been much clearer, on the basis of a subsequent agreement. However, this did not happen and the opinions of States remained divergent. Nevertheless, it would be important to point out that the two opposite views, the so-called "camp protection" and "camp consent" reflect, each of them, one of the most important values in international relations.

On one hand, the interpretation supported by "camp protection" is based on the need to combat impunity, to prevent and deter the commission of the gravest crimes that affect the humankind. Thus, punishing and preventing the crime of aggression, the gravest of all crimes, is of a such paramount importance, that the "consent" might be seen as falling in a secondary plan.
On the other hand, it has to be acknowledged that "camp consent" relies on the principle according to which a State cannot be subject to jurisdiction if it has not agreed to that jurisdiction. Even if it might appear on a first glance that such a principle is not as important for humankind than combating aggression, it is an essential "brick" in the construction of international law. Affecting this principle might put a question mark to legal certainty in international relations and might trigger strong reactions from relevant States.

Moreover, we find important to underline the following issue: the principle of consent is a *procedural* principle in international law, while the general

objective of combating aggression is a *substantial* matter. As in other cases in international law, procedural principles do not run counter to substantial ones and should not be overruled by the latter. We find that a useful analogy might be the relation between the principle of State immunity – which is a procedural principle – and the need to comply with *jus cogens* rules – which are substantial matters. The question appeared: would State immunity be overruled when the alleged wrongful acts of States represented violations of *jus cogens?* The answer of the ICJ in the case concerning *Jurisdictional Immunities of the State* was in the negative.[1]

Therefore, we do not see the clash between protection against aggression and consent as a clash between values, but as a clash between a substantive matter and a procedural principle. The correct approach, in our view, would be to achieve the substantive objective by respecting the procedural principle, because in this way the full trust of the international community in the mechanism designed to achieve the substantive objective would be guaranteed.

Thus, if the step forward towards protecting the international community against aggression would be "more ambitious", at the expense of "a presumed State consent", the disadvantage might be: legally, putting under question a fundamental principle on the basis of which international law works and, politically, even the withdrawal of the support of certain (important) States for the objective of combating aggression. If the step forward towards protecting the international community against aggression would be "less ambitious", while giving full effect to the principle of State consent, the disadvantage might be: a less ambitious approach and a certain disappointment on behalf of States supporting a more ambitious approach. In these conditions, what is more important – to combat and prevent aggression more ambitiously on the „cost" of a flexible interpretation of a presumed State consent? or to secure the certainty of inter-State legal relations on the „cost" of a less ambitious prevention of aggression?

5. Conclusion

The purpose of this study was to review one of the most contentious issues related to the Kampala Amendment. "The question" that appears to need an answer before activating the jurisdiction of the ICC over the crime of

[1] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), Judgment, ICJ Reports 2012, p. 99; see also *Jones and Others v. The United Kingdom*, ECHR, applications nos. 34356/06 and 40528/06, judgment of 14 January 2014.

aggression is whether, in cases of State referrals and *proprio motu* investigations, the Court would have jurisdiction in case of a crime of aggression related to an act of aggression committed by a State Party to the Rome Statute which had not ratified or accepted the Kampala Amendment, against the territory of a State Party which has ratified or accepted the Amendment.

The opposing views that provided answers to "the question" relied on two fundamental values of the international community. On one hand, the so-called "camp protection" relied on the desire to combat aggression to the largest extent possible, as it represents the gravest of all international crimes. On the other hand, the so-called "camp consent" relied on the well-established principle of international law that a State cannot be submitted to an international jurisdiction without agreeing to it. Indeed, even the supporters of "camp protection" do not sustain that consent is overruled: in their opinion, consent of State Parties that have not ratified or accepted the Kampala Amendment is "presumed" or "self-understood", from the combined effect of articles 12 (1) and 5 (2) of the Rome Statute. Therefore, the question of interpretation that needs to be answer is whether the clear text of the second phrase of article 121 (5) – which exclude jurisdiction for crimes covered by amendments, in case of States not having ratified or accepted those amendments - does (or does not) apply to the crime of aggression, because State Parties to the Rome Statute had previously accepted the jurisdiction of the Court for that crime.

The means of interpretation provided by the Vienna Convention on the Law of Treaties have been examined, with opposite results: while the ordinary meaning of the words clearly supports the "consent" approach, the object and purpose of the treaty is a strong argument in favour of the "protective" view. Criticism could be brought to arguments related to the *travaux préparatoires* in Kampala – on one hand, the conference was characterized by behind-the-door negotiations and reduced transparency, on the other hand, the main texts to be interpreted are the ones of the Rome Statute, and the Kampala negotiations could at best serve as subsequent agreements, in the measure in which they reflect the consensus of the parties.

Nevertheless, the answer to the question whether the establishment of State consent for jurisdiction should be "presumed", or "self-understood", or at least "flexibly interpreted" puts in balance a *procedural* principle: the consent for jurisdiction, with a *substantive* objective – the need to combat and prevent aggression. As in the case of State immunity, a procedural principle should

not be overruled by a substantial matter. Achieving the substantive goal should be done by observing the procedural principles – thus ensuring the solidity of the legal construction and the needed political support.

Thus, it would be useful to repeat the conclusions we drawn in a previous preliminary study:[1] what is more important – to dissuade aggression on the „cost" of a flexible consent? or to secure the certainty of inter-State legal relations on the „cost" of a less ambitious dissuasion of aggression? And, as in any case the activation of the jurisdiction of the ICC for the crime of aggression would be an immense "step forward", what is preferred: a solid, ambitious „step forward", with a shaky foundation (legally - putting under question a well-anchored principle of international jurisdiction and politically - a decision of the ASP without consensus, for example with the opposition of permanent members)? or a less ambitious „step forward" (but still a step forward), with a solid foundation (legally – relying on the principle of consent and politically – achieving consensus of the State Parties for activation of jurisdiction over the crime of aggression)?

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Evenimente relevante din practica românească a aplicării dreptului internaţional
Events of Relevance in the Romanian Practice of Implementing International Law

Events in the Romanian Practice of Implementing International Law (January-June 2017)

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Abstract: *This brief presentation of the Romanian practice during the first semester of 2017*[2] *in implementing international law tries to give an overview of what can be termed as a very rich activity of the Romanian authorities in this field. The paper describes the legal positions expressed on various occasions regarding events with relevance to international law, legal procedures regarding important agreements signed by Romania, Romania's participation to the most important international organizations etc.*

Key-words: *Conference on Disarmament, International Court against Terrorism, International Holocaust Remembrance Alliance, ballistic missiles, UN Security Council, Nuclear Weapons Ban Treaty, diplomatic mission, OSCE, Romanian-German Joint Intergovernmental Commission on national minorities, Treaty on friendly cooperation and partnership in*

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[2] Parts of this presentation were already published in the *Judicial Courier* review issues of the first semester of 2017 by the same author, in the section "*International Actuality*".

Europe between Romania and Germany, ECtHR, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Romanian-US Agreement on preventing and combating serious crimes, NATO, OECD Nuclear Energy Agency, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, ECOSOC.

1. The Exercise by Romania of the Presidency of the Geneva Conference on Disarmament

On **23 January 2017**, the Romanian MFA informed through a press release that Romania is amongst the six states (P6) that will hold, during 2017, in alphabetical order, the presidency of the Conference on Disarmament. Romania exercised its mandate between 23 January and 19 February 2017, being the first country presiding over the Conference in 2017.

The MFA also informs through the mentioned source that taking over the presidency of the Conference on Disarmament represents an opportunity for Romania to reiterate its strong political support for this multilateral negotiation forum on disarmament and for the efforts to revive its activities, by adopting, as soon as possible, through consensus, a work schedule.

It is also stated that, as the first State to hold the presidency in 2017, Romania has initiated consultations with regional groups and with the forum's member States in order to identify issues that may link the consensus amongst members of the Disarmament Conference and realistic courses of action during the Romanian presidency.

Since its establishment in 1979, the Geneva Conference on Disarmament has been known, according to the MFA, as a 'sole multilateral forum for disarmament negotiations'. According to the cited source, the main multilateral legal agreements in the field have been negotiated under its auspices: the Treaty on Non-Proliferation of Nuclear Weapons, the Biological and Chemical Weapons Conventions, the Comprehensive Nuclear Test-Ban Treaty. Furthermore, the Conference on Disarmament is the forum designed to ensure progress on issues of large interest in the fields of nuclear disarmament and non-proliferation, such as negotiating a treaty forbidding the production of fissile material for military purposes. Currently, the Conference on Disarmament is focusing on the following issues: nuclear disarmament, preventing an arms race in outer space, negative security assurances, transparency in the field of armaments. The MFA also informs

that the Conference's background activity has been blocked during the last years because of the impossibility to consensually adopt a working schedule.

On **19 February 2017,** according to a press release by the MFA, Romania's term (held since 23 January 2017) for the Presidency of the Conference on Disarmament ended, being the first State from the group of six (P6 – Romania, the Russian Federation, Senegal, Slovakia, South Africa and Spain) that exercised this position in alphabetical order during 2017.

In this quality, according to the cited press release, Romania held consultations with regional groups and the member States of this forum, in order to identify topics which could form the consensus of the CD members and realistic courses of actions during the Romanian presidency. On the basis of the consultations and according to the CD rules of procedure, in order to remove the existing blockage and to identify common positions allowing the adoption of a work schedule with a Conference negotiation mandate so that so that it can fulfil its role, Romania proposed the establishment of a Working Group as a subsidiary CD organ.

According to the cited source, on 17 February 2017, the Disarmament Conference adopted, by consensus of the member States, the decision regarding the Working Group's establishment with the theme "The Path to Follow" in order to identify common elements that could be the basis of the Conference's adoption of a work schedule with a negotiation mandate. The adoption of this decision creates the premises that could lead, through organizing debates on topics from the Conference's agenda, but also on new, unexplored topics, to the revival of its activity.

2. The International Conference "The Road towards an International Court against Terrorism"

On **16 February 2017**, the International Conference "The Road Towards an International Court against Terrorism" took place in Bucharest, organised by the Ministry of Foreign Affairs together with the Ministry of Foreign Affairs and Cooperation of the Kingdom of Spain and the prestigious International Association of Penal Law.

According to a press release of the Romanian MFA, the talks emphasised the added value of the international legal instruments and international justice in growing the fight against terrorism and they approached relevant aspects of the Romanian-Spanish initiative regarding the possible creation of an international criminal court for sanctioning terrorism crimes. The event

included three panels, dedicated to analysing the existing international legal framework, the benefits associated with the creation of an international court against terrorism and the challenges this might entail. The Conference was attended by representatives of the international academic community and government experts specialised in this area, together with members of the Diplomatic Corps accredited in Bucharest.

The opening interventions underlined, according to the cited press release, the growth in intensity and amplitude of the terrorist phenomenon, the potential deepening of this security challenge in the globalisation era, as well as the need to adapt response strategies to these evolutions. Furthermore, it was noted that currently the international community has not managed to develop a coherent normative framework in the field of fighting terrorism, favouring instead a fragmented approach marked by regional and sectorial agreements, pleading for the developing of an approach based on international criminal law in the fight against terrorism, similarly to the legal framework applicable to the most serious crimes of concern to the international community falling under the jurisdiction of the International Criminal Court (ICC).

Spain's Ambassador in Bucharest also underlined that, despite the difficulties inherent to such a project, the debates regarding this initiative represent a success in themselves, and that Romania and Spain continue this effort and remain open to discuss different suggestions regarding the continuation of the project.

According to the cited source, as a special guest, Prof. Dr. Bogdan Aurescu, presidential advisor on foreign policy, who initiated this project in 2015 as Minister for foreign affairs, mentioned that "states must have both political will and vision, in the sense of giving up unilateral sovereign approaches that prove inefficient, in recognising the importance of a more open and applied international co-operation and accepting the role that international law and justice play in the fight against terrorism. We must admit that using the international law and justice instruments in this fight offers us, the international community, the upper moral argument: we do not combat force by just using force, but also with values, the values represented by the rule of law at the international level. Therefore, the fight against terrorism is not just a legal obligation owed by each State, but also a legal responsibility of the international community as a whole. That is why we need an answer based on law: international law is one of the most powerful instruments the international community has".

The same press release shows that, in closing the event, John Vervaele, President of the International Association of Penal Law, and Jose Luis de la Cuesta, Honorary President of the Association, synthesized the main ideas and messages from the discussions, around the common commitment to fight terrorism, including through the instruments offered by international law. Given the subject's complexity, it was considered necessary to continue the reflection process regarding the possibility of establishing an international court sanctioning terrorism acts, including through developing dialogue with the academic community and the civil society.

On this occasion, a joint statement of the Conference organisers was issued, reflecting their determination to continue debates on the topic, in order to identify the best solutions to support the fight against terrorism.

3. The Conclusion of Romania's Chairmanship of the International Holocaust Remembrance Alliance

On **7 March 2017**, according to a press release of the Romanian MFA, Romania concluded its chairmanship of the International Holocaust Remembrance Alliance (IHRA). This moment was marked during a ceremony organised in Berlin, at the Swiss Embassy, the State that assumed the chairmanship of the Alliance for the following year.

According to the mentioned press release, the achievements of the Romanian chairmanship referred to the successful implementation of its three priorities: consolidating the education on the Holocaust, encouraging academic research and fighting anti-Semitism, racism, xenophobia and discrimination through numerous projects and actions undertaken in the country and in the Alliance's member or observer States, through partnerships with local and international institutions and organisations.

The most significant result attained by the Alliance during Romania's chairmanship was the adoption of the *working definition of anti-Semitism*, during the Bucharest IHRA Plenary Meeting in May 2016. This is, according to the cited source, meant to inspire and guide the activity of experts and researchers, as well as national policies in the area, being subsequently adopted formally by the British Government and debated in the US Congress. Also a first for the IHRA, a cooperation with the Holy See was launched, materialised in organising the first common conference on policies regarding refugees since 1930, which took place in February 2017 at the Vatican, as shown by the MFA press release.

The MFA reminds in its press release that the IHRA is an international organisation based in Berlin, with 31 member States, 11 observer States and 7 permanent international partners. IHRA was founded in 1998 and works according to the Stockholm Declaration, in view of consolidating Holocaust remembrance, research and education.

4. Romania's Position on a Series of Defying Actions by North Korea
On **20** and **25 March 2017**, the Romanian MFA reacted through two press releases to the testing of a new type of rocket engine and the launching of ballistic missiles by the Democratic People's Republic of Korea.

As such, the MFA, through the mentioned press releases, expressed its concern about the testing by North Korea of a new type of high-power engine for ballistic missiles, and it strongly condemned the launching of ballistic missiles, considering that these actions by the Democratic People's Republic of Korea continue to violate resolutions of the UN Security Council requesting the DPRK to give up its ballistic programs and to defy calls from the international community requesting the Pyongyang authorities to give up committing defying acts against peace and stability in the Korean Peninsula.

Moreover, the MFA called the DPRK authorities to respect existing international norms and return to the negotiation table in a six-party format.

5. Romania's Position on the Negotiation Process regarding the Nuclear Weapons Convention
On **28 March 2017**, the Romanian MFA issued a press release on the negotiation process of the Nuclear Weapons Convention.

The press release states that that first round of negotiations on the Nuclear Weapons Convention will take place between 27 and 31 March 2017, at the UN headquarters in New York, with the following statements:

Romania has constantly had a balanced approach on the topic of nuclear disarmament worldwide, acknowledging the importance of this topic for global security, but placing it in the context of the commitments undertaken in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and of the measures aimed at enhancing its implementation. Romania considers that making significant progress towards nuclear disarmament requires both enhancing cooperation with the countries that hold nuclear weapons and taking into account security interests of all states involved in this process. It

is also noted that Romania continues to support and promote a gradual approach of the disarmament process, ensuring a safe and irreversible progress, supporting, *inter alia*, the need of enhancing the efforts for the entry in force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and the negotiation of the Fissile Material Cut-off Treaty (FMCT) at the Conference on Disarmament in Geneva.

Taking these into account, the MFA shows in the cited source that Romania is not in a position of supporting proposals that do not take into account the current security architecture and the challenges against the nuclear non-proliferation regime.

6. **The 50th Anniversary of Embassy-Level Diplomatic Relations between Romania and Canada**

3 April 2017 marked the 50th anniversary of embassy-level diplomatic relations between Romania and Canada.

According to a press release by the MFA, the relations between the two states, initially characterised by pragmatism and specific cooperation within international organisations, has grown continuously during the last decades based on firmly defined coordinates: common Euro-Atlantic values and interests, shared attachment towards Francophony and the presence of a significant Romanian community on Canadian territory. The same MFA press release mentions that the Romanian-Canadian ties are marked by projects of cooperation in the political, military and economic fields, as well as by a strong political dialogue, as Canada represents an important ally to Romania within NATO, contributing to the organisation's measures of reassuring Eastern European allies, including through common training exercises with allied participation taking place in Romania.

Furthermore, the cited source also mentions the removal, starting this year, of the requirement of short-stay visas for Romanian citizens travelling to Canada for tourism and business, which will contribute to the growth and diversification of the bilateral relations, as well as the expansion of the entire transatlantic cooperation potential.

Finally, the MFA press release expresses the conviction that the Romania-Canada relations will consolidate and deepen, taking into account the near entry into force of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Canada Strategic Partnership Agreement (SPA).

Diplomatic relations between Romania and Canada were established on 16 August 1919, with the establishment of Romania's Consulate General in Montreal.

7. End of the Romanian Chairmanship of OSCE's Forum for Security Co-operation

The Romanian Chairmanship of OSCE's Forum for Security Co-operation (FSC) ended on 5 April 2017.

According to a MFA press release, by exercising the Chairmanship of the FSC between January and April 2017, Romania has undertaken a prominent profile in multilateral diplomacy, with the purpose of contributing to the consolidation of peace, security and cooperation in Europe. According to the same source, the Romanian chairmanship of the FSC took place during a difficult political and security context, marked by complex challenges, such as the crisis in Ukraine, violent extremism and radicalisation leading to terrorism, plus the permanent erosion of trust- and security-building tools in Europe.

The working schedule included current topics such as regional security in the Balkans and the Black Sea area, managing the surplus of small-calibre weapons and light armament, as well as stocks of conventional ammunition by the Republic of Moldova, the role of the Vienna Document in building trust for current risks and threats approaches, military aspects of cyber security, the non-proliferation of weapons of mass destruction in the context of applying at the OSCE level UN Security Council Resolution 1540, implemention UN Security Council Resolution 1325 concerning women, peace and security.

Overall, 35 guests participated with substantial contributions at the meetings and events organised by the FSC Romanian Chairmanship.

According to the mentioned MFA press release, the FSC is one of the two decision-making bodies of the OSCE (alongside the Permanent Council). Set up in 1992, the Forum reunites on a weekly basis and provides for an assessment and debate platform for the issues of security and multilateral cooperation, to increase stability and security in the OSCE area. The FSC is mandated to deal with a wide range of political and military aspects, from traditional security to confronting threats, such as weapons trafficking,

including weapons of mass destruction. The Forum's main tasks include periodic consultations and cooperation on military security topics, negotiations on measures to increase trust and security (within working groups), the continued decrease of risks of conflict and the implementation of agreed measures.

After Romania, the FSC's rotating chairmanship will be exercised, in 2017, by the Russian Federation and by the Republic of Serbia.

8. Romania's Position regarding North Korea's Launch of a Medium-Range Ballistic Missile

On **5 April 2017**, the Romanian MFA condemned, through a press release, the launch by the Democratic People's Republic of Korea of a new medium-range ballistic missile. The MFA stated the launch violated UN Security Council resolutions in force, this country's repeated actions representing major threats towards international peace and security.

The MFA reiterated its appeal to the Pyongyang authorities to fully respect the existing international norms and to refrain from any actions which may destabilise security in the Korean Peninsula and at a global level.

9. Signing the Protocol of the 20th Session of the Romanian-German Joint Commission on the Problems of German Ethnics in Romania

The Protocol of the 20th session of the Romanian-German Joint Commission on the problems of German ethnics in Romania was signed on **11 April 2017**. According to a press release by the Romanian MFA, it was signed by the co-Chairs of this organism, a Romanian State Secretary and the German Chargé of the Federal Government for German immigrants and national minorities.

According to the cited source, the works of the 20th session of the Joint commission took place in an anniversary context, taking into account the fact that the *Treaty between Romania and the Federal Republic of Germany on friendly cooperation and partnership* in Europe was signed 25 years ago. The same MFA press release shows that the Chargé of the Federal Government for German immigrants and national minorities thanked the Romanian party for the efficient organisation in Bucharest of this year's session of the Commission and appreciated the collaboration with the Romanian authorities regarding German ethnic issues in Romania, and the co-Chairs of the Commission stressed the importance of developing new joint projects, the existing Romanian-German cooperation mechanism being an efficient work

instrument, which may serve as model at European level for the protection of national minorities.

On the same occasion, they noted the German minority's appeal for Germany to support Romania's near future accession to the Schengen area.

According to the mentioned source, the works of the Commission were attended by representatives of the Presidential Administration, the Ministry of Foreign Affairs, the Ministry of National Education, the Ministry of Culture and National Identity, the Ministry of Labour and Social Justice, the Ministry of Public Finances, the Ministry for Romanians Abroad and the Department for Interethnic Relations. They were also attended by representatives of prefectures of counties where the German minority has a significant presence (Brașov, Caraș-Severin, Satu-Mare, Sibiu, Suceava, Timiș), while the German delegation was comprised of representatives of the Federal Ministry of Foreign Affairs, the Ministry of Internal Affairs, as well as representatives of the German ethnic groups originating in Romania.

The Romanian-German Joint Commission on the problems of German ethnics in Romania carries its activity annually, in Romania and Germany alternatively, with the purpose of supporting the German minority in Romania.

10. **Adopting the Joint Statement of the Romanian and German Ministers of Foreign Affairs on the 25th Anniversary of the Treaty on Friendly Cooperation and Partnership in Europe between Romania and Germany**

On **21 April 2017**, a Joint Statement was adopted by the Romanian and German Ministers of Foreign Affairs on the 25th anniversary of the signing on 21 April 1992 of the *Treaty on friendly cooperation and partnership in Europe between Romania and Germany*.

According to the Statement, published by the Romanian MFA, the Treaty is the foundation of political, economic, and cultural cooperation between the two countries. The fall of the Iron Curtain in Europe paved the way for making decisive steps, in partnership, for finally overcoming the division of the European continent. The purpose was to establish a sustainable peaceful order across Europe and to build a unified Europe based on fundamental values: human rights, democracy and rule of law.

The Statement shows the bilateral relations are varied and close, relying on the common cultural heritage and especially on close human relations. As such, the German minority in Romania has left a significant mark over time and especially at crucial times in history, and contributed to the appreciation of Romania in Germany. At the same time, many Romanian citizens living in Germany enrich the close relations between the two countries. This daily interaction between Romanians and Germans, between people of different identities in both countries, reveals impressively how smooth and natural coexistence in Europe can be.

The Statement also mentions that friendship and mutual respect are defining elements of the bilateral political, economic and societal relations, which are a model of coexistence and cooperation in Europe. These relations are proof of a good cooperation between Romania and Germany, both at the government level and at the level land and regional administrations levels.

The text of the Joint Statement highlights that Germany has closely supported Romania's European path. Ever since Romania became a member of the EU 10 years ago, the two countries have closely collaborated towards enhancing the values underlying the EU: respect for human rights, for fundamental freedoms, for democracy and for rule of law. In terms of common security and defence, our countries' NATO membership proves we are part of a strong and united community.

The Statement also reiterates the decision, enshrined in the Rome Declaration of 25 March 2017, to tackle the current European challenges in the spirit of European unity. Europe is our joint future and our essential framework of action. The European Union guarantees security and prosperity in a sustainable and social Europe, which plays an essential part globally and creates closer connections between our states and societies, based on our common values.

Finally, the Statement reaffirms the commitment towards the European project, a project of peace and freedom, of democracy and rule of law, which has led to the development of the most important common economic space, with an unprecedented level of social security. It also states that 'Together, we wish to work towards preserving this unique historical project and to focus it on the future – a safe, prosperous, competitive and socially responsible Europe!'

11. ECtHR's Pilot Judgment in the Case of *Rezmiveş and others v. Romania*

On **25 April 2017**, the European Court of Human Rights (ECtHR) delivered its pilot judgment in the case of *Rezmiveş and others v. Romania*.

According to a MFA press release, the Court reiterated in this judgment the existence of a structural problem regarding overcrowding in Romanian detention and arrest centres as well as in prisons, and also confirmed the progresses recorded, positively appreciating the measures already adopted or predicted by the Romanian State in order to fight this phenomenon of overcrowding. At the same time, according to the MFA, the Court recommended extra measures, logistical or penal, to be adopted by the national authorities, as well as strengthening or introducing preventive and compensatory remedies, for the situations where a person is facing or was exposed to overcrowding in the places where it is or was detained.

The same press release highlights that, taking into account that the State needs time in order to define these supplementary measures, the Court awarded the authorities a six-month period from the date the judgment remains final, in order to submit, in cooperation with the Council of Europe Committee of Ministers, an action plan identifying the supplementary measures and the timeframe of their adoption. The MFA also informs that, in order to support the authorities in this procedure, the Court decided to suspend the examination of applications pending and not yet communicated to the Government for observations, thus favouring an effort focused on identifying and subsequently adopting the extra measures.

According to the cited source, the procedure of the pilot judgment applies in the situation where a significant number of similar applications are registered with the ECtHR, invoking violations which have a common cause. In the judgment delivered in such a procedure, the Court mentions the dysfunctionalities existing in the national framework and sets a timeframe for the Government to identify and implement measures necessary to repair them. The procedure of the pilot judgment represents a form of cooperation between the Court and the respondent State. Its purpose is to offer recommendations of general measures which would be able to solve the respective systemic problem and would be acceptable from the Court's perspective, reported to its case law and the significant number of similar pending applications. The Court confirms in its case law the State's freedom to choose the measures through which to fulfil its obligation to execute the Court's judgments.

The MFA press release reminds the first ECtHR judgment delivered against Romania in the field of material detention conditions dates from December 2007 (*Bragadireanu v. Romania*). Furthermore, in July 2012, the ECtHR delivered a judgment in the case of *Iacov Stanciu v. Romania*, where it stated that despite the Romanian authorities' efforts to improve the situation, there is a structural problem in the field of material detention conditions; following this judgment, the Romanian authorities adopted a series of legislative and administrative measures, the results thereof being positively appreciated by the Court.

According to the MFA press release, another pilot judgment was delivered against Romania, *Maria Atanasiu and others c. Romania*, in the area of restitution of nationalised properties; it is stated that the reforming measures adopted in this field and the authorities' cooperation with the Department for the Execution of Judgments of the ECtHR were publicly appreciated by officials of the Council of Europe and received positively by the Court, which considered that the new legislation offered the possibility to properly solve requests for reparation, in the majority of situations in its pending cases.

12. The 20th Anniversary of the Entry into Force of the Chemical Weapons Convention and the Establishment of the Organisation for the Prohibition of Chemical Weapons

29 April 2017 marked the 20th anniversary of the entry into force of the Convention on prohibition of development, production, storage and use of chemical weapons and their destruction (Chemical Weapons Convention – CWC) and of the establishment of the Organisation for the Prohibition of Chemical Weapons (OPCW), an international institution headquartered in The Hague, whose main objective is the implementation of the CWC provisions.

According to a press release, which welcomes this anniversary, the Romanian MFA underlines the great relevance of the Chemical Weapons Convention, one of the most important international legal tools on disarmament and non-proliferation, the first universal treaty, which aims to abolish an entire category of weapons of mass destruction, under tight international control, being an important pillar for regional and global security.

The MFA press release shows that Romania was one of the first States that signed and ratified the Convention, being a strong supporter of the CWC and thoroughly fulfilling its duties as a State party, an assessment confirmed by

the 16 international inspections carried out by the OPCW at the chemical sites in Romania since 1997 until the present time. It is also mentioned that Romania aims at enhancing its collaboration with the OPCW by developing specific common projects seeking to expand the Romanian authorities' and the OPCW staff's training, in the current context of security challenges that reveal OPCW's position in fighting against proliferation and the use of chemical weapons.

According to the cited source, the CWC is the first treaty that expressly includes the objective and calendar to remove an entire category of weapons of mass destruction – chemical weapons, under tight international control, an undeniable success of post-war multilateralism, through the dynamics of the ratifications, the efficiency of the verification system and the speed to adapt to new challenges of research, science and technology in the matter. There are now 192 states parties to the CWC, continuing their efforts for the universalisation of this legal tool.

The MFA press release informs that Romania signed the Convention on 13 January 1993 and ratified it on 9 December 1994, through Law no. 125/1994, being the 25th signatory State of the CWC. Our country deposited the ratification instruments on 15 February 1995, and the Convention entered into force on 29 April 1997, 180 days after depositing with the UN Secretary General the 65th instrument of ratification. The CWC provisions are implemented in Romania through Law no. 56/1997, supplemented and amended through Law no. 448/2003, the Ministry of Foreign Affairs, through its Department of Exports – ANCEX, being the national authority in the area. In 2013, the OPCW was awarded the Nobel Peace Prize, for 'extensive efforts to abolish chemical weapons.'

13. The Approval by the Romanian Government of the Agreement between the Government of Romania and the Government of the USA on Enhancing Cooperation in Preventing and Combating Serious Crimes

On **5 May 2017**, the Romanian Government approved, according to its press release, the project of the Law for ratifying the Agreement between the Government of Romania and the Government of the USA on enhancing cooperation in preventing and combating serious crimes, signed at Washington on 5 October 2015.

According to the cited press release, the Agreement will allow, once it enters into force, both Governments to cooperate through national contact points, in

order to ensure the exchange of information between authorities with attributions in preventing, discovering and investigating serious crimes and terrorism.

Furthermore, the Government's press release mentions that the Agreement allows the submission by Romanian and American authorities of the reference data in their national automatic systems of fingerprint identification and DNA databases, used in crime prevention and investigation. According to the document, the procedures apply to actions constituting crimes for which the laws of the two countries provide imprisonment for more than one year or a more serious punishment.

The Agreement has, according to the cited source, a prevailing technical character and comprises provisions referring, *inter alia*, to: reciprocal access to reference data in the automatic systems of fingerprint identification, created by the Parties for this purpose; performing automatic interrogations through the comparison of fingerprint data by the national contact points, in individual cases; reciprocal access to reference data in DNA databases; performing automatic interrogations through the comparison of DNA profiles in individual cases, by the national contact points, for the investigation of serious crimes; submitting supplementary personal data and other information referring to fingerprint and DNA data, according to the applicable laws of the two States; aspects referring to the refusal to comply with a request to submit data and information; protection of personal data and limits imposed on the processing thereof; other procedural provisions, such as bearing expenses, the Agreement's entry into force, its termination.

According to the Government's press release, the Agreement was concluded as part of the political and diplomatic efforts undertaken by the Romanian Government for our country's admission to the Visa Waiver Program, to fulfil the technical criteria of the visa liberalisation process for Romanian citizens travelling to the USA.

The Government's press release also shows that the Agreement's provisions are compatible with the principles of Directive (EU) 2016/680 regarding the minimum guarantees which should be imposed in the field of transferring personal data to third countries and the protection thereof, among which the rights of the respective person, ensuring data confidentiality and security and overseeing and controlling processing.

14. Launching the Campaign of Promoting Romania's Candidature for a Non-Permanent Member Seat in the UN Security Council between 2020 and 2021

On **2 June 2017**, in New York, Romania's candidature was officially launched for a term of Non-Permanent Member in the UN Security Council between 2020 and 2021, in the presence of the Romanian Minister for Foreign Affairs.

According to a press release by the Romanian MFA, the event highlighted the moment's special significance for the Romanian diplomacy, through the perspective of confirming Romania's role as responsible actor of the global community. It was moreover shown, according to the cited source, that having a new term as a Non-Permanent Member in the UN Security Council represents a strategic engagement, Romania's candidature for the principal global forum of maintaining international peace and security reflecting our country's engagement to promote the principles and values of the UN Charter, as well as recognising Romania's contribution as a UN Security Council Non-Permanent Member during its previous four terms.

According to the press release, the launch took place at the UN headquarters and enjoyed the attendance by numerous members of the Diplomatic Corps representing all of UN's geographic groups, as well as high officials from the organisation. The motto for Romania's campaign is 'sustainable commitment for Peace, Justice and Development'.

15. Romania salutes Montenegro's deposit of its instrument of accession to NATO

On **6 June 2017**, the Romanian MFA saluted, through a press release, Montenegro's deposit, in Washington, of its instrument of accession to the North Atlantic Treaty.

According to the mentioned source, the decision of inviting Montenegro to join NATO represented a recognition of its progress in internal reforms, as well as its contributions to ensure Euro-Atlantic security. It is also shown that through this new enlargement, NATO has reconfirmed its *open door* policy, which has contributed significantly to the strengthening of security and stability in the Euro-Atlantic area.

Romania has constantly and actively contributed to the support of Montenegro's Euro-Atlantic progress.

The Romanian MFA's press release also shows the evolution of Montenegro's accession to NATO: the invitation to join the Partnership for Peace in November 2006; the initiation, in December 2009, of the NATO Membership Action Plan, a NATO program of consultancy, assistance and practical support adapted to the individual necessities of each candidate State; receiving, in December 2015, the invitation to join the Alliance. The accession protocol was signed in Brussels on 19 May 2016 by the NATO ministers of foreign affairs. It was followed by the ratification process by the NATO member States' parliaments, the final step being the deposit of the accession instrument to the US Department of State. The Romanian Parliament ratified the Accession Protocol on 4 October 2016.

16. Romania's accession to the OECD Nuclear Energy Agency. Signing the OECD Convention to Implement Tax Treaty Related Measures and to Prevent Base Erosion and Profit Shifting

On **7 June 2016**, Romania acceded to the OECD Nuclear Energy Agency (NEA) and signed the Convention to Implement Tax Treaty Related Measures and to Prevent Base Erosion and Profit Shifting (BEPS).

According to a press release by the Romanian MFA, the accession to the NEA, through an exchange of letters, represents a success of an extensive cooperation on nuclear matters, undertaken for 10 years between Romania and the Agency, also representing an international confirmation of the Romanian nuclear program's solidarity, compatible with the highest global standards, attested by the quality of material, human and research infrastructure.

According to the same source, the status of NEA member offers Romania access to the highest level of expertise and good practices in the field, as well as the opportunity to directly participate with the other 31 member States in establishing international regulations in a strategic field – the nuclear field.

The MFA press release also states that by signing the BEPS Convention, Romania joins over 60 States, most OECD and G20 members, in their fight against the phenomenon of profit shifting towards tax heavens. The Convention facilitates, according to the MFA, the exchange of tax data between partner States, as well as the identification and removal from domestic legislation the gaps allowing profit tax evasion and profit shifting outside tax collection areas.

The MFA also shows that the NEA is an intergovernmental agency functioning under OECD, headquartered in Paris since 1958, the NEA facilitating cooperation between States with advanced nuclear infrastructures and technologies and, according to its statute, having as an objective 'reaching excellence in the areas of nuclear safety, as well as in connected fields: technology, research, environment and legislation'.

Regarding BEPS, the MFA mentions it is a multilateral legal instrument with innovative character, establishing measures of cooperation in order to reduce tax evasion opportunities by multinational entities, the signatory States wishing to identify solutions so that governments remove gaps from international norms in force making possible the artificial profit shifting by companies towards places with low taxation, where those companies have minimum or no economic activity.

17. Romania's election as member of the UN Economic and Social Council

On **15 June 2017**, Romania was elected as member of the UN Economic and Social Council (ECOSOC) as representative of the Eastern European Group, during the elections under the 71st session of UN General Assembly, with 172 votes.

According to a press release of the Romanian MFA, Romania's election for this term, which will be carried out in New York between 2018 and 2019, is a direct consequence of our country's involvement in most of the UN activities and confirms the appreciation Romania enjoys internationally. The mentioned press release states that during the campaign to promote its candidacy, Romania built a profile defining its vocation as State belonging to a region committed to promoting European values and high standards of economic and social development.

The mentioned source shows that "Romania is fully committed to further strengthen ECOSOC's activity and to respond, under its term, to the new general framework within which all development partners will strive to achieve the Sustainable Development Goals set out in the Global Agenda for Sustainable Development adopted in 2015. Romania will also, as a member, support ECOSOC's role of forum for dialogue and policy recommendations, balanced integration of sustainable development, response to emerging challenges, as well as platform for accountability on global commitments, and monitoring and reporting on progress".

ECOSOC is, according to the MFA, the third major body in the UN system, being comprised of 54 Member States elected by the UN General Assembly for three-year terms. ECOSOC is the main discussion body for international environmental, humanitarian, social, economic issues and policy recommendations addressed to Member States and the UN system. Through its debates, the Council plays a key role in supporting the international development cooperation and setting global rules, standards and action priorities.

The MFA press release shows that ECOSOC has promoted an integrated, coordinated and unified approach to reviewing and monitoring the results of major conferences and UN summits and that the 2030 Agenda for Sustainable Development (adopted in September 2015) has set important milestones for a unified development agenda.

Under ECOSOC there are, according to the cited source, various commissions or committees with limited membership, such as: the UN Human Rights Committee, the Committee on Statistics, the Commission on Population and Development, the Commission on Narcotic Drugs, the Committee on Natural Resources, and others.

Romania's previous ECOSOC term was between 2007 and 2009. Romania also held the following ECOSOC terms: 1965–1967, 1974–1976, 1978–1980, 1982–1987, 1990–1998, 2001–2003.

Studii și comentarii de jurisprudență și legislație
Studies and Comments on Case Law and Legislation

The Award in the Arbitration between the Republic of Croatia and the Republic of Slovenia Case

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Abstract: *The Award in the Arbitration between the Republic of Croatia and the Republic of Slovenia case has been delivered after procedural complications caused by the revelation of improper communications between the Slovenian Arbitrator and the Slovenian Agent in the case. The Award dealt with both the land and the maritime parts of the border. The land border was decided on the basis of the uti possidetis principle, and by reference to the cadastral limits between the former Yugoslav republics, or, when they were not aligned, on the basis of effectivités. In the Bay of Piran, the Tribunal determined the boundary on the basis of the same principles as in the case of the land border, allocating most of the area of the Bay to Slovenia, due to stronger effectivités. The maritime boundary between the territorial seas was based upon the equidistant line, adjusted to take into account the costal configuration, (which made the equidistance line to produce a cut-off effect for Slovenia). In the most innovative part of the Award, the Tribunal established a "junction area" linking the Slovenian maritime spaces with the areas beyond the Croatian territorial sea, and spelled out a specific legal regime of this area.*

Key-words: *internal bay, effectivités, maritime boundary, junction area*

1. Introductory Remarks. Procedural History. The Tribunal's Task

The delimitation of the land and maritime boundary between Croatia and Slovenia has been since the dissolution of the former Yugoslavia a highly contention issue between the two countries, in particular as Slovenia has tried to block Croatia's EU accession process pending a settlement.

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The Award in the matter of the *Arbitration between the Republic of Croatia and the Republic of Slovenia* was issued on 29 June 2017, far later than the date originally envisaged (17 December 2015). The procedures were delayed because of the publication in mass media of the conversations between the arbiter of appointed by Slovenia and the Slovenian Agent in the case. From these conversations it emerged that the Slovenian Arbiter had revealed the content of the debates of the Tribunal and had accepted instructions from the Slovenian Agent. The Tribunal had to be reconstituted following the resignations of the Slovenian and Croatian Arbiters. Moreover, Croatia took the view that the procedures had been irremediably compromised and that Slovenia had committed a material breach of Arbitration Agreement and decided to terminate the Agreement and to withdraw from the procedures. In a partial award rendered on 30 June 2016 the reconstituted Tribunal found that Slovenia had indeed violated the Arbitration Agreement but that the breach of the Agreement was not such as to justify termination since it did not defeat its object and purpose.

The Tribunal consequently decided that the breach by Slovenia of the Agreement and the subsequent withdrawal of Croatia's from the proceedings do not nullify the Tribunal's competence to issue a ruling on the merits of the case.

In accordance with the Arbitration Agreement the Tribunal was tasked with settling three issues: (a) the course of the maritime and land boundary between Croatia and Slovenia, (b) "Slovenia's junction to the High Sea", and (c) the "regime for the use of the relevant maritime areas".

2. The Land Boundary

The Tribunal turned firstly to the delimitation of the land boundary. In determining the border, the Tribunal relied foremost on the well established *uti possidetis* principle. It further gave effect to certain principles on which it found the parties to be in agreement – in particular that the pre-independence boundary was the course that was stipulated in the domestic law of the two countries and that the views or concerns of the inhabitants of the relevant areas should not determine the border. The cadastral limits were to be considered, in principle, to constitute the border between the two States - in other words, the cadastral limits were considered to give a *prima facie* indication of the border. Wherever these limits were aligned, the determination of the boundary was done in accordance to such alignments. Where gaps were found in the cadastral records, the Tribunal analyzed the exercise of government powers in the disputed areas (*effectivités).*

For example in the case of the small settlement of Brezovec-del/Murišće situated in the area of the Mura river, the Tribunal found in favor of Slovenia on a basis of a string of *effectivités*: the inhabitants living in this settlement were registered on the Slovenian electoral registers; the Slovenian police acted in that area, the population was included within Slovenia in the 1981 census, etc. The Tribunal painstakingly applied these principles for the entire lengths of the segments of the border where the two countries were not in agreement.

3. The Bay of Piran

The Bay of Piran presented many challenges to the Tribunal, as the positions of the parties varied sharply: Croatia advocated a division along the median line, while Slovenia claimed that the entire bay was part of the Slovenian internal waters, as a juridical or legal bay.

The Tribunal found that on the date of the independence of the two countries the Gulf belonged to the Yugoslav internal waters, as a juridical bay. Relying on the precedent of the treatment by the International Court of Justice of the Fonseca Bay in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case, it found that the status of internal water was kept after the dissolution of the Yugoslav State.

While finding in favour of Slovenia on the question of the legal status, the Tribunal was not prepared to accept the argument that the entire bay was therefore Slovenian. It held that the existence of bays with the character of internal waters, the coasts of which belong to more than one State, is possible. The Tribunal therefore proceeded to divide the Bay, in accordance with the same principles as applied to land territory, in particular the *uti possidetis* principle and the existence of *effectivités.*

The Tribunal found of relevance that the Slovenian coast was densely populated and that, by contrast, the Croatian coast was almost deserted. On the basis of *effectivités* such as the establishment by the Slovenian authorities of a fishing reserve, or the fact that the Bay was patrolled by the police from the Slovenian port of Koper, or the response of the authorities in the case of the grounding of the *Nonno Ugo* ship, the Tribunal decided to allot most of the Bay to Slovenia. It noted that, in an agreement contemplated by Croatia and Slovenia in 2001, the line was drawn to join the end of the land boundary in the mouth of the Dragonja river to a point on the closing line of the Bay, which was at a distance from Cape Madona (in Slovenia) that was three times the distance from that same point to Cape Savudrija (in Croatia), and decided to adopt the same line for the boundary.

4. The Delimitation of the Territorial Sea

The Tribunal found that it had to follow a certain sequence of steps, namely first to decide the delimitation of the territorial sea between Croatia and Slovenia, and then to proceed to the determination of the Slovenia's junction to the "High Sea", the claim of Slovenia in respect to the continental shelf and the regime for the use of the relevant maritime area.

The Tribunal recalled the prevalence of the "equidistance / special circumstances" approach in the drawing of single maritime boundaries. The Tribunal did not consider that the disparity between the lengths of the two States constituted a special circumstance, nor that the existence of a historical title was established. It nevertheless found that the " (…) *coastline of Croatia turns sharply southwards around Cape Savudrija, so that the Croatian basepoints that control the equidistance line are located on a very small stretch of coast whose general (north-facing) direction is markedly different from the general (southwest-facing) direction of much the greater part of the Croatian*"[1]. This finding was decisive for the determination of the maritime boundary, as the Tribunal found necessary to make adjustments to the equidistance line in order to attenuate the exaggerated "boxed in" effect produced by this feature of the coastal configuration; the resulting line deviates strongly from equidistance.

5. The determination of Slovenia's Junction to the "High Seas"

The term "High Seas" was taken from the Arbitral Agreement; it is highly problematic because, as the Tribunal has noted from the outset, there is no area anywhere in the Mediterranean Sea where the high sea legal regime as regulated by the United Nations Convention on the Law of the Sea (UNCLOS), would be applicable (as there is no area which lies more than 200 NM from the coasts). However, the Tribunal deduced from the written and oral submission that the parties had invited it to treat all area lying beyond the territorial sea as forming part of the "High Seas".

Further, the Parties held widely different interpretation as to what the term "junction" might mean. For Slovenia, "junction" implied that Slovenia's maritime zones must have a contact with an area of "High Seas"; for Croatia, it merely meant that there should be a secure and uninterrupted access between the "High Seas" and Slovenia's maritime zones.

[1] See *Arbitration between the Republic of Croatia and the Republic of Slovenia,* Award, para 1011.

The Tribunal reasoned that in the English language (the language of the Arbitral Agreement) "junction" has a spatial connotation (it implies that two or more things are put together or "joined"). The Tribunal noted that it had reached this conclusion on the basis of the ordinary meaning of the term and that, although it had fully considered the submissions of the Parties relating to the *travaux préparatoires* of the Arbitration Agreement, it found no need to have recourse to them as a supplementary means of interpretation.

In another key finding, the Tribunal concluded that "*is not to regard itself as confined to an indication that the "regime" in any particular location is whatever it would be if each Party were to assert to the fullest extent its rights under UNCLOS at the relevant distance from the coast*"[1] . Its main task was to reach a fair and just result, and it had great latitude to consider by which means such a result could be achieved. The Tribunal determined that the junction area was a zone in which ships and aircraft enjoyed essentially the same rights of access to Slovenia as they enjoyed on the high seas. Consequently, it established a junction area having of width of 2,5 NM within the Croatian territorial sea, with a special legal regime.

6. Slovenia Claim to Continental Shelf

In a succinct paragraph, the Tribunal dealt with Slovenia's continental shelf claim. It stated that the maritime boundary between Slovenia and Croatia was an all-purpose boundary and that Slovenia had no maritime zone extending west beyond that line. A further consequence was that Slovenia's claim was not compatible with the other findings of the Tribunal and, therefore, the question of continental shelf delimitation did not arise.

7. Determination of the Regime for the Use of Relevant Maritime Areas

The regime that the Tribunal has determined for the junction area is one of the most innovative and interesting parts of the award. The Tribunal noted the purpose of the regime was to guarantee, on the one hand, the integrity of Croatia's territorial sea and, on the other hand, Slovenia's freedoms of communication between its territory and the "High Seas".

The most important feature of this legal regime is the recognition of the "freedom of communication" which includes, in accordance with the content indicated by the Tribunal "*the freedoms of navigation and overflight and of the laying of submarine cable sand pipelines, and other internationally lawful*

[1] Ibid, para 1079.

uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines."[1]. These freedoms apply to *all* ships and aircraft (not only those flying the flag of Slovenia), on the grounds that rights of access to or out of Slovenia's ports and airports are of relevance not only for Slovenia. The Tribunal also spelled out other implication of this legal regime, namely that ships and aircraft are not subject to boarding, arrest, detention, diversion, or any other form of interference by Croatia while in the Junction Area. Interestingly, the Tribunal considered that Croatia is entitled to proscribe laws and regulations for the Junction Area, as for any other area of the Croatian territorial Sea, but not to *enforce* them.

8. Conclusions

The land border was the most straightforward part of the Award. The Tribunal sifted through a great amount of evidence, but the underlying legal principles on which the analysis rests are quite simple and unproblematic.

The maritime aspects of the Award will, no doubt, be of more interest for the scholars. In respect of the delimitation of the territorial sea, it was to be expected, in the light of the existing body of jurisprudence, that the Tribunal would not find the equidistance line to lead to a just and equitable solution as the "cut-off effect" (or, to use the term preferred by the Tribunal, the "boxing-in effect") on the Slovenian entitlements produced by this line is quite obvious. However, the establishment of the Junction Area was less predictable. The Tribunal acted quite boldly in the interpretation of the task entrusted to it, and had to be lauded for the efforts to ensure that term "High Seas" was not left devoid of any effect, although it was misapplied by the parties. At the same time, the term "junction" was interpreted quite extensively to mean not only a point of contact, but rather a corridor cutting through the territorial sea of Croatia.

The concept of freedom of communication, encompassing some freedoms peculiar to the high sea regime established by UNCLOS, is also a novelty and it remains to be seen whether it will take hold in the field of the law of the sea.

[1] Ibid, para 1123.

Many news reports[1] have interpreted the ruling as a victory for Slovenia. There is much to be said for this view: the right to a corridor through the Croatian territorial sea was long sought after by Slovenia, and fiercely contested by Croatia. The Tribunal found in the favour of Slovenia on this point. It further allocated most of the waters of Piran Bay to Slovenia, and adjusted the equidistance line in Slovenia's favor when determining the territorial sea boundary. These determinations of the Tribunal might have something (along with the improper conduct of the Slovenian Arbiter and Agent) to do with the refusal of Croatia to abide by its terms[2].

While the issue of compliance by Croatia with the Award lies outside the scope of this paper, one cannot but regret the multiplication of situations where, although international courts find themselves competent to settle the cases, the States which are parties to the disputes refuse to accept the ruling, the South China Sea Arbitration (*the Republic of Philippines vs. the Republic of China*) being another case in point.

[1] See, for example, "Slovenia wins battle with Croatia over high seas access" available on the BBC website, accessible at http://www.bbc.com/news/world-europe-40449776 last visited on 20 may 2017.

[2] For the Croatian position, see the "*Termination of the Arbitration Process between Croatia and Slovenia: Causes and Consequences*" section on the website of the Croatian Ministry of Foreign Affairs available at http://www.mvep.hr/en/other/termination-of-the-arbitration-process/ last visited on 05 may 2017.

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

Advantages and Disadvantages of Transparency and Public Participation in Investment Arbitration

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Abstract*: Transparency and public participation in international arbitration proceedings is a relevant issue that has become the subject of many disputes over the last years. Given that international investment arbitration is both public and private in nature, there is a legitimate interest from the public to have increased access, and screening of, previously secretive proceedings. After all, damages awarded to investors by arbitral tribunals are paid almost exclusively from the public purse. Therefore, this paper makes the case for more transparency and access to arbitral proceedings when public interest and welfare are at stake. It analyzes the advantages and disadvantages of more open proceedings from the point of view of the investor, State authorities and the civil society, and takes into account the possible effects this might have on a number of issues such as: duration of proceedings, public interests or sensitive business information. It concludes that although transparency and public participation may, in some cases, hinder the arbitral process, it represents a small price to pay for alleviating public concerns about the ability of international corporations to influence public policies by threatening state authorities with international arbitration.*

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Key-words: *transparency, arbitration, ICSID, NAFTA.*

1. Introduction

In today's world, economic liberalization brought with it an increased amount of disputes between investors and States hosting the investment. These disputes often led to arbitration, as the only efficient means to settle differences and protect threatened rights. Investor-State arbitration allows a private investor from a state party to the treaty to seek compensation for damages arising out of measures inconsistent with the substantive obligation the other party has assumed under the treaty.[1] Although the concept of investor-State arbitration is not new, only recently has it become accepted as an effective means to challenge governmental measures hindering the application of suitable standards for the protection of investors. The burgeoning case law under both ICSID[2] and NAFTA[3] has, to a very large extent, reshaped the standards for the protection of foreign investors and their investments.

Critics of the system often point out that investor-State arbitration is fraught with controversy. While concerns about the investor-State process are numerous and varied, one of the most frequent complaints is that investor-State arbitration is not transparent. Examining the substance and structure of the process has led to the belief that investor-State arbitration resembles commercial arbitration too closely.[4] That should not pose a problem in itself; after all, they are both legitimate ways to protect the rights of aggrieved parties - rights that have been conferred under a contract or a treaty. The difference is that while commercial arbitration was designed to protect private interests only, investment dispute settlement was intended to protect both private and public interests alike.[5] As such, investor-State arbitration is often

[1] Laura R. Dawson and Donald M. McRae, "Whose Rights? The NAFTA Chapter 11 Debate", *Ottawa: Centre for Trade Policy and Law*, 42, 2002 p. 47.

[2] International Centre for Settlement of Investment Disputes website https://icsid.worldbank.org/ last visited on 10 August 2017.

[3] North American Free Trade Agreement.

[4] See International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 art. 14(1), available at https://icsid.worldbank.org/ICSID/ICSID/Rules_Main.jsp [hereinafter ICSID Convention] last visited on 10 August 2017.

[5] See Leon E. Trakman, "The ICSID Under Siege", 45 *CORNELL INT'L L.J*, p. 620.

directed to challenge measures inscribed in general policies employed by governmental authorities with the aim of achieving important public policy goals such as the protection of human rights, the environment, public order and public health. Allowing open access to the dispute settlement system will ensure a higher degree of public acceptance of the result and accountability of the process.

All of the above has led some to question the benefits of increased transparency in investor-State arbitration.[1] In light of this controversy, the scope of this paper is to analyze the current status of investor-State arbitration under both ICSID and NAFTA in respect to transparency and public participation. We will discuss the advantages and disadvantages of increased transparency in investment arbitration and evaluate the arguments for and against an increase in the level of openness and accessibility of arbitral proceedings.

2. Advantages of Transparency and Public Participation in Investment Arbitration

2.1. Protects Public Interest and Increases Accountability

The very presence of a State as a party to the arbitration raises a public interest issue because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration.[2] Generally, public interest refers to interests for which States bear responsibility.

There are many instances where the public interest is present. Investor-State arbitration often involves either important natural resources, such as oil and gas, hard rock minerals, forests, freshwater resources, and fisheries, or major infrastructure such as water and sanitation facilities, roads and other transport, power generation, and dams.[3] The latter often implicate the delivery of important domestic services, such as drinking water, sanitation, or electricity.

Additionally, investor-State arbitrations may also involve challenges to regulatory or other decisions that penetrate deeply into traditionally domestic

[1] H. Inadomi, *Independent Power Projects in Developing Countries*, Wolters Kluwer, Amsterdam, 2010.

[2] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 Petition by NGOs and people to participate as an intervening party or amici curiae, 2002, p. 23.

[3] See G. Van Harten, and M. Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", 17 *EJIL* 121 (2006).

sovereign prerogatives (e.g., regulations protecting health, safety, or the environment), or activities that similarly have deep roots in domestic institutions (e.g., the operation of a jury system or the response to a fiscal crisis).[1] The public interest in maintaining the integrity and effectiveness of these domestic policies and governmental actions is obvious.[2] Moreover, the amount of money at stake in investor-State arbitration can be very large, as is evidenced by the series of cases against Argentina. The potential impact on the public raises again obvious public interest as any award would have important financial implication on the public purse.[3]

One of the main problems in any society is that communities affected by investments or developing projects often lack awareness of the existence of a dispute between the government and the investor.[4] As such, they rarely get a chance to participate in the dispute resolution to protect their rights and hold the government accountable. More transparency would alleviate this problem, because at the very least, the existence of a dispute would be public knowledge. Additionally, allowing increased access to the details of the dispute would make public participation more meaningful, thereby providing greater help to the tribunal in determining the real issues behind the case. Public participation through *amicus* briefs may bring forth arguments not raised by the parties themselves which are especially pertinent in defense of the public interest. More transparency and participation in the arbitral process may also lead to governments being held accountable for their actions. The concept of accountability involves two distinct stages: accountability and enforcement. Accountability refers to the obligation of the government to justify their decisions to the public and to those institutions tasked with providing oversight. Enforcement suggests that the public or the institution responsible for accountability can sanction the offending party or remedy the contravening behavior.[5]

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[1] Ibidem.

[2] See Hóber, K., "Arbitration Involving States", in Newman, L. & Hill, R. (eds.), *Leading Arbitrators'Guide to International Arbitration*, Juris Publishing, 2003, pp. 139, 154.

[3] See Mistelis, L., "Confidentiality and Third Party Participation", 21 *Arbitration International* 211 (2005).

[4] Daniel Barstow Magraw Jr., Niranjali Manel Amerasinghe, "Transparance and Public Participation in Investor-State Arbitration", 1 5 *ILSA J. Int'l & Comp. L*. 337 at 350.

[5] Bovens, M., "Public Accountability", in Ferlie, Ewan. Laurence E. Lynn, Jr. & Christopher Pollitt (eds), *The Oxford Handbook of Public Management*., Oxford: Oxford University Press, 2005.

2.2. Greater Legitimacy

Investor-State arbitration raises new challenges for the international arbitration system and the international legal system, of which international arbitration is a part. As more and more investor-State disputes are resolved using arbitration, the credibility or legitimacy of the system becomes an important issue.[1] Rules and regulations for transparency and public participation may vary greatly from forum to forum, so interested third parties usually do not have a clear enough image of what rules are applicable, in what order, and which procedural time limits the parties must comply with if they seek to file amicus curiae briefs. The lack of openness and clarity results in a deficit of legitimacy for the entire system. As Charles Brower suggested, in order for international dispute settlement systems to be perceived as legitimate, they must "operate predictably, conform to historical practice, and incorporate fundamental values shared by the governed community".[2]

With regard to predictability, one must acknowledge that, in many respects, investor-State arbitration has come a long way since the early 1960's. The increase in density of investment activity worldwide has compelled the dispute settlement procedures to adapt in order to accommodate the growing number of claims. Today, investors have access to a wide variety of institutional and ad-hoc tribunals that apply both substantive and procedural rules, which in essence are clear and predictable.

The same cannot be said about rules on transparency and public participation. For example, in *Piero Foresti v. South Africa*, non-disputing parties were given extensive access to documents and evidence submitted to the tribunal, in order to "focus their submissions upon the issues arising in the case and to see what position the parties have taken on those issues".[3] In contrast, in *Biwater v. Tanzania*, the tribunal restricted disclosure to the parties' own documents[4] and refused to allow the publication of minutes, documents produced by the opposing party, and the correspondence between the parties

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[1] United Nations Conference on Trade and Development, International Investment Arrangements: Trends and Emerging Issues, New York, United Nations, 2006, p. 16, available online at UNCTAD <http://www.unctad.org/en/docs/iteiit200511_en.pdf>, last visited 1 July 2017.

[2] Charles H. Brower, II, "Structure, Legitimacy and NAFTA's Investment Chapter" (2003) 36 *Vand. J. Transnat'l L.*, p. 37.

[3] *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, Procedural order September 2009 ICSID Case No. ARB(AF)/07/1.

[4] See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 3, ICSID Case No. ARB/05/22, paras.32-33.

and the tribunal. It is obvious that with so much power lodged in the hands of the litigating parties to determine the extent and content of transparency and public participation, progress towards a more predictable environment regarding openness and outside participation is somewhat difficult to achieve.

Equally important, past practice regarding transparency and public participation has been anything but consistent. Although both ICSID and NAFTA initially created tools to adapt to changes brought upon by the constant evolution of International Investment Law, transparency was not considered a priority. As such, transparency standards remained low and inconsistent. However, pressure from the public and the media, coupled with a strong culture of accountability in front of the electorate, made the US and Canadian authorities push for more transparency with regard to all cases in which either country acts as respondent.

Legitimacy also means conforming to the "fundamental values shared by the governed community".[1] In the case of transparency, it means being able to accommodate the legitimate expectations the public might have with respect to access to claims and the documents filed by the parties, access to hearings and an explanation of awards. Of course, the level of expectation depends greatly on the level of public participation and the culture of accountability within each society. More developed societies would generally have a higher degree of public scrutiny, while less developed societies would have a lower degree[2]. Therefore, standards set by arbitration procedures are usually higher than those the investor might encounter in the domestic courts of the host State. As such, it is not hard to regard the former as more suitable to protect investor's rights.

In the case of NAFTA, however, the situation was totally different. As noted above, both the US and Canada have well developed economies with strong democratic traditions and an equally strong culture of accountability. The standards for transparency and judicial impartiality are very high throughout their domestic court system. It was thus a challenge for NAFTA to implement the same uniform standards an investor would encounter had it sought recourse in national courts. From this standpoint, one can easily argue that

[1] See Brower, *op. cit.*, 37.

[2] See Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment (Winnipeg: International Institute for Sustainable Development, 1999) at 7, 60 available online at IISD http://www.iisd.org/pdf/nafta.pdf, last accessed 5 July 2017.

NAFTA Chapter 11 has constantly failed to meet expectation in regard to transparency.[1]

Assessing the exact degree of transparency required to provide legitimacy is difficult, if not impossible, to achieve.[2] Many have argued that the relatively high standard of domestic legal proceeding is the best standard against which transparency in investor-State arbitration should be judged.[3] The only problem is that domestic legal proceedings are not themselves uniform and homogenous enough when it comes to transparency.[4] Many judiciary systems are indeed fully open to public participation, but many others are not.[5] Thus, coming up with a uniform standard is a challenge the system must confront if it wants to increase its credibility in the future. An argument in support of establishing a uniform standard for transparency in investor-State arbitration is that unlike court decisions, awards are subject to judicial reviews only on very narrow grounds, such as procedural errors, inappropriate exercise of jurisdiction or inconsistency with public policy.[6] Thus, greater openness would likely make implementation easier, as the public is more willing to accept the result of a process in which they had the opportunity to fully participate.

The good news is that the trend towards openness and public participation seems to be strengthening. Although NAFTA and ICSID have seen some important changes, they are still far away from a uniform standard on transparency and outside participation. The hope now lies with the new generation of BITs. Some countries have already begun integrating provisions into their investment treaties to enhance and ensure transparency

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[1] Julie A. Soloway "NAFTA's Chapter 11: The Challenge of Private Party Participation" (1999) 16:2 *J. Int'l Arb*. 8 at 10.

[2] See Brower, *op. cit.*, p. 51.

[3] See Gerald A. Galk, *The Canadian Legal System*, 3d ed., Carswell, Calgary, 1990, pp. 128-134.

[4] See P.M. Langbroek & W.J.M. Voermans (eds. and research directors), *Provision of information by courts and court administrations: a comparative inventory of eight European Countries and in the USA*, available at: http://www.iias-iisa.org/egpa/e/study_groups/law/Pages/default.aspx, last visited 5 July 2017.

[5] Ibid.

[6] Cheri D. Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes" (1994) 11:4 *J. Int'l Arb*. 135 at 15971.

in investor-State disputes in the different stages of the arbitration process.[1] These elements are typically introduced to amend, clarify or complete the applicable arbitration rules, such as the ICSID or the UNCITRAL arbitration rules.

2.3. Improved Decision making and Consistency

Increased transparency is likely to lead to an improvement in decision-making in investor-State arbitration. The publication of awards, judicial decisions or procedural orders is a precondition for the evolution of a consistent case which provides legal certainty that all cases are treated on an equal basis.[2] This, in turn, will increase the confidence of litigants in the predictability of the system and ensure that arbitration is seen as a true alternative to other forms of dispute settlement.[3]

The public availability of documents and decisions is especially helpful in investment arbitration where arbitrators are often called upon to interpret substantive and procedurals norms that are of a highly general and vague character. Of course, this should not imply that past cases are regarded as precedents, but more of a reference point for how other tribunals have interpreted similar provisions. At the moment, credibility of the system as a whole, and also of individual awards, is thwarted by non-transparency (which verges on secrecy) and by inconsistent results.

Most IIAs contain more or less similarly worded substantive standards that are often vague and imprecise.[4] It was only by the interpretation of arbitral tribunals that those standards such as expropriation, full protection and security, and fair and equitable treatment became workable concepts.[5] More

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[1] See 2012 U.S. Model Bilateral Investment Treaty art.28 and art.29 available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf, last visited 5 July 2017.

[2] Cf. Berger, K. P., "The International Arbitrators' Application of Precedents", 9 *Journal of International Arbitration* 5 (1992), p 19.

[3] Ibidem.

[4] See, for example, Art. 2 (2) Pakistan-Italy BIT: "Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party." Or Art 1105 NAFTA: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".

[5] See Schreuer, C., "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", *Transnational Dispute Management*, Vol. 3, No. 2, 2006.

standardized provisions could also help discourage parties to raise redundant claims or defenses, if that means arguing against a solid, well settled case law. Conversely, parties could benefit from the publications of awards as these contain arguments and reasoning that may be relevant to their own case.

Public participation can also assist in a higher degree of decision making, as amicus curiae briefs can provide facts and legal arguments that neither party would otherwise provide. Usually, the amicus briefs are quite relevant for a tribunal because they set the context for disputes. Often the parties would not produce an accurate factual background to the dispute, especially with concern to issues of wider public policies. In addition to that, *an amicus curiae* may already have all the information relevant to the dispute, information that may take weeks if not months for the tribunal to gather on its own, thus helping the tribunal make a more informed decision regarding the case.[1]

The specialized knowledge of some *amicus curiae* NGO's did not go unnoticed by tribunals whenever it related to public concerns. In *Suez/Vivendi v. The Argentine Republic*, the ICSID tribunal granted five NGOs amicus curiae status because they had proved expertise in water distribution and sewage management that was central to the case. The factor that gives this case particular public interest is that the investment dispute centers on the water distribution and sewage systems of a large metropolitan area. As was stated in the decision, "[g]iven the public interest in the subject matter of this case, it is possible that appropriate non-parties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision".[2]

Amicus briefs may also include arguments not addressed by the parties in their own submissions. In *Methanex v Mexico*, the tribunal noted that the amicus briefs had raised "important legal issues that had been developed by the Disputing Parties" namely with respect to how international law gives deference to the government when assessing health and environmental issues.

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[1] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A (Spain) v. Argentine Republic (Arg.)*, Order in Response to a Petition for Transparency and Participation as Amicus curiae, ICSID Case No. ARB/03/19, pp. 15-16 (2005).

[2] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A (Spain) v. Argentine Republic (Arg.)*, Order in Response to a Petition for Transparency and Participation as Amicus curiae, ICSID Case No. ARB/03/19, pp. 19-21 (2005).

In *Biwater v. Tanzania*, the tribunal used the legal argument made in the amicus brief concerning the investor responsibility in the context of fair and equitable treatment[1]. It took "into account the submissions of the Petitioners ... which emphasize countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct."[2] Apart from these advantages, there are also disadvantages to greater transparency and public participation in the arbitral process. The disadvantages fall into several categories and are discussed below.

3. Disadvantages of Transparency and Public Participation in Investment Arbitration

3.1. Interference with the Proceedings

Transparency and full public disclosure may pose a serious risk to the procedural integrity of a dispute. The fear is that greater openness towards outside parties could make the proceedings vulnerable to media and political pressure .This was evident in *Biwater v Tanzania*, where Biwater complained about the conduct of NGO's and the media, which was "a threat to the procedural integrity of the dispute" and a risk to aggravation or exacerbation of the dispute.[3] The tribunal issued an order of confidentiality, drawing a line between legitimate and inappropriate use of the media by the parties to a dispute.[4] It had acknowledged the right of the parties to publicize their own documents and tribunal decisions, as long as these did not contain information that would exacerbate the dispute,[5] but noted that it had been given a clear mandate to decide the case without outside pressure or media interference.

Amicus briefs came equally under fire when they were found to have raised concerns about the integrity and fairness of arbitral proceedings. It was pointed out that many of the petitioners were NGO's which, from the start, were against investments projects but petitioned the tribunal in order to disrupt or delay the proceedings.[6] Another concern raised was that *amicus*

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[1] See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, (2007), pp. 370-378.

[2] Ibidem, p. 601.

[3] See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 3, ICSID Case No. ARB/05/22, [hereinafter Biwater No. 3].

[4] See Meg Kinnear and Aisaatou Diop, "Use of the media by Counsel in investor-State arbitration", p.49.

[5] Ibidem, p.49.

[6] See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 3, ICSID Case No. ARB/05/22, paras. 32-33.

briefs were more likely to support arguments in favor of the host state, rather than the investor. In *Methanex v. Mexico*, the tribunal was concerned about the unequal procedural protection afforded to the parties[1] and believed the claimant (the investor), lacking amicus support, should be entitled to additional protection.[2]

Allowing *amicus* submission also means that parties lack the ability to have control over which facts are presented to the tribunal. *Amicus* briefs often refer to facts in addition to those brought up by the parties.[3] This is especially problematic because the intervener is neither required nor often given the opportunity [4] to prove the facts it presents to the tribunal.[5] While these may have significant relevance to the dispute, they often create a burden on the parties if they choose to rebut such facts and legal argumentation presented in the briefs.[6]

3.2. Breached Confidentiality

Confidentiality is generally regarded as one of the hallmarks of arbitration and is one of the main reasons why parties prefer arbitration over other forms

[1] *Methanex Corp. (Can.) v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," 2001, p. 50.

[2] Ibidem.

[3] Ibidem.

[4] Most tribunals impose a page limit for *amicus* briefs.

[5] Brigitte Stern, 'The Intervention of Private Entities and State as "Friends of the Court" in WTO Dispute Settlement Proceedings", in PATRICK F.J. MACRORY ET AL, *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, 2005 at pp. 1427, 1456.

[6] Ibidem, p. 1438.

of dispute settlement.[1] Advocates of confidentiality refer to the advantages it holds over transparency in that it gives protection to sensitive business and commercial information and keeps the public image and reputation of companies and governments untarnished. Confidentiality may also help reduce tensions between the parties and may favor settlement talks in the early stages of the proceedings.

Similarly, confidentiality, at least during proceedings, will contribute to the de-politicization of investment disputes, one of the avowed purposes of ICSID arbitration.[2] On the contrary, more transparency can result in a considerable disadvantage to the investor and possibly to the government, too. One drawback to transparency is that it may affect any prospects of settling a dispute amicably because it opens the door to political pressure, cold calculations and media interference.[3]

A second drawback is that there is a greater risk of an inadvertent disclosure of business and governmental secrets to outside parties, which may have serious repercussions on the security of both investors and states alike. To address the latter issue, States and international organizations have sought ways to protect parties from revealing information that would imperil their security. For example, the proposed UNCITRAL draft on a treaty-based standard of transparency in investment-arbitration limits the amount of information parties have to disclose by stating that: *"Nothing in these Rules requires a respondent to make available to the public information the*

[1] See Article 31 UNCITRAL Notes on Organizing Arbitral Proceedings: "It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration, might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality." UNCITRAL Notes on Organizing Arbitral Proceedings, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf. See also Kouris, S., "Confidentiality: Is International Arbitration Losing One of Its Major Benefits?", 22 *Journal of International Arbitration*, 2005, p.127.

[2] UNCTAD Series on International Investment Policies for Development Investor–State Disputes: Prevention and Alternatives to Arbitration 2010, p.13.

[3] See Jeswald Salacuse, "Is there a better way?, Alternative Methods of Treaty-Based Investor-State Dispute Resolution", 31 *Fordham Int'l L.J.*, 168, pp. 2007-2008.

disclosure of which it considers to be contrary to its essential security interests".[1] Thus finding the right balance between the need to disclose relevant information and the need to protect confidential information is key to making any real progress in establishing an international legal standard on transparency and public participation in investor–State arbitration.

3.3. Increased Cost

Initially, the choice for international arbitration to hear investor–state cases was motivated by the perception that arbitration was rapid, less expensive, more flexible, and more familiar for companies. Contrary to the expectations, it turns out that costs in investor–State arbitration have increased dramatically in recent years.[2] Thus, opening up the arbitral process to the public will further increase the administrative[3] costs of tribunals and dispute settlement institutions that provide assistance to tribunals.

In the same way, public participation will increase the cost on the parties to the extent that they seek to respond to the *amicus* briefs, and to the tribunal, insofar as it will have to consider procedural matters regarding granting *amicus* status, *amicus* requests, examining the legal arguments in the briefs and using them when drafting the final award. In *Methanex v Mexico*, the tribunal remarked that "the acceptance of *amicu*s submissions might add significantly to the overall cost of the arbitration" and "imposes an extra burden on one or both the Disputing Parties".[4] Since the purpose of arbitration is to be less expensive than other binding forms of dispute settlement, the increased cost of the proceedings may deter future litigants form resorting to it.

Over the years, institutions and tribunals have implemented different methods aimed at reducing costs requiring, for example, that amicus briefs be limited

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[1] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013) A/CN.9/WG.II/WP.174, 2012, p. 18.

[2] See e.g *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24), where the combined costs of both claimant and respondent exceeded 17 million $. In *Pey Casado v. Chile* (ICSID Case No. ARB/98/2) the combined costs for both parties stood at $15 million.

[3] See http://www.whitecase.com/idq/fall_2009_4/#.UX5CKaKnC8B. In general, administrative costs refer to costs associated with the submission of written materials and other documents, costs associated with the correspondence between the tribunal and the parties (including amici), costs relating to interim orders issued by the tribunal and logistical costs.

[4] *Methanex Corp. (Can.) v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", p. 50 (2001)

to a specific range of pages set by the tribunal or other institutional bodies. For example, NAFTA Free Trade Commission set a limit of five and twenty pages, respectively, for applications and briefs submitted by *amici.*[1] Other methods include reducing the amount of material and evidence the tribunal and the parties will have to consider.[2] Also, NGO's may be asked to submit a joint brief on behalf of all groups interested to participate in the litigation, as non-disputing parties. In *Biwater v. Tanzania*, a dispute arose involving a water and sewage infrastructure project in Dar es Salaam. Five NGOs petitioned and were granted permission to submit written briefs. In order to make the process more expedient and less costly, the Tribunal restricted third party submission to a single joint brief of no more than 50 pages.[3]

3.4. Measures to Minimize Disadvantages

There are several means to minimize disadvantages posed by increasing transparency and public participation. In the following section, we will briefly describe some of the measures that can be employed to limit the effect disadvantages have on the arbitral process.

- **Impose page and subject matter limits on amicus curiae**. Limiting pages and subject matter can help reduce costs and prevent delays associated with handling amicus briefs. Thus, non-disputing parties would have to be concise and address the specific issues put forward in the case. This would limit the time the tribunal would spend on reviewing amicus briefs and responding to the legal issues addressed in the briefs[4]. Due to the complexity of the issues raised with the tribunal, institutionally imposed limits for documents may not give optimal results because they will deprive the parties and the tribunal from conducting an in depth analysis of the case. Therefore, some discretion should be given to tribunals to determine what limits to place, or extend institutional limits if necessary.

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[1] See Office of the United States Trade Representative, 'Statement of the Free Trade Commission on non-disputing Part Participation' (2003), available at http://www.ustr.gov/assets/Trade, last visited 1 July 2017.

[2] Having so many items to review the tribunal may choose to set time limits for the filling of procedural required documents so to reduce delays and improve efficiency.

[3] See supra. CIEL, Three Hundred Citizen Groups Call on Secret World Bank to Open up Bechtel Case Against Bolivia, Aug. 29, 2002, CIEL, http:// www.ciel.org/Tae/Bechtel_Bolivia_Aug02.html, last visited 1 July 2017.

[4]Ruth MacKenzie, "The Amicus Curiae in International Courts: Towards Common Procedural Approaches?", in Tulio Treves (ed.), *Civil Society, International Courts and Compliance Bodies*, pp. 300-301.

- **Tight schedule for amicus curiae submission and timely access to briefs, evidence and documents submitted to the tribunal.** Imposing reasonable procedural deadlines for the submission of amicus curiae briefs would reduce delays in the arbitral proceeding and thus reduce the cost associated with lengthy procedures[1]. It would also limit the amount of time non-disputing parties spend on drafting the briefs and indirectly limit the amount of material in the briefs. Furthermore, it would limit the amount of material the parties and the tribunal would have to address and respond to.

  Furthermore, if the non-disputing party is given timely access to briefs documents, evidence, submissions and correspondence, it will help interveners tailor their petitions and the briefs to the claims of the case. This would help avoid those situations where the non-disputing parties would have to rely primarily on outside sources to help prepare the case, which would delay amicus preparation as wells as the parties and tribunals' response to the brief.

- **Provide protection of confidential business information and state secrets.** We have already seen how problematic the issue of disclosure of business information and state secrets is. Confidential business information and state secrets can be inadvertently disclosed by increasing mechanisms for transparency and public participation. However, much of this is alleviated by issuing confidentiality orders. This is allowed under the current rules of both ICSID and UNCITRAL. The extent to which information will be disclosed is left to the discretion of the party. This means that the parties would have the right to bar disclosure of all documents believed to contain confidential information, including claims, submission, evidence and awards. While this is problematic in other respects, it does ensure that the information will not be made public. One alternative to this restrictive regime would be to hold hearings *in camera* and allow access of the parties and interveners while requiring that all information disclosed during these closed proceedings would remain confidential.

- **Usage of the internet and other electronic sources to reduce costs**

[1] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, ICSID Case No. ARB/05/22, 12-14 (2007).

and delays. One of the best ways to cut costs and reduce delays is to use the Internet to allow public access to both documents and hearings. There is no need to include confidential information and what is confidential can be determined beforehand. The Internet would allow outside parties to access information in a timely manner, at a relatively low-cost, from geographically dispersed locations around the world. Another cost effective measure is to allow open hearings via either satellite or closed circuit television[1]. Current rules allow both NAFTA and ICSID to permit open hearings if the parties do not object.[2] To date, open hearings have been authorized in several cases, including UPS, Methanex and Canfor.

4. Conclusion

Arguably, investor-State arbitration made control by the public over the State harder to achieve. In theory at least, claims brought by investors in public courts or other public forums would be more likely to come under public scrutiny than disputes differed to opaque international tribunals often with no opportunity for public participation. The public could hold the government accountable for the negative financial impact an award in favor of the investor would have on the public purse.

The same could not be said about investor-State arbitration. As more and more cases are filed that involved public policy issues, the public wants to gain knowledge of, and participate in, the legal proceedings. In the beginning, this was difficult to achieve because of the barriers erected by the lack of transparency. As such, the public demanded that governments become accountable for the action and allow more scrutiny of the process. Although opening up the arbitral procedure may have disadvantages in terms of costs, this should be remedied through careful analysis of the advantages and disadvantages of transparency and public participation at each stage of the arbitral proceeding. Such an analysis reveals many instances where transparency and public participation rules need to be revised, utilizing available techniques for limiting or eliminating the possible disadvantages.

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[1] See United Nations Commission on International Trade Law Working Group II (Arbitration and Conciliation) A/CN.9/WG.II/WP.176/Add.1 New York 2013 at 5- according to ICSID the cost of using internet and close circuit television to broadcast the hearings is between 4500-4750 $ per two days.

[2] Office of the Unitd States Trade Representative, 'Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations' (2003) available at http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf, last visited 10 July 2017.

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Cyber Operations Triggering an International Armed Conflict

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Abstract: *The purpose of this paper is to analyze possible issues or difficulties in applying one of the conditions of international armed conflicts to exist, namely the resort to armed force, to cyber operations. It will attempt to understand the conventional meaning of the phrase and how these may apply in the cyber context. Departing from debates as to the original meaning of the phrase and following the rationale use by current doctrine, this paper will highlight current trends in the interpretation of when cyber operations constitute a resort to armed force and possible solutions. Unlike previous work, that concentrated on cyber operations as the use of force or armed attacks under jus ad bellum, the focus now turns to the more specific condition of cyber operations that trigger an international armed conflict.*

Key-words: *cyber operations, international humanitarian law, international armed conflict, resort to armed force*

1. Introduction

It is no longer a question whether International Humanitarian Law (hereinafter "IHL") is applicable to cyber operations.[1] State practice[2] and *la*

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[1] Remarks by Harold Hongju Koh, Legal Advisor U.S. Department of State, USCYBERCOM Inter-Agency Legal Conference. Ft. Meade, MD, September 18, 2012 questions available on 30 August 2016 at http://www.state.gov/s/l/releases/remarks/197924.htm, last visited on 10 June 2017, see answers to questions 5, 6 and 7.

[2] US Department of Defense Cyberspace Policy Report, *A Report to Congress Pursuant to the National Defense Authorization Act for Fiscal Year 2011*, Section 934, pp. 7-9, available on 30 August 2016 at http://nsarchive.gwu.edu/NSAEBB/NSAEBB424/docs/Cyber-059.pdf, last visited on 10 July 2017.

doctrine[1] have already agreed that, in the context of an armed conflict, the rules that regulate the conduct of hostilities apply to the tools and operations used in and carried out in cyberspace.

Consider, for example, the principle of distinction.[2] It is obvious that, while in an armed conflict, a missile attack against a civilian neighbourhood would breach the principle of distinction, and so would a cyber operation on the local power plant rendering the population without power during winter (a discussion would be necessary here on the dual-use nature of the cyber infrastructure used to carry out the operation or the dual-use nature of the power plant, however this is beyond the purposes of the example).

In other words, the development of technology allowing for "war" or hostilities to be carried out in cyberspace does not render the rules of IHL inapplicable.[3] Thus, cyberspace is not a means of circumventing IHL or any legal rules in general.

Although this conclusion is clear, practical application of the rules of IHL will give rise to questions for which answers may not be as clear. Indeed, IHL did apply to the 2008 cyber operations carried out between Russian and Georgia because an armed conflict was already ongoing between the two states.[4] However, it does not appear as obvious when IHL began to apply to these cyber operations or if such operations alone would have been able to give rise to the armed conflict itself. As such, is the pre-existence of an armed

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[1] Schmitt M. N., *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, 2013, p. 75.

[2] According to the principle of distinction, the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. The principle is codified by Article 48, 51(2) and 52(2) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977* and Article 13(2) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977*. The International Court of Justice affirmed that the principle of distinction was one of the "cardinal principles" of international humanitarian law and one of the "intransgressible principles of international customary law" - Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 35.

[3] Melzer N., *Cyberwarfare and International Law*, United Nations Institute for Disarmament Research Resources, p. 22, available on 30 August 2015 at http://unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf, last visited on 10 July 2017.

[4] Schmitt M. N., 2013, *op. cit.*, p. 76.

conflict by conventional means a condition for IHL to apply to cyber operations or can cyber operations give rise to an armed conflict? Similarly, can an armed conflict take place solely in cyberspace? It is the intention of this paper to attempt to find answers to these questions by analyzing the relevant customary and conventional IHL on defining and qualifying an international armed conflict (hereinafter "IAC") in cyberspace.

Before briefly presenting the outline of this paper, it is important to clarify certain limitations of the research. The analysis will only address the application of IHL as far as the existence of an IAC in the cyber context is concerned. Thus, it will not address how cyber operations may trigger a non-international armed conflict. In addition, of the two conditions that need to be met for an IAC to exist, namely the resort to armed force and its use by and between two or more States,[1] only the former will be addressed. It is true, of course that the issue of attribution is also central to qualifying an IAC and just as important for the cyber context.

In view of the above, this paper will first analyze the meaning of resort to armed force in general terms with the purpose of concluding whether such an IAC may be triggered by cyber operations alone. In the affirmative, this paper will then analyze the conditions that need to be met for a cyber operation to trigger an IAC.

2. Resort to Armed Force in IHL

Conventional IHL does not provide an explicit definition of what constitutes resort to armed force. However, the interpretation of the relevant treaties through state practice and case law may provide a clear picture in understanding the meaning of the phrase.[2]

[1] International Committee of the Red Cross, How is the Term "Armed Conflict" Defined in International Humanitarian Law? Opinion Paper, March 2008, p. 1, available on 2 September 2016 at https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf, last visited on 15 June 2017 *Commentary of 2016 to common Article 2 of the four Geneva Conventions*, para. 214, 217, Gâlea I., *Aplicarea normelor dreptului internaţional umanitar în cazul operaţiunilor antiteroriste*, C.H. Beck, Bucharest, 2013, pp. 244-248.

[2]

The first sentence of Article 2 common to the four Geneva Conventions,[1] as well as Article 1(4) of Additional Protocol I[2] provide relate the content of the armed conflict to state of war or fighting, not resort to armed force.[3] The phrase was later crystallized in *doctrine*[4] and case law.[5] In the *Tadić case*, the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") maintained that "an armed conflict exists whenever there is a *resort to armed force* between States" (*emphasis added*).[6]

As a premise, it is first necessary to make a distinction between the use of force in *jus ad bellum* and the resort to armed force in *jus in bello.*[7] In the *Nicaragua case*, the ICJ considered that "use of force may *in some circumstances* raise questions of [IHL]" (*emphasis added*).[8] If it is only in some or certain circumstances that the use of force will raise questions of IHL, then it can be concluded that in certain other circumstances it does not. One example would be the arming of rebels that use force against a State. Such a conduct by a State would inevitably qualify as a use of force under

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[1] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949*, *Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949*, *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949*.

[2] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*.

[3] Matheson M.J., Momtaz D., *Les règles et institutions du droit international humanitaire à l'éprouve des conflits armés récents,* Académie de Droit International de la Haye, Martinus Nijhoff Publishers, 2010, p. 180.

[4] Pictet J. S., *Commentary on the Geneva Conventions of 12 August 1949*, Geneva, 1952, vol. I, p. 29, *Commentary of 1952 to common Article 2 of the four Geneva Convetions*, pp. 31-32, available on 2 September 2016 at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=02A56E8C272389A9C12563CD0041FAB4, last visited on 10 July 2017, *Commentary of 2016 to common Article 2 of the four Geneva Conventions*, paras. 210-219.

[5] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

[6] *Ibidem.*

[7] Schmitt M. N., *"Attack" as Term of Art in International Law: The Cyber Operations Context*, 4th International Conference on Cyber Conflict, 2012 © NATO CCD COE Publications, Tallinn, 2012, pp. 284, 285.

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits,* Judgment. I.C.J. Reports 1986, p. 14, para. 216.

Article 2(4) of the UN Charter,[1] but it would not be considered a "resort to armed force" for the purposes of IHL.

There is, of course, no need for a declaration of war, as the use of armed force is an alternative condition to that of a declaration of war.[2] These objective criteria were confirmed by the International Criminal Tribunal for Rwanda in the case concerning *Jean Paul Akayesu*. The Chamber "stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict".[3] Similarly, in *Boškoski and Tarčulovski*, the ICTY Trial Chamber stated "the question of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial".[4]

There is also no need for a certain intensity of the use of force.[5] According to Jean Pictet, "[i]t makes no difference *how long* the conflict lasts, or *how much slaughter* takes place" (*emphasis added*).[6] Essentially, an IAC exists from the first instance of use of force between states or, as concluded by the ICTY, "an [international] armed conflict exists whenever there is a resort to armed force between States".[7]

Although this conclusion is widely accepted, there are some scholars that consider minor border incursions, clashes or incidents as not constituting an international armed conflict.[8] However, such opinions are faced with strong

[1] And under customary international law. *See Nicaragua case*, para. 228 and A/RES/25/2625.

[2] *Commentary of 1952 to common Article 2 of the four Geneva Convetions*, p. 30, *Commentary of 2016 to common Article 2 of the four Geneva Conventions*, paras. 210-212.

[3] *The Prosecutor v. Jean-Paul AKAYESU*, Judgement in Chamber I, *ICTR-96-4-T* , 1998, para. 603.

[4] *Prosecutor v. Ljube Boškoski, Johan Tarčulovski*, Judgment in Trial Chamber II, IT-04-82-T, 2008, para. 174.

[5] International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law? Opinion Paper*, March 2008, pp. 1, 2.

[6] Pictet J. S., 1952, *op. cit.* p. 32.

[7] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

[8] International Law Association, Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law, The Hague Conference, 2010, pp. 32–33.

criticism[1] and clear opposing practice. In one case, for example, States have considered an IAC to have been triggered by the capture of just one member of the armed forces.[2] An argument of logic could be added. If minor border clashes are not considered to be part of an IAC or to trigger an international armed conflict, then the targeting of a civilian in State A with a grenade by the border patrol of State B would not be considered a war crime, while a coordinated military assault on a hospital would. If we were to accept such a differentiation, then, if captured by State A, the respective border patrol personnel would not benefit from prisoner of war status,[3] unlike the military personnel that assaulted the hospital, which would. This interpretation cannot be accepted since it would completely contort the very object and purpose of the Geneva Conventions and IHL in general.[4]

3. Resort to Armed Force through Cyber Operations

There is no doubt that an IAC may take place in cyberspace alone. Since there is no limit (minimal or maximal) to the level of slaughter or the length of the hostilities,[5] there should also be no limit to where the slaughter or hostilities take place. This should not be interpreted as meaning that cyber operations in an IAC are unlimitedly legal, it just means that an IAC can be triggered by cyber operations and occur solely, but necessarily, in cyberspace, while IHL rules on an IAC apply to such cyber operations.

This is concurrent with the idea behind the two alternatives given Article 2, common to the four Geneva Conventions – declared war[6] or other armed conflict. The second alternative sets objective standards for qualifying an IAC,[7] thus one cannot elude the application of IHL by arguing that there is no IAC because operations are being carried out by cyber and not conventional means. An analogy for this conclusion could be made to the case

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[1] Gasser H. P., *International humanitarian law: An introduction*, Humanity for All: The International Red Cross and Red Crescent Movement, Henry Dunant Institute, Geneva, 1993, pp. 510–511.

[2] Digest of United States Practice in International Law (1981–1988), Vol. III, 1993, p. 3456.

[3] Under *Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949*.

[4] *Commentary of 2016 to common Article 2 of the four Geneva Conventions*, para. 239.

[5] Pictet J. S., 1952, *op. cit.* p. 32.

[6] It is obvious that IHL would apply to cyber operations subsequent to a declaration of war.

[7] *Commentary of 2016 to common Article 2 of the four Geneva Conventions*, paras. 201, 209, 210.

law of the ICTY regarding biological or chemical weapons.[1] Just because there is no explicit prohibition on chemical or biological weapons in IHL, it does not mean that they are not prohibited.[2] The same logic can be used for the existence of an IAC in the cyber world. There is no express provision, but the conditions are wide enough to cover "cyber IACs".

Consequently, an IAC may exist whenever there is a cyber operation amounting to a resort to armed force between two or more states.[3]

Things might not be so clear when addressing the more complex matters.

Turning first to the matter of border incursions or clashes, those so-called less grave hostilities, one question that requires an answer would be whether there is an IAC when a cyber operation physical or kinetic effect.

In view of the strong criticism on the requirement for a certain scale of hostilities, it is not important to analyze whether cyber operations causing a lower degree of damage may trigger an IAC. Practice and logic argue otherwise. However, this is only clear because conventional weapons always have a kinetic effect or cause physical damage. Therefore, no matter how grave a cyber operation having analogous effects to a conventional operation would always trigger an IAC. This is not the case and, accordingly, not as clear with cyber operations that only damage cyber (intangible) data.[4]

A simple example would be a computer hack by an intelligence unit of State A in a nuclear facility of State B. No doubt an explosion caused by this computer hack would trigger an IAC, but would electronic data destruction on a new ballistic missile developed by State B also be considered the same?

No definite conclusion has been reached by doctrinarian research and no relevant state practice or case law exists,[5] as arguments support both sides.[6]

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[1] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 124.

[2] *Ibidem*.

[3] A discussion here on what constitutes the use of force in cyberspace exceeds the purposes of this paper.

[4] *Commentary of 2016 to common Article 2 of the four Geneva Conventions*, paras. 253-256.

[5] *Ibidem.*

[6] Schmitt M. N., 2013, *op. cit.*, pp. 82-83.

One could argue that the four Geneva Conventions are intended to protect the sick, the wounded, the shipwrecked, prisoners of war or civilians, which lack the virtual component. On the other hand, the principle of distinction between military objectives and civilian objects, as enshrined in Additional Protocol I,[1] makes no difference as to how such objectives or objects are damaged. According to the relevant part of Article 48 "the Parties to the conflict shall at all times distinguish between […] civilian objects and military objectives and accordingly shall direct their *operations* only against military objectives". The emphasis is on the qualification of *operations*, or lack thereof. Article 52, which is supposed to provide further details on the protection, merely states in paragraph 1 that "[c]ivilian objects shall not be the object of attack or of reprisals […]" and in paragraph 2 "[a]ttacks shall be limited strictly to military objectives". There is no qualification on how the attack is performed. Indeed, some may argue that attacks are defined in Article 49 as "acts of violence", but the question then arises, what is violence? One may argue that intrinsic to violence is physical damage. Others may argue that there is no limit to how violence should be interpreted. If violence and damage now takes a different, wider meaning, so as to include virtual damage or violence, the so should the interpretation of Additional Protocol I and IHL in general.

The argument of logic could be added. If a cyber operation without kinetic effect is not governed by IHL, then states might attempt to circumvent IHL by conducting large scale wars in the cyber sphere, as long as their operations do not cause physical damage to life or property. This could even lead to instances where, if applied, IHL would consider certain operations as war crimes. If a malware was introduced in the operating system of a hospital's power generator that causes rapid draining of the battery and leaves the hospital without the necessary power. Could one seriously argue that planting the malware is not a breach of the first and fourth Geneva Conventions?[2] Of course, a counter-argument could underline that the final outcome and effects should be analyzed, which is the power shortage, a physical effect. If that was the case all cyber operations without immediate kinetic effect would eventually be quantifiable in physical damage. Consequently, the essence of the attacks is that they are hostile or adverse and not necessarily physical in nature.

[1] Articles 48 and 52(2).

[2] Article 19 of *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August* 1949, Article 18 of *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.*

The debate could go on with arguments for both sides. Thus, a clarification *de lege ferenda* appears not only useful, but necessary. Of course, amending the wording might prove difficult or even controversial,[1] but an interpretative instrument of the general terms could prove to be a viable solution.[2]

4. Conclusions

The norms of IHL concerning IACs, as they were in 1949 and as they stand today, are broad enough to allow their application to the nowadays technological context.

Yes, an IAC may be triggered and may take place solely in the cyber world. Difficulties reside with the fact that some cyber operations do not have a kinetic or physical effect.

IHL, just like international law in general should be interpreted in an evolutionary manner. This should not be an interpretative method *per se*, but a realistic and natural consequence of interpreting international law norms in their context in light of their object and purpose. In the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the International Court of Justice held that where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[3] The same must be concluded for generic terms such as the resort to armed force. It is generic phrase meant to cover the entire spectrum of actions that may be part of an armed conflict, regardless of how these may change through time.

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[2] Article 31(3)a of the *Vienna Convention on the Law of Treaties, done in Vienna, on 23 May 1969*.

[3] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p.213, paras. 57-71.

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Recenzie de carte / Book Review

Public International Law of Cyberspace

(Kriangsak Kittichaisaree,
Law, Governance and Technology Series
Volume 32, Springer 2017, 401 pages)

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In this comprehensive 401-page monographic work, one of the 19 international experts that prepared *The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* gives his view on how a number of branches of international law apply to cyberspace.

Covering a large spectrum of international law, this book proves versatile for any scholar, lawyer, judge or lawmaker interested in the interaction between public international law and cyberspace. Thus, the book addresses several much talked about issues such as the use of force in cyberspace, including both *jus ad bellum* and *jus in bello*, human rights law in the cyber world or the issue of attribution when acting behind a code or a computer, as well as matters that legal literature is still developing, like cyber espionage, cyber crimes or cyber terrorism.

In a carefully structured manner, the author analyzes the views provided by states, doctrinarians and the very scarce case law in relation to real, documented cyber operations, in order to provide the reader with the current state of play and the essentials in the ongoing debate. In the words of the author, everyone agrees "that the relevant rules of existing international law

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regulate cyberspace", however "opinions diverge, though, on which rules are to be applied and how".

As such, the author agrees with the general view that the law of attribution in international law, especially the customary standards encoded in the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, does apply to cyberspace. However, he then goes to show how a uniform standard of proof is required, because the identity of the perpetrator behind an operation directed through cyber means may be hidden in a number of ways, which have so far made it almost impossible to trace those behind the major real-world offensive cyber incidents.

Similarly, the author shows how cyber operations may amount to a use of force or an armed attack and how such actions are prohibited under current public international law, except, of course, if not permitted by well-known exceptions. He then signals the different opinions on the thresholds required to qualify cyber operations a use of force or armed attacks and the difficulties of reaching common views. A more thorough analysis behind their differences and reasoning would have been ideal.

On the subject of the law of armed conflict, the book highlights the very fine line between the theoretical application of International Humanitarian Law to cyber operations and the actual, practical application to real life events. Using clever examples, the author points to the specificities of cyberspace, especially its dual-use nature, to emphasize how rules, such as the principle of distinction, could not be applied in practice, despite the logical conclusion that cyber operations should not target civilians or civilian objects.

The book also provides comprehensive studies and food for thought on several other matters, including the very delicate issue of cyber terrorism. Thus, the author explains how international law in force may be applied to deter or convict criminal intending to act or acting in cyberspace, highlighting that the cyber world is not a law free zone.

Finally, the author gives his view on the way forward. Emphasis is put on stockpiling, cybersecurity and cyber deterrence, as the author argues that the exercise of state sovereignty in the cyber world may prove unrealistic. This very well presented opinion will be put to the test by the balance between the interests and will of states on the one hand and real world cyber events on the other.