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CUPRINS

TABLE OF CONTENTS

Cuvânt înainte / Foreword

The present issue has the pleasure to host, within the *Articles* section, a very interesting and up-to-date contribution signed by Senior Lecturer Dr. Ion Gâlea discussing *International Reaction to Catalonia: Possible Consequences for International Law*. The article covers the legal and political aspects of the Catalonian 'Declaration of Independence' and the possible issues it raises.

In the section *Commentaries regarding the Activities of International Bodies in the Field of International Law*, Mr. Victor Stoica discusses the first part of a paper on *Recent Developments regarding Compensation before the International Court of Justice: The Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua*. The article covers the Court's recent case law and its practical aspects concerning the field of reparation under the law of international responsibility.

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

Within the *Studies and Comments on Case Law and Legislation* section, Mr. Radu Șerbănescu publishes a *Review of European Union Sanctions on Terrorism. Recent Developments in Case Law: The LLTE Case*. The article shows a pragmatic approach to the various legal issues raised.

As a *PhD and Master Candidate's Contribution*, Mr. Adrian-Nicușor Popescu submits a commentary entitled *Commentaire d'arrêt : Obligations relatives à des négotiations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Îles Marshall c. Royaume-Uni, 2016, CIJ)*, covering the recent and very debated ruling of the International Court of Justice in that case.

Finally, Dr. Elena Lazăr covers a very useful *Book Review* concerning Laurie R. Blank's and Gregory P. Noone's book *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War*.

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

Articole / Articles

International Reaction to Catalonia: Possible Consequences for International Law

Ion GÂLEA[1]
Faculty of Law, University of Bucharest

Abstract

This study aims at briefly examining the international reactions to the unilateral declaration of independence with respect to Catalonia, in order to identify possible trends or evolutions in international law. The article departs from the assumption that two main theories have been proposed with respect to the international law applicable to secession attempts and tries to identify elements that may support one theory or the other. The main aspects that will be looked upon when studying the reactions of States shall be references to: territorial integrity and sovereignty, conformity with the Constitution and the domestic laws, and the rule of law.

Keywords: *Catalonia, secession, recognition, territorial integrity, rule of law.*

Introduction

The sequence of events in Catalonia in the autumn of 2017 held the attention of the international community. It was indeed an unprecedented event for a territory (a region or a province) in a Member State of the European Union to attempt to achieve secession. A brief analysis of the international law aspects surrounding this issue, as well as the consequences of such reaction for the evolution

It is not the purpose of this study to make a detailed analysis of the facts, but a short recall of the most important events might be useful: the parliament of the Autonomous Community of Catalonia approved on 6 September 2017,

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

called by the Generalitat of Catalonia (the government);[1] however, the High Court of Justice of Catalonia issued orders to the police to attempt to prevent the conduct of such referendum;[2] the referendum took place on 1 October 2017; according to the organizers, 92% of the persons that voted expressed themselves in favour of the independence, while the turnout was 43%;[3] the referendum was on 7 October 2017 the Constitutional Court of Spain, upon the request of the Government of Spain, declared that the referendum infringed the Constitution;[4] a document entitled "declaration of independence" was signed on 10 October 2017 by the members of the pro-independence parties in the Catalan parliament and was voted by a majority of 70 out of 135 members;[5] in the same day, the Spanish Government, with the consent of the Senate, invoked article 155 of the Spanish Constitution and dismissed the head of the Generalitat;[6] upon request of the Spanish

[1] El Govern en pleno firma el decreto de convocatoria del referéndum del 1 de octubre, 6 September 2017, El Diario, http://www.eldiario.es/catalunya/politica/consellers-decreto-convocatoria-referendum-octubre_0_683832560.html (accessed 10 December 2017); En vivo: la Mesa del Parlament aprueba la tramitación de la Ley de Transitoriedad Jurídica, 6 september 2017, El Mundo, http://www.elmundo.es/cataluna/2017/09/06/59af9fe5e2704eaf268b468b.html (accesed 10 December 2017).

[2] Police close voting centres before Catalan referendum, the Guardian, 30 September 2017, https://www.theguardian.com/world/2017/sep/30/police-close-more-than-half-of-voting-centres-ahead-of-catalan-referendum (accessed 11 December 2017).

[3] Los resultados definitivos del referéndum no cuadran con los provisionales, El Pais, 6 October 2017, https://elpais.com/ccaa/2017/10/06/catalunya/1507305113_021426.html (accessed 11 December 2017).

[4] Tribunal Constitucional. Pleno. Sentencia 114/2017, de 17 de octubre de 2017. Recurso de inconstitucionalidad 4334-2017. Interpuesto por el Abogado del Estado en nombre del Presidente del Gobierno frente a la Ley del Parlamento de Cataluña 19/2017, de 6 de septiembre, denominada «del referéndum de autodeterminación», ECLI:ES:TC:2017:114, Boletin Oficial del Estado, Núm. 256 Martes 24 de octubre de 2017 Sec. TC., p/ 10254.

[5] Un Parlament semivacío consuma en voto secreto la rebelión contra el Estado, El Mundo, 27 October 2017, http://www.elmundo.es/cataluna/2017/10/27/59f2feafe2704e491b8b48e2.html (accessed 11 December 2017).

[6] El Senado aprueba aplicar el artículo 155 en Cataluña, El Pais, 27 October 2017, https://politica.elpais.com/politica/2017/10/27/actualidad/1509105725_777595.html (accessed 11 December 2017).

Government, the Spanish Constitutional Court [declared the nullity] of the declaration of independence.[1]

This is only the general picture of the events. The essential feature of the process that should be underlined is the non-conformity with the Spanish Constitution: the entire process, the so-called referendum and the declaration of independence broke the provisions of the Constitution and triggered prompt reaction from the Constitutional Court.

The situation calls upon one of the most important questions in contemporary international law: whether international law allows the secession of a territory without the consent of the State from which it is a part. The answer to this question is not clear, as two opposite theories have been advanced in recent years. This study departs from this assumption: in relation to certain crucial questions, international law is a sequence of arguments that come in pairs.[2] Most of the great problems in international law are subject to "theory A" and "theory B". Sometimes one of the arguments is based on realism, the other on idealism; sometimes one argument is based on one of the values of the international community, while the other argument on another value. In many cases, certain States may support "theory A", while others "theory B". Moreover, over time, the balance between the two theories may oscillate.

Therefore, the purpose of this study is to expose the main theories surrounding the key question whether a territory of a State can achieve secession (section I) and to examine whether the international reactions to the independence of Catalonia contain any legal elements that might be in favour of one of the two theories (section II). It is true, international law has the wonderful feature of allowing an important degree of flexibility, but is also characterized by the fact that every statement of a State matters, as it represents a brick in the construction of future legal arguments. This study

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[1] Tribunal Constitucional. Pleno. Sentencia 121/2017, de 31 d'octubre de 2017. Impugnación de disposiciones autonómicas 4333-2017. Formulada por el Gobierno de la Nación respecto del Decreto de la Generalitat de Cataluña 140/2017, de 7 de septiembre, de normas complementarias para la celebración del referéndum d'autodeterminación, Buletin Oficial del Estado, Núm. 278 Jueves 16 de noviembre de 2017 Sec. TC., p. 110703; Tribunal Constitucional. Pleno. Sentencia 122/2017, de 31 d'octubre de 2017. Impugnación de disposiciones autonómicas 4335-2017. Formulada por el Gobierno de la Nación respecto del Decreto 139/2017, de 6 de septiembre, de convocatoria del referéndum d'autodeterminación de Cataluña, Buletin Oficial del Estado, Núm. 278 Jueves 16 de noviembre de 2017 Sec. TC., p. 110707.

[2] Martti Koskenniemi, 'International Law in the World of Ideas', in J. Crawford, M. Koskenniemi, *The Cambridge Companion to International Law*, Cambdridge University Press, 2011, p. 60.

does not propose a comprehensive analysis of the international law concerning secession, recognition or the creation of States, but a small contribution or a "beginning" in the perspective of a larger research.

1. Main legal theories applicable to secession of a territory

1.1. The outline of the two theories

1.1.1. Theory A – neutrality of international law

The first theory (we will name it theory A) relies on the assumption that international law is neutral with respect to secession. It argues that secession is not prohibited by international law, because there is no rule of international law that would prevent the creation of a new State. It was argued that the rule of territorial integrity relates only to inter-State relations and that the scope of territorial integrity does not cover the relations between a State and internal secessionist movements or entities.

The theory relies on the so-called "Lotus principle", according to which where there is no express prohibition in international law, States are free to adopt whatever conduct they may choose. Practically, what is not expressly prohibited, is permitted under international law.[1]

An important number of arguments presented during the pleadings before the International Court of Justice in the advisory proceedings *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* were based on this theory.[2] Thus, for example, the United States expressed the view that "For that basic principle calls upon States to respect the territorial integrity of other States. But it does not regulate the internal conduct of groups within States, or preclude such internal groups from seceding or declaring independence".[3] Statements in support of the idea that territorial integrity applies only to inter-State relations were also made by France, Switzerland, the Czech Republic, Albania.[4] The same oral statement of the United States quotes, *inter alia,* Malcolm Shaw, who expressed views that: "as a matter of law the international system neither

[1] *Lotus (France v. Turkey),* Permanent Court of International Justice, P.C.I.J. (ser. A) No. 10 (1927), para. 45-48.
[2] *I.C.J. Reports 2010*, p. 403.
[3] Verbatim Record CR 2009/30, p. 30, para. 20.
[4] Written Statement of France, 17 April 2009, p. 26, para. 2.6.; Written Statement of Switzerland, April 2009, p. 14, para. 55; Written Statement of the Czech Republic, April 2009, pp. 7-8; Verbatim Record CR 2009/26, p. 13, para. 19 (Oral Statement of Albania).

authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law".[1]

James Crawford, representing the United Kingdom, stressed that "A prohibition of secession is certainly not to be found in the pre-1919 international law. Nor did this position change after 1919".[2] Daniel Muller, representing the authors of the declaration of independence, formulated the argument that "*le droit international ne crée pas l'Etat, son sujet par excellence, mais constate son existence, en prend acte et en tire toutes les consequences*".[3]

To draw a short conclusion with respect to this « Theory A », it might be appropriate to refer again to a pragraph from Professor Malcolm Shaw (who, ironically, pleaded for Serbia), quoted by Jamew Crawford: "*There is, of course*, no international legal duty to refrain from secession attempts: the situation remains subject to the domestic law. However, should such a secession prove successful in fact, then the concepts of recognition and the appropriate criteria of statehood would prove relevant and determinative as to the new situation" (emphasis added by quotation).[4]

1.1.2. Theory B – "implied" prohibition of secession

The second theory departs from the assumption that the principle of territorial integrity contains the prohibition of unilateral secession. It is argued that international law gives effect to domestic law, meaning that international law accepts the conclusion that, if secession is prohibited by the constitutional law of the State from which secession is attempted, international law will accept that conclusion. In this sense, a paragraph from the case before the Supreme Court of Canada, *Secession of Quebec*, is often quoted:

"*As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part [...]. Where, as here, unilateral secession would be incompatible with the domestic Constitution,*

[1] Malcolm Shaw, *Re: Order in Council P.C. 1996-1497 of 30 September 1996*, in Anne Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned*, Brill, 2000, p. 136, quoted in Verbatim Record 2009/30, p. 29, para. 18; See also John Dugard, *The Secession of States and their Recognition in the Wake of Kosovo,* the Hague Academy of International Law, AIL-Pocket, 2013, p. 139.
[2] Verbatim Record, 32/2009, p. 49, para. 11-12.
[3] Vebatim Record, 25/2009, p. 39, para. 19.
[4] Malcolm Shaw, *International Law,* 6th ed., Cambridge: Cambridge University Press, 2008, p. 218, quoted in Verbatim Record, 32/2009, p. 52, para. 21.

international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn".[1]

It is true, the Supreme Court is using somehow a volatile language (it does not say „international law prohibits" or „international law protects territorial integrity", but „places a great importance...", or uses words like „by and large" or „is likely to accept"). At the same time, this paragraph is placed after the following general Statement:

„*International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below*".[2]

The paragraph above could be commented in two ways. On one side, it may refer to an „implicit" prohibition of secession (which would correspond to the denial of a correlative right), resulting from the exceptional circumstances required for the exercise of the right to „external" self determination.[3] On the other side, this paragraph may refer only to „the right of secession" – which may refer to a specific situation, that may be discussed under „Theoretic point C", below (because, in the conception of theory A, the non-existence of a right does not correspond necessarily to a prohibition – as what is not expressly prohibited is permitted, according to the „Lotus" principle).[4]

Moreover, a supplementary point may be taken. The reference to "circumstances required for the secession to be permitted under the right of a people to self-determination" lead to the so-called "safeguard clause" which is contained by two of the most important documents related to self-determination, namely the *Declaration on Friendly Relations* and the *Helsinki Final Act.* The "safeguard clause" reads as follows:

"*Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus*

[1] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 112.
[2] *Ibid.*
[3] Verbatim Record, 32/2009, p. 27, para. 4 (Oral Statement of Romania).
[4] Verbatim Record, 32/2009, p. 51, para. 19 (Oral Statement of the United Kingdom).

possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[1]

Nevertheless this argument was also criticized by the supporters of theory A, as the safeguard clause establishes aslo an inter-statate relation, excluding any prohibition for non-state actors, like the secessionist entities.[2]

During the pleadings in the advisory proceedings *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, a number of countries supported that the principle of territorial integrity prohibits secession, also in relation to other international actors. For example, Argentina argued that "*respect for the principle of territorial integrity is an obligation that applies not only to States and international organizations, but also to other international actors".*[3] Also, in the words of Bogdan Aurescu, representing Romania, "*It has been argued that secession is not prohibited by international law and that the principle of territorial integrity applies only between States and does not protect States from secessionist movements and that non-State actors are not bound by this principle. Accepting this statement would lead to extremely severe consequences for the international legal order. It would mean that any province, district, county, or even the smallest hamlet from any corner of any State, is allowed by international law to declare independence and to obtain secession".*[4]

As John Dugard mentions, "the International Court of Justice has failed to provide guidance on the law governing State secession in its Advisory Opinion" on the declaration of independence concerning Kosovo.[5] The Court regarded the question put by the General Assembly as very narrow: "It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State".[6] However, the Court made a small, but important, step in favour of Theory A

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[1] A/RES/25/2625, 24 October 1970.
[2] Verbatim Record, 25/2009, p. 44, para. 29 (authors of the declaration of independence).
[3] Written Statement of Argentina, 17 April 2009, p. 30, para. 75; John Dugard, *The Secession of States and their Recognition,* op. cit., p. 139.
[4] Verbatim Record, 32/2009, p. 20, para. 10.
[5] John Dugard, *The Secession of States and their Recognition,* op. cit., p. 139.
[6] ICJ Reports, 2010, p. 423, para. 51.

– it accepted that the principle of territorial integrity applies only between States: "Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States".[1] Although this finding was criticized for lack of thorough examination of the issue, it remains an authoritative statement.[2] Therefore, the way forward for Theory B relies on the proposition that the territorial integrity would not prohibit non-state actors, namely secessionist movements, to attempt secession, but would prohibit States from recognizing such allegedly new States. However, this argument shifts towards recognition, which is a much more complex issue.

1.2. Supplementary remarks – self-determination and recognition

1.2.1. *"Theoretic point C" – Self-determination*

A different argument than theories "A" and "B" above relates to the right to self-determination. The first element that might be important to be outlined is the relation between the right to self-determination and the two theories. They are, somehow, in a "triangular" relation: theory A and theory B are opposed; self-determination, in those cases where it allows "external" self-determination may be regarded as an "exception" from theory B;[3] nevertheless, the relation between theory A and the right to self-determination is somehow more complex: theory A argues that secession is not prohibited and "what is not prohibited is permitted" – therefore, there is no need to argue that a people is entitled to "the right to [external] self-determination", since there is no prohibition against secession. However, the "self-determination" may be regarded as a supplementary argument, in relation to theory A: if there is no right to self-determination, the success of the secession will remain subject to the faculty of the international community to accept the new entity, while in the case of a "positive right of self-determination", the international community may be called upon to accept the new state.

Some general elements related to the right to self-determination may be useful. First, it has to be pointed out that the right to self-determination is confined to "peoples". As the Venice Commission points out, "the right to self-determination does not appertain to minorities or other groups within a

[1] *Ibid,* p. 437, para. 80.
[2] John Dugard points out that „it is surely iresponsible of the Court to pronounce on such controversial matter without a full examination of the subject" *The Secession of States and their Recognition,* op. cit., p. 245; T. Christakis, *The ICJ Advisory Opinion: Has International Law Something to Say about Secession?* (2011) Leiden Journal of International Law, vol. 24, p. 73, 85.
[3] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 112.

state".[1] Rosalyn Higgins answered firmly in the negative the question which may have raised in the context of the dissolution of Yugoslavia and Soviet Union: "*Is it right, as it is commonly asserted by different nationalist factions, that minorities are entitled to self-determination, and that self-determination entails secession?*".[2]

Second, it has to be pointed out that even if an entity qualifies as a people, the right to self-determination does not necessarily entitle that people to secession (the "external aspect" of the self-determination). As the Supreme Court of Canada recalled in the *Secession of Quebec* case, "*In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination*".[3] The Venice Commission recalles that „*But even if a group qualifies as a "people", in the international law sense, the principle of self-determination of peoples does not automatically entail their right to secession. [...] In any case, even a secession would only be an option of last resort in a situation where a people's right to internal self-determination has been persistently and massively violated and all other means have failed*".[4] Interesting guidance on this issue has also been provided by the International Fact-Finding Mission in Georgia (2009): „*outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of a secession is not accepted in state practice. A limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most*

[1] European Commission for Democracy through Law (Venice Commission), Opinion no. 763/2014, 21 March 2014, CDL-AD (2014)004, para. 25; the Venice Commission is also quoting the International Court of Justice in the *Western Sahara* Advisory Opinion, ICJ Reports, 1975, par. 59; however, the Venice Commission points out that „it may, however, in specific cases be difficult in practice to categorise a given group of persons as a "people" or ("only") as a "minority" in the sense of international law" (para. 25).

[2] Rosalyn Higgin, *Problems and Process: International Law and How We Use It*, Oxford University Press, p. 121-122.

[3] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138.

[4] European Commission for Democracy through Law (Venice Commission), Opinion no. 763/2014, 21 March 2014, CDL-AD(2014)004, para. 26.

authors opine that such a remedial "right" or allowance does not form part of international law as it stands." [1]

As it can be summarized from the above sources, the right to self-determination is supposed to be achieved within its „internal aspect". It provides for secession in the case of colonies or opressed people. Outside the colonial context, the theory of „remedial secession" (in case when the right to internal self-determination of a people is manifestly violated) is subject to debate,[2] but, nevertheless, its application in cases where the state is notorious to ensure representative government might be „manifestly" excluded.[3]

1.2.2. Relevance of recognition

Since the International Court of Justice expressly accepted, in the *Kosovo Advisory Opinion*, that "the scope of the principle of territorial integrity is confined to the sphere of relations between States",[4] it appears that theory B would mainly rely on the argument that, by recognizing the secessionist attempt, any State would violate the territorial integrity of the State from which secession is desired.

Thus, theory A may argue that the decision of a State to recognize is entirely discretionary. In this sense, the words of Sir Hersch Lauterpacht may be quoted: "*according to what is still the predominant view in the international law literature, recognition of States is not a matter governed by law, but a question of policy*".[5] The discretionary character of recognition of States is, indeed, widely recognized.

On the other side, theory B may argue that there exists an obligation not to recognize an attempted secession that would violate the territorial integrity of a State and would not be justified by the right to "external" self-determination. In support of such statement, the wording of principle 5 of the 1989 Vienna Document of the CSCE meeting could be invoked: "They confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United

[1] Independent International Fact-Finding Mission in Georgia, vol. II, September 2009, p. 141.
[2] John Dugard, *The Secession of States and their Recognition,* op. cit., p. 276-277; Mark Weller, Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?, Leiden Journal of International Law, vol. 24, Issue 1, March 2011, p. 137.
[3] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138.
[4] *Ibid.*, p. 437, para. 80.
[5] Hersch Lauterpacht, *Recognition in International Law,* Cambridge University Press, p. 1.

Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States".[1]

It is not the purpose of this study to examine the possible limitations to the discretionary character of the recognition. Nevertheless, as John Dugard pointed out, as there is no mechanism, no international court of procedure enabled to scrutinize the legality of attempted secessions, the "credentials of the aspiring state", it is left to the existing States, to the international community to decide whether a new entity would be admitted to the "Club of Nations".[2]

One of the questions addressed by the members of the Committee on Recognition and Non-Recognition of the International Law Association, was formulated as follows: "Please give any examples of your State not recognizing another entity as a State. Is this indicative of a legal obligation of non-recognition?".[3] The Report notes the various state practice related to non-recognition and acknowledges the opposing views regarding the existence of an obligation of non-recognition. These opposing views balance between: a) the view that rejects any obligation of non-recognition, even in the case when a territory was acquired by the use of force[4], and b) the view that "[t]hird States... may be prevented from according recognition as long

[1] Concluding Document of the Vienna Meeting 1986 of Representatives of Paricipating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, principle 5; quoted also by Referrence re Secession of Quebec, op. cit., para. 129.

[2] John Dugard, *The Secession of States and their Recognition,* op. cit., p. 35.

[3] International Law Association, Washington Conference (2014), Committee on Recognition/Non-Recognition in International Law, Second (Interim) Report, March 2014, p. 1.

[4] For example: "*in 1986, the Australian government stated that it did not acknowledge a legal obligation of non-recognition when territory was acquired by the use of force. Australia recognised Indonesian sovereignty over East Timor, and in discussing the relevance of the 1970 UNGA Friendly Relations Declaration (Res 2625 (XXV)) to Australia's negotiations with Indonesia over natural resources in the Timor Gap, the Minister for Resources and Energy stated that: "Senator GARETH EVANS: ... It is our understanding that there is no binding international legal obligation not to recognise the acquisition of territory that was acquired by force*" - International Law Association, Washington Conference (2014), Committee on Recognition/Non-Recognition in International Law, Second (Interim) Report, March 2014, p. 4.

as the injured state does not waive its rights since such a unilateral action would infringe the rights of the latter State".[1]

Practice of States is evolving with each case on the international scene. This is why it would be useful to analyse briefly the international reactions to the declaration of independence of Catalonia, in order to observe whether they may contain any legal position or whether they may favour one or the other of the theories exposed above. As in any matter of international law, the balance between two opposing theories may swift over time.

2. Reactions to Catalonia and their possible consequences

2.1. The positions of States

No State has recognized Catalonia as an independent State.[2] Nevertheless, it would be useful to point out some positions, in order to try to identify any legal elements that may be contained by the statements of States.

First, certain States limited their statements to the fact that they will not recognize Catalonia, without providing any legal elements. Certain states in this group may have called for a solution based on dialogue, or simply referred to the issue as an "internal matter": Portugal,[3] Hungary,[4] Mexico,[5]

[1] Karl Doehring, "Effectiveness," in 2 Encyclopedia of Public International Law 43, 47 (R. Bernhardt, ed. 1995), quoted by International Law Association, Washington Conference (2014), Committee on Recognition/Non-Recognition in International Law, Second (Interim) Report, March 2014, p. 4; in the same sense, the Report notes that in the case of Kosovo, the reaction of Spain was that "The Spanish government will not recognize the unilateral act proclaimed yesterday by the Kosovar assembly, and it will not recognize it because we do not believe it respects international legality".

[2] It may not be taken seriously that "Abkhazia" and "South Ossetia" declared that they may recognize Catalonia, if asked by the Catalan government.

[3] The position of Portugal was expressed by the President, who communicated that "Portugal does not recognized the unilateral declaration of independence of Catalonia and defends the respect for the unity of Spain", TSF, 28 October 2017, https://www.tsf.pt/politica/interior/catalunha-marcelo-transmitiu-a-felipe-vi-que-portugal-nao-reconhece-declaracao-de-independencia-8879291.html (accessed 20 December 2017).

[4] The Hungarian minister of foreign affairs declared to media that „"The Hungarian Government views the declaration of Catalonian independence as a matter of Spanish internal affairs" - Press information of the Ministry of Foreign Affairs and Trade, The declaration of Catalonian independence is a matter of Spanish internal affairs, 28 October 2017, http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-declaration-of-catalonian-independence-is-a-matter-of-spanish-internal-affairs (accessed 19 October 2017).

[5] The President of Mexico declared on twitter that „Mexico will not recognize the unilateral independence of Catalonia. We hope for a peaceful and political solution", Excelsior, México no reconocerá la independencia de Cataluña: Peña, 27 October 2017 http://www.excelsior.com.mx/nacional/2017/10/27/1197636, (accessed 20 December 2017).

Russia (but made a general reference to future developments being in conformity with the constitution and the laws),[1] Unite States (declared that Catalonia is an integral part of Spain).[2]

Second, it is remarkable that a large group of States referred to the need to respect the Spanish constitution or generally the domestic law: Argentina,[3] Belgium (although Belgium just called in general terms for respecting domestic and international order),[4] Brazil,[5] Bulgaria,[1] Canada,[2] Croatia,[3]

[1] The position of the Russian Federation was expressed by the spokesperson of the Ministry of Foreign Affairs: „We regard the situation in Catalonia as an internal affair of Spain. We proceed from the assumption that further developments in this Spanish region will conform to that country's Constitution and laws, in compliance with the democratic norms and human rights. We hope that the early parliamentary elections in Catalonia scheduled for December 21 will become a crucial stage in efforts to overcome the crisis and will stabilise the operation of state and municipal authorities", Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow, November 2, 2017, http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2932032 (accessed 20 December 2017).

[2] The Department of State of the United States issued a press statement in the following terms: „The United States enjoys a great friendship and an enduring partnership with our NATO Ally Spain. Our two countries cooperate closely to advance our shared security and economic priorities. Catalonia is an integral part of Spain, and the United States supports the Spanish government's constitutional measures to keep Spain strong and united", Press Statement, 27 October 2017, https://www.state.gov/r/pa/prs/ps/2017/10/275136.htm (accessed 20 December 2017).

[3] Argentina declared that "The Argentine Government does not recognize and thus rejects the declaration of independence passed by the Parliament of Catalonia. Argentina hopes that legality is restored through the constitutional mechanisms, in a context of peace among the Spanish people, guaranteeing the unity and territorial integrity of Spain", Ministry of Foreign Affairs and Worship of Argentina, Press release No. 484/17, 27 October 2017, https://www.mrecic.gov.ar/en/argentina-and-situation-catalonia-ii (accessed 19 December 2017).

[4] The Belgian Prime-minister declared (on his twitter account) that „a political crisis can only be solved through dialogue. We plead for a peaceful solution that would respect domestic and international order", Le Monde, 27 October 2017, http://www.lemonde.fr/europe/article/2017/10/27/catalogne-la-declaration-d-independance-suscite-des-reactions-internationales_5207023_3214.html (accessed 19 December 2017).

[5] The position of Brasil was that: „The Government of Brazil government closely monitors the developments concerning Catalonia, rejects the unilateral declaration of independence and reiterates its call for dialogue based on full respect for constitutional legality and the preservation of the unity of the Kingdom of Spain.", Ministry of Foreign Affairrs of Brasil, Press release no. 358, 28 October 2017, http://www.itamaraty.gov.br/en/press-releases/17726-developments-in-catalonia (accessed 19 December 2017).

China,[4] Estonia,[5] India,[1] Ireland,[2] Italy,[3] Peru,[4] Turkey,[5] United Kingdom.[6]

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[1]The Ministry of Foreign Affairs of Bulgaria issued a press release, by which it expressed the following position: "Bulgaria respects the constitutional order of the Kingdom of Spain, the rule of law and the principles of the legal State as fundamental values of the European Union and all its Member States. We support the preservation of the territorial integrity and the state sovereignty of Spain, which is our strategic partner and ally. The unilateral declaration of independence of Catalonia does not meet the conditions for legitimacy and breaches the principles of the legal State, as evident from the decisions of the Constitutional Court of the Kingdom of Spain" - Press release, Ministry of Foreign Affairs Position: Bulgaria respects Spain's territorial integrity, 27 October 2017, http://www.mfa.bg/en/events/6/1/2069/index.html (accessed 19 December 2017).

[2] The Prime-minister of Canada declared that „"Canada recognizes one united Spain […] We understand there are significant internal discussions that they are going through right now and we simply call for those discussions to be done according to the rule of law, according to the Spanish constitution, according to the principles of international law", Canada recognizes one united Spain amid Catalonia dispute, Trudeau says, The Star News, 27 October 2017, https://www.thestar.com/news/canada/2017/10/27/canada-recognizes-one-united-spain-amid-catalonia-dispute-trudeau-says.html (accessed 19 December 2017).

[3] The position of Croatia was along the lines of a press release of the Ministry of Foreign Affairs: "The Republic of Croatia considers the developments in Catalonia Spain's internal issue and advocates democratic and peaceful solutions in keeping with the European values. The Republic of Croatia believes that Catalonia's declaration independence is not in line with the Spanish constitution and that the best solution is one based on dialogue, with full respect for the rule of law and protection of rights of all citizens living in Catalonia" - Press release, Catalonia's declaration of independence not in line with Spanish constitution, 28 October 2017, http://www.mvep.hr/en/info-servis/press-releases/,29319.html (accessed 19 December 2017).

[4] The position of China was expressed by the spokesperson of the Ministry of Foreign Affairs: „China's position on this issue has been consistent and unequivocal. We think it falls within Spain's internal affairs. We understand and support the Spanish government's effort to uphold national unity, ethnic solidarity and territorial integrity, oppose the act of splitting the country and undermining the rule of law, and believe Spain is capable of upholding the social order and safeguarding the rights and interests of its citizens. China and Spain are friendly countries. We will continue to develop friendly cooperation in various fields with Spain following the principle of mutual respect for each other's sovereignty and territorial integrity and mutual non-interference in each other's internal affairs", Regular Press Conference of 30 October 2017, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1505871.shtml (accessed 20 December 2017).

[5] The Estonian Prime-minister declared publicly that the question of Catalonia is „an internal matter of Spain". Moreover, the Ministry of Foreign Affairs of Estonia stated that "We are convinced that all internal matters will be solved in accordance with the laws of Spain. The bilateral relations of Estonia and Spain are strong—Spain is a close ally of Estonia in NATO, and an important partner in the European Union." - Estonian government: Events in Catalonia Spain's internal matter, https://news.err.ee/633455/estonian-government-events-in-catalonia-spain-s-internal-matter (accessed 19 December 2017).

[1] The spokesperson of the Indian Ministry of Foreign Affairs declared: „As a country that values and fosters unity in diversity, India would urge that issues of identity and culture are best addressed within the constitutional framework and with respect for national integrity." - The Times of India, 30 October 2017, https://timesofindia.indiatimes.com/india/neither-europe-nor-world-would-benefit-from-instability-india-on-catalonia-crisis/articleshow/61347963.cms (accessed 19 December 2017).

[2] The position of Ireland was that „We are all concerned about the crisis in Catalonia. Ireland respects the constitutional and territorial integrity of Spain and we do not accept or recognise the Catalan Unilateral Declaration of Independence. The resolution of the current crisis needs to be within Spain's constitutional framework and through Spain's democratic institutions. Ireland supports efforts to resolve this crisis through lawful and peaceful means." - Statement on Catalonia, 28 October 2017, https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2017/october/statement-on-catalonia/ (accessed 19 December 2017).

[3]The Minister of Foreign Affaris of Italy declared publicly that „Italy does not recognise, and will not recognise, the unilateral declaration of independence proclaimed today by the Catalonia regional parliament […] Indeed, it is an extremely serious gesture outside the framework of the law. For this reason we express firm condemnation and, at the same time, the hope that dialogue can be restored, with respect of the Spanish Constitution, to save the population an escalation of tension, far from a united country with a strong European stamp like Spain" - Italy does not recognise Catalan independence – Alfano, ANSA news, 27 October 2017, http://www.ansa.it/english/news/2017/10/27/italy-does-not-recognise-catalan-independence-alfano-2_ef09bf9e-9e6a-4763-9e48-889a71359271.html (accessed December 2017).

[4] The Government of Peru declared that it rejects the unilateral declaration of independence, „because it is an action contary to the constituton and the laws of Spain", El Commercio, Perú rechaza declaración unilateral de independencia de Cataluña, 27 October 2017, https://elcomercio.pe/politica/peru-rechaza-declaracion-unilateral-independencia-cataluna-noticia-469388 (accessed 20 December 2017).

[5] The Ministry of Foreign Affairs of Turkey issued a press release in the following terms: „Respect for the territorial integrity and the Constitution of Spain as well as the will of Spanish people are fundamental. The unilateral decision of the Parliament does not comply with the Constitution and the laws of Spain and does not reflect the will of Spain as well as the people of this region. We hope that the Regional Government of Catalonia will not insist on this unilateral decision, which has no constitutional legitimacy and could lead to tension and escalation. We believe that this issue will be resolved based on democracy and the rule of law", Press release no. 333, 27 October 2017, http://www.mfa.gov.tr/no_-333_-ispanyada-katalunya-ozerk-bolgesiyle-ilgili-gelismeler-hk_en.en.mfa (accessed 20 December 2017).

[6] In the United Kingdom, the Downing Street Spokesperson said: "The UK does not and will not recognise the Unilateral Declaration of Independence made by the Catalan regional parliament. It is based on a vote that was declared illegal by the Spanish courts. We continue to want to see the rule of law upheld, the Spanish Constitution respected, and Spanish unity preserved", Press Release Statement on the Unilateral Declaration of Independence made by the Catalan regional parliament, 27 October 2017, https://www.gov.uk/government/news/statement-on-udi-made-by-catalan-regional-parliament-27-october-2017 (accessed 20 December 2017).

Third, another important number of countries stated that they respect the „territorial integrity", „sovereignty" or „unity" of Spain: Argentina, Brazil, Bulgaria, China, Germany,[1] Greece,[2] India, Ireland, Lithuania,[3] Morocco,[4] Poland,[5] Romania.[6]

[1] The position of Germany was expressed by the spokesperson of the Federal Government, declaring that it was "concerned about the renewed escalation of the situation in Catalonia, triggered by another breach of the constitution on the part of the Catalonian regional parliament […] The sovereignty and territorial integrity of Spain are inviolable and will remain so […] The unilateral declaration of independence breaches these protected principles. The German government will not recognise any declaration of independence of this sort" - Press release, The German government will not recognise the unilateral declaration of independence issued by the Catalonian regional parliament, 28 October 2017, https://www.bundesregierung.de/Content/EN/Artikel/2017/10_en/2017-10-27-katalonien-unabhaengigkeit_en.html?nn=709674 (accessed 28 October 2017).

[2] The position of Greece was expressed by the Ministry of Foreign Affairs: "Greece supports Spain's territorial integrity and rejects unilateral actions that undermine the country's unity and the immutability of borders.", Press Release, Ministry of Foreign Affairs announcement regarding the situation in Catalonia, 29 October 2017, http://www.mfa.gr/en/current-affairs/statements-speeches/ministry-of-foreign-affairs-announcement-regarding-the-situation-in-catalonia.html (accessed 10 December 2017).

[3] The Minister of Foreign Affairs of Lithuania declared that "We support the territorial integrity and sovereignty of Spain and, at the same time, we call for solving this crisis through dialog, not by force or violence", Delphi, The Lithuanian Tribune, 27 October 2017, https://en.delfi.lt/eu/lithuania-calls-for-dialog-in-solving-catalan-crisis.d?id=76188889 (accessed 20 December 2017).

[4] The position of Morocco was expressed by the Ministry of Foreign Affairs: „Morocco, faithful as it has always been to respect for the principles of international law, rejects the unilateral process of the independence of Catalonia, and expresses its attachment to the sovereignty, national unity and the territorial integrity of Spain.", Press Release, 10.11.2017, https://www.diplomatie.ma/en/Politiqueétrangère/Europe/tabid/2798/vw/1/ItemID/15082/language/en-US/Default.aspx (accessed 10 December 2017).

[5] The Ministry of Foreign Affairs of Poland expressed the following statement: "Poland fully respects the principles of sovereignty, territorial integrity, and unity of the Kingdom of Spain. We believe that solving the dispute between the government of the Kingdom of Spain and Catalonia, just like any disputes between the Kingdom of Spain and its autonomous regions, including separatist tendencies, are an internal affair of the Kingdom of Spain. We hope that the situation in Catalonia will stabilise quickly in observance of the constitution of the Kingdom of Spain", MFA statement on developments in Catalonia, 27 October 2017, http://mfa.gov.pl/en/news/mfa_statement_on_developments_in_catalonia_1 (accessed 20 December 2017).

[6] The position of Romania was expressed in a press release of the Ministry of Foreign Affairs: "We firmly and irrevocably deny the 'unilateral declaration of independence' of Catalonia. We reaffirm Romania's strong support for the sovereignty and territorial integrity of Spain. Spain is a major ally and strategic partner of our country – relationship reflected both at bilateral level and at EU and international level. We underline that the legitimacy of any process or any action pertaining to the internal order of a State resides in its full

Fourth, a number of countries referred to the „rule of law" generally, or the fact that the declaration of independence is not in conformity with the rule of law: Bulgaria, Canada, Croatia, China, France,[1] Finland,[2] Romania, Turkey, United Kingdom, as well as the European Parliament.[3]

However, only a limited number of countries expressly referred to arguments of international law. The statement of Romania may be noted, as it mentioned that "We reiterate Romania's consistent position in favour of the international law, which does not allow territorial changes to occur without the consent of the state concerned".[4] Morocco, also, rejected the declaration of independence, while „Morocco, faithful as it has always been to respect for the principles of international law".[5] Canada very generally

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compliance with the fundamental law, the rule of law in that State. We reiterate Romania's consistent position in favour of the international law, which does not allow territorial changes to occur without the consent of the state concerned. The situation generated in Catalonia pertains to Spain's internal order and we hope that it will return as soon as possible to the parameters of the constitutional order of that State", Press Release, Romania reaffirms its strong support for the sovereignty and territorial integrity of Spain, 28 October 2017, http://www.mae.ro/en/node/43854 (accessed 20 December 2017).

[1] In France, the President Emmanuel Macron declared publicly that „There is only one interlocutor in Spain, Prime minister Rajoy [...] There is a rule of law in Spain, with constitutional rules. He wants them respected and he has my full support" - Catalogne : Emmanuel Macron apporte son "plein soutien" à Mariano Rajoy, Europe 1, 27 Octomber 2017, http://www.europe1.fr/international/catalogne-macron-apporte-son-plein-soutien-a-rajoy-3476636 (accessed 19 December 2017).

[2] The minister of foreign affairs of Finland declared that "The declaration took place without the members of the opposition parties in attendance. This does not meet the criteria of democratic process or the rule of law", Yle Uutiset, 28 October 2017, https://yle.fi/uutiset/osasto/news/foreign_minister_rejects_rumour_of_finnish_recognition_for_catalan_independence_spanish_government_has_our_full_support/9906032 (accessed 20 December 2017).

[3] Antonio Tajani, the president of the European Parliament, declared: "No one will ever recognize Catalonia as an independent country. The referendum was illegal ... The rule of law should be restored." He said that the election will allow Catalans to "decide what kind of government they want to have. All should happen according to the Spanish Constitution." Statement of Antonio Tajani, president of the European Parliament, 27 October 2017, AP News, https://apnews.com/919885dc53724eadb4476350f75ac9da (accessed 19 December 2017).

[4] Press Release, Romania reaffirms its strong support for the sovereignty and territorial integrity of Spain, 28 October 2017, http://www.mae.ro/en/node/43854 (accessed 20 December 2017.)

[5] Press Release, 10.11.2017, https://www.diplomatie.ma/en/Politiqueétrangère/Europe/tabid/2798/vw/1/ItemID/15082/language/en-US/Default.aspx (accessed 10 December 2017).

referred to the discussions being in accordance with „principles of international law".[1]

2.2. Brief assessment of the international reaction

On one side, the fact that many countries referred in their statements of non-recognition to the need to respect the Constitution and the laws of Spain may be regarded as an argument in favour of theory B stated above. Thus, such statements may be related to the *dictum* in the *Secession of Quebec* case, according to which „*Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion*".[2] On the other hand, it may be argued that the states that invoked the non-conformity of the process with the constitutional framework of Spain may have done that only as a „legal justification for a political decision", while exercing their discretion whether to recognize or not to recognize an entity. In this sense, it has to be said that the difference between asuming a legal obligation not to recognize (which may be in favour of theory B) and asuming that the political „discretionary" decision not to recognize may be accompagnied by a legal argument (which would correspond to theory A) is very thin.

The same is valid for the support for the support for territorial integrity. On one side it may be argued that the principle of territorial integrity is an international rule that obliges States not to recognize a situation contrary to this principle (as the German statement mentioned, „The sovereignty and territorial integrity of Spain are inviolable and will remain so […] The unilateral declaration of independence breaches these protected principles").[3] On the other side, the territorial integrity might also be a justification for a political decision not to recognize.

In any case, the large number of references to "territorial integrity", "sovereignty" and to the respect for the Spanish Constitution and laws, could be regarded at least as a minor swift in balance in favour of theory B. Indeed, it is not clear whether States did not recognize Catalonia out of the sense of a legal obligation or because they decided so within the margin of

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[1] The Star News, 27 October 2017, https://www.thestar.com/news/canada/2017/10/27/canada-recognizes-one-united-spain-amid-catalonia-dispute-trudeau-says.html (accessed 19 December 2017).

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

[3] Press release, The German government will not recognise the unilateral declaration of independence issued by the Catalonian regional parliament, 28 October 2017, https://www.bundesregierung.de/Content/EN/Artikel/2017/10_en/2017-10-27-katalonien-unabhaengigkeit_en.html?nn=709674 (accessed 28 October 2017); However, it is interesting to remark that in the case of Kosovo, Germany supported theory A.

discretion conferred by recognition. Nevertheless, as States are rational international agents, they may exercise the power to decide whether to recognize or not by taking into account legal criteria, among which conformity with domestic law of an attempted secession. In this sense, it has to be underlined that "conformity with domestic law" may represent an essential component of the principle of territorial integrity: if a secession would not be in accordance with domestic law, then the principle of territorial integrity would operate. This might, at least, be taken into consideration when States make their decisions related to recognition or non-recognition.

The element that is a novelty within the reaction of States is, nevertheless, the refference to the rule of law. First, it could be argued that rule of law is becoming to cristalize as a rule of customary international law, on the background of the important number of resolutions adopted by the United Nations adopted since 2000.[1] Second, if rule of law imposes, in good faith, that all processes be governed by the constitution and the laws, which are subject to institutional checks and ballances, it may be correctly argued that an attempted secession that would break the constitution of a State would breach the rule of law. Of course, in this perspective, the rule of law should not be regarded as „strict conformity with the letter of the laws". Rule of law is a state of mind and overpasses the requirements of formal legality. In the words of the CSCE Copenhagen Document of 1990, „rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression".[2]

Thus, rule of law may appear as an emerging argument in favour of theory B, provided that the state from which secession is attempted offers itself sufficient guarantees of rule of law and complies with the "safeguard clause".[3]

Conclusion

International reaction to the attempted declaration of independence of Catalonia provided many referencces to formulas like „territorial integrity",

[1] For example, A/RES/55/2, 2000, A/RES/61/39, 2006; A/ /RES/62/70, 2008; A/ RES/63/128, 2009; A/ /RES/64/116, 2010; A/ /RES/65/32, 2011; A./ /RES/66/102, 2012; A/ /RES/67/97, 2013; A/ /RES/68/116, 2013; A/ /RES/69/123, 2014.
[2] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.
[3] A/RES/25/2625, 24 October 1970.

„sovereignty", „accordance with Constitution and the laws". Nevertheless, it is difficult to interpret these statements. On one side, they may reflect a consciesness of a duty not to recognize a situation breaching the territorial integrity, but on the other side they may reflect a legal argument that accompanies, as a justification, a political decision based on the discretionary power of States to recognize or not an entity as a State.

However, the reactions on Catalonia come against the background of long-standing diverging views in the international community with respect to the international law applicable to secession attempts. International law proves to represent a system of arguments that come in pairs. Thus, „theory A", which supports the idea that international law is neutral to secession, is opposed to „theory B", which argues that secession is prohibited by international law, if the domestic law so of the State so provides, subject to the application of the right to self- determination. It is not a firm affirmation that reactinons to Catalonia may shift the ballance towards theory B, but it cannot be denied that the words employed by the statements of States („territorial integrity", „sovereignty", „accordance with Constitution and the laws") are elements of this „theory B".

Moreover, it has to be emphasized that the rule of law was a new element contained in an important number of statements. It may have an impact on the future developments of international law. It is the first time when „rule of law" is invoked in relation to „secession". Thus, it may be useful to explore, in the future, the legal relation between the two notions.

Last but not least, notwithstanding whether an obligation not to recognize exists or whether the legal argument is only a justification for a political decision, it has to be pointed out that States should act responsibly and should exercise their margin of appreciation („discretion") within the criteria framed by the rule of law. Therefore, it might be argued that the rule of law creates an obligation for States to ensure „greater rationality and transparency in the decision making process in respect of recognition", having in mind "the heavy responsibility [these decisions] bear in the creation of States".[1]

[1] John Dugard, *The Secession of States and their Recognition,* op. cit., p. 283.

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

Recent Developments regarding Compensation before the International Court of Justice: The Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua

(Part I)

Victor STOICA[1]
Faculty of Law, University of Bucharest

Abstract:

This article studies the manner in which compensation is interpreted and how it currently applies before the International Court of Justice through the perspective of the Case Concerning Certain Activities Carried out by Nicaragua in the Border Area.

Key-words*: State Responsibility, Remedies, Compensation.*

1. Introduction

The Permanent Court of International Justice and the International Court of Justice have issued various judgments interpreting and clarifying compensation as a remedy. The right of a state to claim compensation is established and has never been contested in the Courts' recent practice. The Gabcikovo Nagymaros Case was one case[2] in which the right to claim

[1] *Teaching Assistant, University of Bucharest-Faculty of Law, Bucharest Romania. PhD diploma at the University of Geneva, Switzerland.* The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

[2] The Court issued judgments through which compensation were granted in other cases as well, such as: *Corfu Channel Case (Great Britain v Albania)* (Merits) [1949] ICJ Rep 4.

compensation was contested. The Court therein further confirmed that receiving compensation is a principle of international law, by stating that:

> *"It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it*."[1]

The details that are most relevant with respect to this remedy, such as the burden of proof, the qualification of damages as being material or moral, or issues with respect to the principles that apply to the quantification of compensation, have all been raised both before the Permanent Court and before the International Court. The practice of the International Court of Justice is of paramount importance for determining the manner in which compensation is interpreted and applied by the judicial organ.

The doctrine is not necessarily coherent in determining the relevance of compensation before the International Court of Justice. While some authors conclude that compensation is the most frequent form of reparation,[2] other authors have concluded that compensation represents an exceptional remedy, as follows:

> "*Perhaps surprisingly the Permanent Court and the International Court have very rarely awarded compensation. It has been suggested that this is because '[m]any sovereign interests do not lend themselves to quantification, but this is neither here nor there*."[3]

This latter conclusion supports the argument that compensation is rather exceptional. The Permanent Court has granted compensation in one case: The S.S. Wimbledon. Furthermore, the International Court of Justice has granted this remedy in two cases, namely in the Corfu Channel Case[4] and the Diallo Case,[5] the latter being the only case in the history of the Court in which compensation for moral damages was granted. It could, thus, be considered that compensation is not necessarily the most frequent form of reparation and that an opposite conclusion would artificially detach practice from theory.

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012, p. 324.

[1] *Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment) [1997] ICJ Rep 7.81.

[2] Alina Kaczorowska, *Public International Law* (Routledge 2010) 483. 483.

[3] James Crawford, *State Responsibility: The General Part* (CUP 2013), 506-536, 518.

[4] *Corfu Channel Case* (*Great Britain v Albania*) (Compensation) [1949] ICJ Rep 244.

[5] *Amahdou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (n 1).

However, even though the case-law where compensation was granted is scarce, the International Court of Justice has recently issued its judgment in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua[1] on the 2nd of February 2018. This judgment is the first in the history of the Court in which compensation was granted for environmental damage. Various issues stemming from the methodology for assessing compensation for environmental damage to punitive damages were analysed by the Court through its landmark judgment.

These issues will be critically assessed in this article. Firstly, the requests of Costa Rica submitted through its Application instituting proceedings shall be critically analysed (Part I) and, secondly, the judgment of the International Court of Justice shall also be assessed (Part II). The reason for this approach is the interaction between the state parties and the Court regarding the remedies that are available for a particular dispute, is essential for their interpretation and clarification; analysing the remedies strictly from one perspective would constitute an isolated approach that would fail to contribute to the systemic analysis of the issues at stake.

2. The Requests of Costa Rica

2.1. The Application Instituting Proceedings

On the 19th of November 2010 the Republic of Costa Rica commenced proceedings against the Republic of Nicaragua before the International Court of Justice; the dispute originated from two factual circumstances:

i) An alleged incursion, occupation and use of Costa Rican territory by the military of Nicaragua

and

ii) The alleged breaches of Nicaragua's obligations towards Costa Rica under certain international treaties and conventions.

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665*.

As such, through an Application submitted before the International Court of Justice,[1] Costa Rica concluded that Nicaragua illegally occupied its territory and illegally commenced the construction of a canal across Costa Rican territory. The Applicant further argued that the Responding State unlawfully commenced a series of related dredging works on the San Juan River. As such, Costa Rica submitted that *"the ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region".*[2] Even if not referred to as such, the application of Costa Rica implied that its requests before the Court regarded environmental damage, *inter alia.* This conclusion is supported by the fact that the applicant expressly referred to the damages caused to the flow of water, wetlands and national protected wildlife. Further, the Application contained a rather detailed description of the damages caused to the territory of Costa Rica, as such:

> *"In particular, the following damage has been caused to Costa Rican territory by Nicaragua's dredging and the activities related to the construction of the canal:*
>
> *(g) the deposit of sediments from the San Juan River on Costa Rican territory;*
>
> *(h) the felling and destruction of primary forest in Costa Rican territory, specifically in a national wildlife protected area of rainforests and wetlands;*
>
> *(i) the digging and removal of soil in Costa Rican territory, with the purpose of building an artificial channel to divert the San Juan River;*
>
> *(j) the infliction of damage to wetlands in Costa Rican territory, as a result of digging and removal of soil in a national wildlife protected area."*[3]

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Application instituting Proceedings.
[2] Ibid. p. 6.
[3] Ibid. p. 24.

This submission indicates that the Application considered that compensation was the applicable remedy for the alleged breaches of international law. However, it must be noted that, at this juncture, the Application contained no express reference to compensation as a remedy. As such, the Applicant generally concluded as follows with respect to the remedies sought:

> *"Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River."*[1]

Further, confirming a rather general approach towards the applicable remedies, the Applicant State specifically requested the International Court of Justice to declare that Nicaragua has breached the following:

> *(a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;*
>
> *(b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;*
>
> *(c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;*
>
> *(d) the obligation not to damage Costa Rican territory;*
>
> *(e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;*

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Application instituting Proceedings, p. 26.

(f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;

(g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

(h) the obligations under the Ramsar Convention on Wetlands;

(i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions"[1]

The only particular remedy sought through the Application was the declaratory judgment with respect to the above-mentioned breaches of international law. This approach is a confirmation of the approach that States have before the International Court of Justice, the Application often being more general in its framework related to remedies, while the Memorial contains more specific requests. It is true the declaratory judgment is often considered as the most common type of remedy sought before the International Court of Justice and further rendered in its decisions.[2] Even so, it must be noted that Costa Rica also sought *"reparation"*, generally, from the judicial body, as such:

"The Court is also requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in paragraph 41 above."[3]

This last submission with respect to reparation indicates the intention of the Applicant to further contextualize its request for remedies in its subsequent pleadings. As it will be provided below, the Memorial submitted by Costa

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Application instituting Proceedings, p. 26.

[2] Christine Gray, *Judicial Remedies in International Law* (Clarendon Press 1990), 59-119, p. 96.

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665, p.* 26.

Rica in this respect contained a variety of requested remedies, pecuniary compensation being among them.

2.2. The Memorial

The above-mentioned rather general request for remedies, submitted before the Court through the Application, was further amended and contextualized through the Memorial, within which the Applicant State requested the following remedies from the Court:

> *" - a declaration of the extent of Nicaragua's breaches of its obligations;*
>
> - *the cessation of any internationally wrongful acts that continue to be committed by Nicaragua;*
> - *reparation by Nicaragua for damage caused as a result of those breaches, and*
> - *appropriate guarantees of non-repetition by Nicaragua of its wrongful conduct."*[1]

It can be observed that there are similarities between the Memorial and the Application Instituting Proceedings. In this respect, the declaratory judgment sought from the International Court of Justice is present in both written pleadings. However, it can be concluded that, if Costa Rica requested a declaration of wrongfulness and reparation through the Application, it was in the Memorial that it requested four different remedies: i) a declaration of wrongfulness; ii) cessation; iii) compensation and iv) guarantees of non-repetition.

With respect to the nature of the claims submitted before the International Court of Justice, Costa Rica argued that:

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Memorial of Costa Rica, p. 297.

> *"This is not a boundary dispute in which the parties have advanced their claims and elaborated them at length over time. This is not a case in which the parties realised that part of their boundary has not been delimited."*[1]

a) The Interaction between *"reparation for damage"* and *"compensation"*

Even if the Application instituting proceedings did not contain any reference towards compensation, the Memorials' first reference to this remedy is as *"reparation for damage"* and not as *"compensation"*. The Applicant contextualised its request, by referring to the finding of the Permanent Court in the Chorzow Factory Case[2] and by concluding that *"reparation must be determined by reference to the damage suffered by Costa Rica."*[3] This request can be assimilated to compensation if read in conjunction with the following paragraph, in which Costa Rica expressly requested compensation from the International Court of Justice, as such:

> *"Costa Rica seeks pecuniary compensation from Nicaragua for all damages caused by the unlawful acts that have been committed or may yet be committed, these damages to include moral damages for insult to the Costa Rican flag, and to be assessed in a separate phase of the proceedings."*[4]

The request submitted by Costa Rica with respect to compensation exhausts a variety of categories that could be granted by the International Court of Justice regarding compensation. Thus, firstly, the Applicant requested the pecuniary compensation is granted by the Court, limiting the scope of the

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Memorial of Costa Rica, p. 195.

[2] *Factory at Chorzow*, Jurisdiction, P.C.I.J., Series A, No. 9 (1926), p. 21: *"[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.",* as mentioned within Memorial, p. 300.

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Memorial of Costa Rica, p. 300.

[4] Ibid.

remedy in this respect. It could be argued that non-pecuniary compensation was excluded from its request. However, no further clarifications were submitted by the Applicant with respect to a potential difference between pecuniary and non-pecuniary compensation. At first glance, it could be concluded that the Applicant intended to exclude satisfaction as a remedy, it being similar in substance with non-pecuniary compensation. Thus, The notion of *"moral damages"* is also referred to as non-material damages,[1] in the sense that it does not affect property or other interests of the state or its nationals. However, this conclusion is infirmed by the Applicant, which also requested satisfaction through the Memorial, as such:

> *"The Court is also requested to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua."*[2]

It can, therefore, be concluded that the Applicant did not, in fact, intend to exclude satisfaction from the requested remedies by referring to pecuniary compensation as such. Thus, five concepts were included in the armoury of remedies requested by the Applicant. It is also relevant to note that Costa Rica requested compensation for the acts that were committed and, more interestingly, for the acts that *"may yet be committed"*. This approach is rather exceptional before the International Court of Justice as, generally, the damages sought as compensation are directed towards injuries already caused, which regarding the past and not the future.

Finally, the Applicant also requested moral compensation. The International Court of Justice has granted this typology of compensation in the Diallo Case.[3]

b) Bifurcation of Proceedings

As mentioned, without any further clarifications, at this stage of the proceedings, the Applicant requested the Court *"to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua."*[4] This

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[1] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 223.

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Memorial of Costa Rica, p. 305.

[3] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Compensation, Judgment, I.C.J. Reports 2012, p. 324.

[4] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Memorial of Costa Rica, 305.

approach towards compensation is not singular in the practice of the International Court of Justice. As such, the judgment of the Corfu Channel case is relevant to compensation as a remedy from a procedural standpoint from this perspective. In this case, the Court, after deciding that compensation is the appropriate remedy that should be granted to the Applicant, decided to bifurcate the proceedings and hold a separate phase with respect to the determination of the quantum of compensation.[1] Furthermore, in the Diallo Case,[2] the International Court of Justice pursued the same approach. The submission of the applicant in this respect is therefore unsurprising.

It can therefore be concluded that the bifurcation of proceedings before the International Court of Justice is currently the usual procedural mechanism through which the Court resolves the disputes: it first delivers a judgment regarding the merits of the case and, subject to further clarifications provided either by the parties or by designated experts, it delivers a judgment regarding the quantum of compensation.

3. Conclusion

The scope of this Part was to establish and analyse the request of Costa Rica with respect to compensation as a remedy. Issues such as i) categories of compensation; ii) methodology of assessing quantum and iii) assessing moral compensation for injuries caused to a state were submitted before the International Court of Justice by the Applicant.

Part II shall assess the manner in which the International Court of Justice interpreted and clarified the submissions of the parties, through its judgments.

[1] *Corfu Channel Case (Great Britain v Albania)* (Merits) [1949] ICJ Rep 4, 36.
[2] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits) [2010] Judgment, I.C.J. Rep., p. 639, 58.

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 (June-December 2017)

Bogdan AURESCU[1]
Faculty of Law, University of Bucharest

Abstract: *This brief presentation of the Romanian practice during the second 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: *Consular Agreements, East Ukraine, Ballistic/Nuclear Test, North Korea, Joint Investigation Team, crime of terrorism, EU-Ukraine Association Agreement, Agreement on privileges and immunities*

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

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

between the Government of Romania and the Organisation for the Prohibition of Chemical Weapons (OPCW), Ukrainian Law on Education, UN Security Council, Romanian-Ukrainian Joint Intergovernmental Commission on national minorities, independence, Catalonia.

1. The signing of two consular Agreements between Romania and Portugal

On **18 July 2017**, the Romanian and Portuguese MFAs signed, in Bucharest, two legal cooperation documents regarding assistance and consular protection for Romanian and Portuguese citizens located in areas where the two countries do not have resident diplomatic missions.

According to a press release of the Romanian MFA, the two signed documents are the Memorandum of Understanding between the Ministry of Foreign Affairs of Romania and the Ministry of Foreign Affairs of the Portuguese Republic on the Protection of Romanian Interest in the Republic of Guinea-Bissau and the Republic of Mozambique by the Portuguese Republic and the Memorandum of Understanding between the Ministry of Foreign Affairs of Romania and the Ministry of Foreign Affairs of the Portuguese Republic on the protection of Portuguese interests in the Syrian Arab Republic by Romania.

According to the cited source, taking into account both the Portuguese Republic's traditional presence in the two African states and the possibilities of managing consular situations by the Portuguese diplomatic missions in the two mentioned states, through the provisions of the first document the Portuguese side will take over the assistance and protection of the Romanian citizens in the two countries. At the same time, the Romanian MFA shows in the cited press release that the second document sets forth the granting of consular protection and assistance for the benefit of Portuguese citizens by Romania, the only EU Member State with a fully operational diplomatic mission to Damascus.

2. Romania condemns the proclamation by the separatists of Donetsk of a new so-called state in Eastern Ukraine

On **19 July 2017**, the Ministry of Foreign Affairs condemned, through a press release, the proclamation on 18 July 2017, by the separatists in Donetsk of a new so-called state in Eastern Ukraine, called 'Little Russia'. The MFA shows that this act flagrantly violates the norms of international law and violates Ukraine's sovereignty and territorial integrity, and reiterated that Romania firmly supports the implementation of 2015 Minsk

Agreements, urging their implementation. According to the press release, these Agreements are the only viable and recognized framework allowing for a political settlement of the Donbass conflict. Furthermore, it is shown that Romania supports the need to respect Ukraine's independence, sovereignty and territorial integrity, within its internationally-recognized borders.

3. Romania condemns the conduct of a new ballistic test by North Korea

On **29 July 2017**, the Romanian MFA condemned through a press release the conduct of a new ballistic test by North Korea on 28 July 2017. This action represents, according to the cited source, a new escalation of the tensions within the Korean Peninsula and a major challenge against global peace. Furthermore, through the cited press release, the MFA reiterates its call towards the Pyongyang authorities to fully respect international norms in force and to initiate concrete measures towards denuclearizing the Korean Peninsula in a complete, verifiable and irreversible manner.

4. Romania supports the decision of the *Joint Investigation Team* to conduct criminal proceedings in the territory of the Netherlands in order to clarify the circumstances of the crash of flight MH-17

On **3 August 2017**, Romania, through a MFA press release, showed its support for the decision of the *Joint Investigation Team*/JIT, composed of the Netherlands, Ukraine, Malaysia, Australia, Belgium, to inititiate criminal proceedings within the territory of the Netherlands, for the clarification of the circumstances of the crash of flight MH-17, pursuant to Dutch law. According to the press release, Romania asked all states able to support this procedure to fully cooperate, in order to identify, establish and bring to justice the responsible persons, in accordance with the provisions of Security Council resolution 2166 of 2014.

According to the cited source, on 17 July 2014 flight MH-17 belonging to Malaysia Airlines crashed in Eastern Ukraine, while performing an Amsterdam – Kuala Lumpur flight. 298 people on board lost their lives (283 passengers and 15 crew members). A person with double citizenship, including Romanian citizenship, also lost his life in this incident. The criminal investigation is coordinated by a *Joint Investigation Team* composed of representatives of judicial and police authorities from the Netherlands, Ukraine, Australia, Belgium and Malaysia.

5. Romania condemns the launch, by North Korea, of a ballistic missile that overflew Japan

On **29 August 2017**, the Romanian MFA condemned through a press release the launch by the Democratic People's Republic of Korea, at the same date, of a ballistic missile that oveflew Japan. This action represents, according to the cited source, a very serious escalation of the tensions within the Korean Peninsula. The MFA also reiterated its call towards the Pyongyang authorities to fully comply with the international norms and the UN Security Council resolutions in force.

At the same time, the MFA press release considers that the new provocative action by North Korea also represents an unprecedented threat against Japan and expresses its full solidarity with Japan, a special partner of our country.

6. **The entry into force of the EU – Ukraine Association Agreement**

On **1 September 2017**, Romania welcomed the entry into force at the same date of the Association Agreement between Ukraine and the European Union and the European Atomic Energy Community and their Member States.

According to a press release of the Romanian MFA, it is shown that Romania further supports Ukraine's European journey and that the conclusion of the Agreement's ratification process by all the 28 Member States and the European Parliament represents an achievement that will allow the realization of the full cooperation potential between Ukraine and the European Union. Moreover, it is mentioned that the entry into force of the Association Agreements with the Republic of Moldova, Georgia and Ukraine is a moment of reference for achieving the objective actively and constantly supported by Romania within the European Union about promoting European values and standards with our Eastern neighbors.

The referenced source reminds that the Association Agreement with Ukraine was signed on 21 March 2014 (the political part) and 27 June 2014 (the economic part). The political part of the Association Agreement with Ukraine has been provisionally applied since 1 November 2014, and the economic part (Deep and Comprehensive Free Trade Area – DCFTA) since 1 January 2016. The Association Agreements with the Republic of Moldova and with Georgia have been in force since 1 July 2016.

7. Romania condemns the nuclear test conducted by North Korea on 3 September 2017

On **3 September 2017**, Romania condemned, through a press release of the Romanian MFA, in the strongest terms, the nuclear test conducted by the Democratic People's Republic of Korea at the same date, qualified as a new major threat against regional and international peace and security.

Through the referenced press release, the MFA expresses its deep concern at the continued provocative actions of the North Korean authorities, representing serious violations of UN Security Council resolutions and leading to an unprecedented increase in the tensions within the Korean Peninsula. Moreover, it reiterates the firm call addressed to the Pyongyang Government to implement all of the UN Security Council and International Atomic Energy Agency resolutions, to abandon all existing nuclear programs in a complete, verifiable and irreversible manner and to abstain from any actions affecting regional and global stability. The press release also states Romania will continue to actively support international efforts regarding the peaceful denuclearization of the Korean Peninsula.

8. The signing of the Agreement on Privileges and Immunities between the Government of Romania and the Organisation for the Prohibition of Chemical Weapons

On **6 September 2017**, according to a press release of the Romanian MFA, the Agreement on Privileges and Immunities between the Government of Romania and the Organisation for the Prohibition of Chemical Weapons was signed.

The OPCW is, according to the referenced source, an international institutions based in The Hague, whose main objective is the implementation of the Convention on the prohibition of chemical weapons (CWC). According to the MFA press release, the Agreement establishes the privileges and immunities enjoyed by the OPCW staff, in accordance with international law, for the effective exercise of their attributions, both during the verification activities on the territory of Romania, and during other activities related to the object and purpose of the Convention.

According to the MFA, the entry into force of the Agreement on Privileges and Immunities will open the way for a closer collaboration between Romania and the OPCW, by developing specific joint projects, aimed at increasing the preparation of the Romanian authorities and OPCW staff, within the current context marked by security challenges stressing the role of the OPCW in combating the proliferation and use of chemical weapons. Moreover, the press release mentions that taking into account the OPCW's specifics as a global organization, signing the Agreement reconfirms Romania's commitment to actively contribute to multilateral diplomacy in order to maintain and promote world peace.

The press release mentions that 29 April 2017 marked the 20th anniversary of the CWC's entry into force and OPCW's establishment, the CWC being the first treaty expressly including the aim and the calendar of eliminating

an entire category of weapons of mass destruction – chemical weapons, under firm international control. This has been a definite success of postwar multilateralism, through the dynamics of ratifications, the efficiency of the verification system and the speed of adapting to new challenges of research, science and technology in the matter. 192 states are parties to the CWC, continuing the efforts for the universalization of this legal instrument. So far, 53 states parties to the Convention, including 16 EU Member States, have concluded such agreements with the OPCW.

9. Romania's reaction regarding Ukraine's adoption of the new Law on Education

On **7 September 2017**, the Romanian MFA took note with concern, through a press release, of the form adopted on 5 September 2017 by the Verkhovna Rada of Ukraine of the new Law on Education, particularly Article 7 thereof, concerning education in the languages of the national minorities.

The MFA reminds in the press release that, according to the provisions of the 1995 Council of Europe Framework Convention for the protection of national minorities, states parties undertake to recognize the right of any person belonging to a national minority to learn in their mother tongue. Also, the necessity to conform to the relevant international norms has been permanently stressed by the Romanian party in its dialogue with the Ukrainian party regarding promoting and protecting the rights of persons belonging to the Romanian national minority in Ukraine. At the same time, the MFA expresses its expectation that the rights of persons belonging to the Romanian national minority in Ukraine be preserved and underlines the Romanian authorities' constant concern regarding this issue.

On **14 September 2017**, the MFA informed by a press release that the Romanian Minister for Foreign Affairs, together with his counterparts in Bulgaria, Greece and Hungary, sent the Ukrainian Minister for Foreign Affairs, the Secretary General of the Council of Europe and the OSCE High Commissioner for National Minorities, a joint letter expressing their concern and deep regret regarding the recent adoption by the Verkhovna Rada of the Ukrainian Law on Education project on 5 September 2017.

This common enterprise takes into account, according to the cited source, the signatories' interest in ensuring the protection of the rights of persons belonging to national minorities and appeals to the Ukrainian authorities for identifying concrete measures / solutions in this sense, in the spirit of cooperation, and with Ukraine's firm respect for the relevant international norms and standards. Moreover, the letter supports the need to use all instruments available to the Council of Europe and OSCE in order to ensure

that the new restrictive provisions introduced by the Ukrainian Law on Education will not affect the proper protection of the fundamental rights of persons belonging to national minorities.

According to the MFA press release, Romania reiterates its availability to support Ukraine in its extended process of legislative, institutional and economic reforms and to contribute to the international support efforts, together with our partners, in order to efficiently meet the Ukrainian side's needs.

Subsequently, on **26 September 2017**, the MFA expressed, through a press release, its regret that, despite all of the efforts of the Romanian authorities regarding the Ukrainian side (which reported that the current form of the Law on Education significantly diminishes the rights of the persons belonging to the Romanian minority), the Ukrainian President promulgated the law on 25 September.

The MFA press release reminds that Ukraine has constantly expressed to the Romanian side during all official contacts its engagement to respect the relevant international norms and standards regarding the protection of the rights of persons belonging to national minorities, as well as its assurance that the level and quality of the Romanian-language education will not be affected by the new norms. At the same time, it is mentioned the MFA will continue its actions, including within international organisations with attributions in the field (the Secretary General of the Council of Europe, the OSCE High Commissioner for National Minorities and the Venice Commission), to report the negative impact of these legislative changes on Ukrainian education.

Furthermore, the MFA press release firmly asks the Ukrainian authorities to adopt all necessary measures to ensure the right of persons belonging to the Romanian national minority of learning in their mother tongue.

10. The conference on the launch of the campaign for promoting Romania's candidacy for a seat as Non-Permanent Member in the UN Security Council

On **12 September 2017**, the Romanian MFA launched, according to its press release, the campaign for promoting Romania's candidacy for a seat as Non-Permanent Member of the UN Security Council between 2020-2021, in the presence of high dignitaries from the institutions of the Romanian state, political personalities from our country, representatives of the civil society, of the educational, business and media environment, as well as of the Diplomatic Corps accredited in Bucharest.

According to the MFA press release, on this occasion, the Romanian diplomacy's efforts in its campaign for the UN Security Council (the main global forum with responsibilities in the maintenance of international peace and security) were stressed, especially the importance of a joint effort and sustained support on behalf of all segments of Romanian society in order to achieve this objective. In this context, it was also stressed that respect for international law has been and continues to be one of the Romanian foreign policy's constants.

The slogan of the campaign, 'Romania for UN SC: A Long-Term Commitment in Favour of Peace, Justice and Development' reflects, according to the cited source, the attention our country pays to the complexity of the topics taking place on the international stage and represents Romania's firm commitment to principles meant to ensure peace, stability, respect for universal human rights and the reduction of global development disparities.

11. Session of the Romanian-Ukrainian Intergovernmental Commission regarding the protection of persons belonging to national minorities

On **13 September 2017**, the Sixth Session of the Joint Romanian-Ukrainian Intergovernmental Commission regarding the protection of persons belonging to national minorities took place in Kiev. According to a MFA press release, the delegation was comprised of representatives of the Ministry of Foreign Affairs, the Ministry for Romanians Abroad, the Ministry of National Education, the Ministry of Culture and National Identity, the Department for Inter-ethnic Relations, the State Secretariat for Religious Denominations and the Union of Ukrainians in Romania.

The mentioned source states that, on the occasion of resuming its activity, the Commission agreed and signed a Joint Declaration closing the Commission's 2002 and 2006 sessions and assuming on the 2017 agenda all topics of interests to the two Parties beginning with 1997. At the same time, the 2017 session was closed by signing a protocol noting both the Parties' joint conclusions and their divergent opinions.

The MFA press release underlines that, during the negotiations in Kiev, but also in the period prior to the reunion of the Joint Commission, the Romanian delegation's mandate sought to promote the good faith application of international norms and standards relevant to the protection of rights of persons belonging to national minorities in order to ensure the ethnic, cultural, linguistic and religious identity of the Romanian minority in Ukraine and of the Ukrainian minority in Romania.

The MFA states in the mentioned press release that special attention was paid to the adoption by the Verkhovna Rada of the Ukrainian Law on Education on 5 September 2017. According to the cited source, the Romanian delegation expressed it deep regret concerning the fact that the adoption of the new Law on Education and particularly its Article 7, concerning the language of the educational process, was made without consulting the representatives of the organisations of the Romanian minority in Ukraine, and requested that the Ukrainian authorities ask the opinion of the European Commission for Democracy through Law (the Venice Commission) and of the OSCE High Commissioner for National Minorities before the new law is promulgated by the Ukrainian President. Moreover, it expressed the Romanian side's determination for identifying, in cooperation with the competent Ukrainian authorities, solutions to ensure respect for the right to education in the Romanian language of all persons belonging to the Romanian minority in Ukraine.

The press release also presents the history of the Romanian-Ukrainian Joint Intergovernmental Commission regarding the protection of persons belonging to national minorities: it was established pursuant to Article 13 of the Treaty on good neighbourliness and cooperation between Romania and Ukraine, signed on 2 June 1997, which is the main bilateral framework of consultation and cooperation in the field of protecting the rights of persons belonging to national minorities.

12. Romania's position regarding Catalonia's declaration of independence

On **28 October 2017**, the Romanian MFA expressed, through a press release, its position of rejecting 'firmly and irrevocably' the so-called 'unilateral declaration of independence' of Catalonia from the previous day. The press release reaffirms Romania's firm support for Spain's sovereignty and territorial integrity and shows that Spain is an important ally and a strategic partner of our country, relationship reflected both at a bilateral level, as well as within EU and at an international level.

In addition, the press release underlines that the legitimacy of any process or action regarding a state's internal order resides in its complete accordance with the fundamental law, and with the rule of law in that state. At the same time, Romania's constant position is mentioned in favour of respecting international law, which does not allow territorial modifications without the consent of the affected state. Last but not least, the MFA mentions that the situation generated in Catalonia is related to the Spanish internal order and expresses hope that it will soon return to the parameters of that country's constitutional order.

Prior to this position, through the press release of the Presidential Administration of **18 October 2017**, with the occasion of the welcoming by the President of Romania of the Spanish Minister for Foreign Affairs during the latter's visit to Bucharest, the President of Romania underlined the excellent character of the strategic partnership between the two countries, a fact shared by the Spanish Minister, and reaffirmed Romania's firm support for Spain's sovereignty and territorial integrity, underlining the need, in the context of the events in Catalonia, for the Constitutional framework and the principles of international law to be respected. The President of Romania also stressed, according to the same source, that in our country's view this topic represents an internal issue for Spain and expressed his confidence that, within this framework, the best solutions will be found to return to the Spanish constitutional order.

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

Review of European Union Sanctions on Terrorism. Recent Developments in Case Law: the LTTE Case

Radu-Mihai ȘERBĂNESCU[1]
University of Bucharest, Faculty of Law

Abstract: *The purpose of this paper is to analyse the recent case law of the Court of Justice of the European Union with regard to the restrictive measures to combat terrorism. It will attempt to outline the primary conclusions drawn from this case law, as well as to evaluate the diverging views between the General Court and the Grand Chamber on the interpretation of the EU legal act governing terrorism sanctions. Departing from this debate, the paper will highlight the consequences of the prevailing views rendered by the Grand Chamber and how these will affect the future practice of EU in the field.*

Key-words: *international sanctions, terrorism, European Union law.*

1. Introduction

On 26 July 2017, the Court of Justice of the European Union dismissed the appeal submitted by the Council and confirmed the annulment of certain EU legal acts as far as they concerned the listing as a terrorist organization of the Liberation Tigers of Tamil Eelam (LTTE) at EU level.[2]

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[1] *Radu Mihai Şerbănescu has graduated the University of Bucharest, Faculty of Law (2009), the LLM in Public International Law (2010) and the LLM in European Union Law (2011) at the same faculty. He is currently in the fifth year of doctoral studies at the Faculty of Law. In this capacity, he has been in charge of certain seminars on Public International Law and International Organisations and Relations for the second year of undergraduate studies. Previously, he has been a research assistant at the Research Center for Criminal Studies at the Faculty of Law. He has worked for the Department of Legal Affairs of the Romanian Ministry of Foreign Affairs, where he was also the Head of the Office on the Implementation of International Sanctions. Currently, he works with the Romanian permanent mission to the European Union.* The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

[2] Judgement, 26 July 2017, *Council v Liberation Tigers of Tamil Eelam (LTTE)*, C-599/14 P, EU: C:2017:583, paragraph 91.

Although it arrived at the same conclusion as the General Court,[1] namely that the Council had failed to provide sufficient reasons for the listing,[2] the CJEU did not concur in full with the reasoning behind the judgement rendered by the General Court.[3] One element of divergence referred to the mechanism for maintaining an entity on the list of those to which the restrictive measures applied. While the General Court considered that retaining an entity on the list requires a decision by a 'competent authority'[4] (as defined by Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism),[5] the Grand Chamber ruled that the Council could maintain an entity on the list if it concluded that there is an ongoing risk of that entity being involved in terrorist activities,[6] including by relying on open source materials and regardless of a new or revised decision by a 'competent authority'.[7]

Indeed, there are other important conclusions to be drawn from the two judgements, such as the fact that the Council can rely on decisions of competent authorities in third countries[8] or that the Council must argue why it considers human rights standards are respected in that third country,[9] and, regardless of the reasoning, the final outcome was that the Council breached the obligation to state reasons. However, the difference in the rationale used by the two courts makes the initial annulment an issue of procedure while the latter an issue of substance. In this regard, the difference is of particular interest to the way lawmakers (i.e. the Council) will have to draft statements of reasons in the future.

In light of these observations, it is the purpose of this paper to analyse how the two courts have viewed the process of retaining an entity on the list and the consequences the prevailing second rationale given by the Grand Chamber will have on future review processes of EU listed terrorist entities.

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[1] Judgement, 16 October 2014, *Liberation Tigers of Tamil Eelam (LTTE) v. Council*, T-208/11 and T-508/11, EU: T:2014:885, paragraph 190.
[2] C-599/14 P, paragraphs 38, 55, 79, 85.
[3] *Ibid* paragraphs 62-74.
[4] T-208/11 and T-508/11, paragraphs 157, 162.
[5] OJ 2001 L 344, p. 93
[6] C-599/14 P, paragraph 54.
[7] *Ibid* paragraphs 71, 72.
[8] T-208/11 and T-508/11, paragraphs 126-129.
[9] *Ibid* paragraphs 141, 142, C-599/14 P, paragraphs 24-37.

2. Relevant EU Law Provisions and their Interpretation by the two Courts

2.1. Common Position 2001/931/CFSP

In accordance with the first paragraph of Article 1(4) of Common Position 2001/931/CFSP,[1] the list of persons, groups or entities involved in terrorist acts "shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds". Thus, in order for the Council to include certain persons, groups or entities on the list, three conditions have to be met cumulatively:

(i) there is a decision of a competent authority regarding the persons, groups or entities concerned;

(ii) that decision should concern either the initiation of investigations or prosecution for a terrorist act, attempting to perpetrate, participate in or facilitate such an act; or a conviction for a terrorist act, attempting to perpetrate, participate in or facilitate such an act;

(iii) such a decision must be based on serious and credible evidence or clues.

As regards the *first condition*, the second paragraph of Article 1(4) of Common Position 2001/931/CFSP states that 'competent authority' means "a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area". Thus, a 'competent authority' is either a judicial authority or other authority having competence to initiate investigations or prosecution for a terrorist act or for attempting to perpetrate, participating in or facilitating such a terrorist act, or to convict for any of these acts. Examples of competent authorities other than judicial authorities can be found in the case law of the CJEU. In one instance, the Court considered that "the Sanctieregeling [Order on Terrorist Sanctions 2003, Stcrt. 2003, no. 68, p. 11, adopted by the Dutch Minister for Foreign Affairs on the basis of Sanctiewet 1977 (Dutch Law of 1977 on Sanctions) by ordering the freezing of all funds and financial assets of Stichting Al Aqsa] was adopted by a competent authority within the meaning of the second paragraph of

[1] Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ 2001 L 344, p. 93

Article 1(4) of Common Position 2001/931".[1] In this sense, the Court considered that "the protection of the persons concerned is not called into question if the decision taken by the national authority does not form part of a procedure seeking to impose criminal sanctions, *but of a procedure aimed at the adoption of preventive measures*"[2] (*emphasis added*).

As regards the *second condition*, it is not strictly necessary to have a conviction, with the alternative that the EU listing may also be adopted on the basis of a decision to initiate the prosecution or even the investigation (a stage prior to the prosecution) for a terrorist act or participation in one form or another in the commission of such act.

The definition of a 'terrorist act' is provided by Article 1(3) of Common Position 2001/931/CFSP and includes the following cumulative conditions:

- it must be an intentional act;

- by its nature or circumstances, the act must be likely to seriously harm a country or an international organization;

- the act must match the definition of an offense under the national law of the State in which the decision is issued;

- it has to be committed for one of the enumerated purposes. [3]

Concerning the *third condition*, the purpose of the formulas 'precise information' and 'serious and credible evidence or clues' is to protect the targeted persons, groups or entities, by ensuring that their inclusion on the list the dispute can be dealt with only on a sufficiently solid factual basis.

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[1] Judgment, 15 November 2012, *Stichting Al Aqsa v Council of the European Union*, C-539/10 P, EU:C:2012:711, paragraph 75.

[2] *Ibid* paragraph 70.

[3] (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) threatening to commit any of the acts listed under (a) to (h); (j) directing a terrorist group; (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

The rationale behind this objective was explained by the CJEU, when it considered that "*in the absence of means on the part of the European Union to carry out its own investigations* regarding the involvement of a given person in terrorist acts, *that requirement aims to establish that evidence or serious and credible clues exist* of the involvement of the person concerned in terrorist activities, *regarded as reliable by the national authorities and having led them*, at the very least, to adopt measures of inquiry, without requiring the national decision to have been taken in a specific legal form or to have been published or notified"[1] (*emphasis added*).

Common Position 2001/931/CFSP also provides for a review process. Article 1(6) establishes that the "names of persons and entities on the list […] shall be reviewed […] to ensure that there are grounds for keeping them on the list".

2.2. Landmarks of the Interpretation given by the General Court in the LTTE case

In its judgment of 16 October 2014, the General Court has confirmed and clarified a number of the elements outlined in the previous section.

One argument that was raised by the LTTE was that the acts the entity was being accused of cannot be qualified as terrorist acts since they were committed during an armed conflict and thus are lawful acts of war in accordance with international humanitarian law.[2] The General Court considered that situations of armed conflict do not exclude the application of the law on terrorism.[3] Essentially, Common Position 2001/931/CFSP makes no distinction between the fact that an act has or has not been committed in the context of an armed conflict.[4] Thus, the applicability of one branch of law does not render one or all other branches of law inapplicable. Accordingly, the legality of measures adopted by the Council against a group pursuant to Common Position 2001/931/CFSP depends on the fulfillment of the conditions and requirements laid down in the EU legal act. In any event, the perpetration of terrorist acts during an armed conflict is covered and outlawed by international humanitarian law.[5]

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[1] C-539/10 P, paragraph 69.
[2] T-208/11 and T-508/11, paragraph 45.
[3] *Ibid* paragraph 56.
[4] *Ibid* paragraph 57.
[5] Article 33 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

As regards the understanding of 'competent authority', the General Court rejected LTTE's argument that the decision should be taken by the judicial authorities, recalling previous case law.[1] In the same sense, the General Court expressly clarified that decisions of non-EU Member States can form the basis of EU listing. It reminded that Common Position 2001/931/CFSP was adopted in the implementation of UN Security Council Resolution 1373 (2001), which obliges all States to take necessary measures to prevent terrorist acts, including through exchanging information and, moreover, Common Position 2001/931/CFSP does not contain any limitation on the nationality of the competent authorities.[2] However, the General Court did point out that the decisions of competent authorities must comply with certain conditions, including the protection of the rights of defence and the right to effective judicial protection.[3] It went on to consider that the Council did not verify the fulfillment of these conditions as far as the Indian decision was concerned but did so in relation to the UK decision[4] (the LTTE listing was based on: (i) the proscription by the Government of India in 1992 under the Unlawful Activities Act 1967 and later inclusion in the list of terrorist organisations under the Schedule to the Unlawful Activities Prevention (Amendment) Act 2004 and (ii) the decision of the UK Secretary of State for the Home Department ('the Home Secretary') of 29 March 2001 under Section 3(3)(a) of the UK Terrorism Act 2000).

Finally, turning to the matter of the review process, the General Court affirmed that the statement of reasons "must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power to review its lawfulness".[5] Analyzing LTTE's statement of reasons, the Court notes that, in the first part, the Council lists a number of acts which it regards as terrorist acts within the meaning Article 1(3) of Common Position 2001/931/CFSP, based on information found in the press or on the internet.[6] In the words of the Court "*instead of taking,* for the factual basis of its assessment*, decisions adopted by competent authorities that have taken into consideration the specific acts and acted on the basis of those acts, and then verifying that those acts are indeed 'terrorist acts'* and that the group concerned is indeed 'a group', as defined in Common

[1] T-208/11 and T-508/11, paragraphs 104-117.
[2] *Ibid* paragraphs 125-129.
[3] *Ibid* paragraph 141.
[4] *Ibid* paragraph 142.
[5] *Ibid* paragraph 159.
[6] *Ibid* paragraphs 169, 187.

Position 2001/931, in order to decide, on that basis and in exercising its broad discretion, whether to adopt a decision at EU level, *the Council does the reverse in the grounds for the contested regulations*" (*emphasis added*).[1] "*It begins with assessments which are, in actual fact, its own assessments*, classifying the LTTE as a terrorist from the first sentence of the grounds […] *and imputing to it a series of acts of violence which the Council took from the press and the internet*" (*emphasis added*).[2] Then, "only after those remarks […] the Council refers to decisions of national authorities".[3] In conclusion, the General Court considered that this approach was contrary to the two-tier system established by Common Position 2001/931/CFSP.[4] Consequently, it decided to annul LTTE's listing on the ground that the Council had breached the obligation to state reasons.

The central landmark that can be drawn from the rationale presented above is that the annulment was based on issues of procedure and not substance. The General Court took issue with the way the Council chose to fulfill the listing requirements provided by Common Position 2001/931/CFSP. It did not consider that LTTE was not a terrorist organization or that it did not commit the acts enumerated by the Council, but rather that invoking those acts, even if they fell under the definition of terrorist acts, could not be used as such in the statement of reasons because that is not how the procedure of Common Position 2001/931/CFSP works. It calls for a decision of a 'competent authority' that decided upon such or other acts that fall under the said definition. What this means is that the Council did not fail on providing reasons as to LTTE being a terrorist organization, but failed on the way it went about showing that LTTE was a terrorist organization. What the Council should have done was to search for a 'competent authority' decision (which can be of a third state, but which must be in conformity with EU human rights standards) that identifies LTTE as committing terrorist acts. As worded by the General Court, "the Council exercises the functions of the 'competent authority' within the meaning of Article 1(4) of Common Position 2001/931, which […] is neither within its competence according to that common position nor within its means".[5]

In arriving at this landmark, the General Court treated both the listing requirements and those for the review and relisting process as a whole. This means that the initial listing, as well as subsequent listings must follow the

[1] *Ibid* paragraph 191.
[2] *Ibid* paragraph 192.
[3] *Ibid* paragraph 195.
[4] *Ibid* paragraph 203.
[5] *Ibid* paragraph 198.

same procedure. The conclusion is drawn by interpreting Article 1(6) of Common Position 2001/931/CFSP in the context of the entire Article 1, including Article 1(4). In the view of this paper, the General Court was correct to consider that the word 'grounds' in Article 1(6) should relate to the listing grounds called for in Article 1(4). The Council must have meant for the 'grounds' in Article 1(6) to be understood as described in Article 1(4). Apart from the contextual interpretation, one should also look at the wording of Article 1(4). It begins with "[t]he list in the Annex shall be drawn up […]", without reference to when the list is drawn up (initially or after the review process), thus not limiting the provision to the initial listing alone. If it was the intention of the Council to do so it would have expressly made that distinction in order to clarify that the initial listing required a certain procedure (competent authority decision, terrorist acts, etc.), while relisting after review necessitated other 'grounds'.

2.3. Landmarks of the Interpretation given by the Grand Chamber in the LTTE case

The main argument advanced by the Council in the appeal it filed against the initial annulment was that, for maintaining a person or entity on the list following the six months' review, such decision should not be based solely on considerations of national decisions but can indicate other sources, as well. [1]

The Grand Chamber considered that the General Court had misinterpreted Article 1(6) of Common Position 2001/931/CFSP, arguing that the provision does not limit the 'grounds' for maintaining the listing to the content of 'competent authority' decisions.[2] In its words, Article 1 "draws a distinction between the initial entry of a person or entity on the list at issue, referred to in paragraph 4 thereof, and the retention on that list of a person or entity already listed, referred to in paragraph 6 thereof".[3] The distinction "is attributable to the fact that […] *the retention of a person or entity on the list* at issue is, in essence, an extension of the original listing and *presupposes*, therefore, that there is *an ongoing risk of the person or entity concerned being involved in terrorist activities*, as initially established by the Council on the basis of the national decision on which that original

[1] C-539/10 P, paragraphs 41, 57.
[2] *Ibid* paragraphs 58-62.
[3] *Ibid* paragraph 58.

listing was based" (*emphasis added*).[1] Thus, the Council may use other sources apart from the finding of competent authorities.[2]

Having pointed to the error of interpretation made by the General Court, the Grand Chamber went on to analyze the statement of reasons in its substance. It noted that after 2010 there was a lack of new elements to justify keeping LTTE on the list of terrorist entities.[3] Accordingly, although it accepted the argument raised by the Council with respect to grounds for keeping an entity on the list, it maintained the decision to annul the listing because the material, even which obtained from sources other than competent authorities, did include evidence purporting a risk of involvement in terrorist activities by LTTE.[4]

The essential landmark of the appeal judgment is that the procedure for the review process is different from that of the initial listing. While the initial listing follows the requirements of Article 1(4) of Common Position 2001/931/CFSP, including the existence of a 'competent authority' decision, the relisting must respect the conditions of Article 1(6), which in the interpretation of the Grand Chamber means the existence of an "ongoing risk of the person or entity concerned being involved in terrorist activities". In the view of this paper, it is not clear how the Court arrived at this conclusion. The judgement simply argues that the relisting is an extension of the previous listing and that it requires a risk of involvement in terrorist activities. Recalling that Article 1(4) begins with "[t]he list in the Annex shall be drawn up […]" without distinction as to when it is drawn up, it appears that the outcome of the review process is rather a relisting (as the term was repeatedly used in this paper) than an extension of the previous listing. As the Grand Chamber pointed out, the requirement for a 'competent authority' decision "seeks to ensure that, i*n the absence of any means at the disposal of the European Union that would enable it to carry out its own investigations* regarding the involvement of a person or entity in terrorist acts, the Council's decision on the *initial* listing is taken on a sufficient factual basis"[5] (*emphasis added*). It would at least be odd to believe that if the EU lacked means to investigate the involvement of a person or entity in terrorist acts for an initial listing, it would suddenly have the means to investigate the 'risk' of involvement in terrorist activities in order to extend a listing.

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[1] *Ibid* paragraph 61.
[2] *Ibid* paragraphs 71, 72.
[3] *Ibid* paragraphs 77, 78.
[4] *Ibid* paragraphs 79-81.
[5] *Ibid* paragraph 45; judgment of 15 November 2012, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, C-539/10 P and C-550/10 P, EU:C:2012:711, paragraphs 69, 79 and 81.

Another landmark, which is a consequence of the previous one, is that during the review and extension process (the term extension will now be used instead of relisting, taking into account the interpretation of the Grand Chamber), the Council may rely on public source material, including the press or the internet. Indeed, the Grand Chamber did not expressly refer to public sources or the press or the internet. It simply made reference to 'other sources'. It is the understanding of this paper that the general formula used in the judgment implies any other sources than 'competent authority' decisions, thus including public sources such as the press or the internet.

3. Consequences of the Recent Case Law in the LTTE case

Without repeating too much what has already been presented in the previous section, a number of conclusions can be drawn from the case law in the LTTE case.

- the applicability of international humanitarian law does not render EU law on sanctions inapplicable;
- decisions adopted by 'competent authorities' of non-EU Member States may be used to underlie the listing of terrorist persons or entities at European Union level;
- if the Council chooses to invoke decisions adopted by 'competent authorities' of non-EU Member States as a basis for EU listings, it must verify that those states ensure human rights standards equivalent to those of EU Member States and, in the affirmative, provide evidence of this conclusion;
- there is a distinction between the requirements for an initial listing and those for keeping a person or entity on the list. In order to keep a person or entity on the list the Council needs to prove that there is an ongoing risk of that person or entity being involved in terrorist activities;
- when deciding to extend the listing of a person or entity, the Council may use other sources than decisions of 'competent authorities', including material available to the public, such as the press or the internet, in order to prove the existence of a risk of involvement in terrorist activities.

Before concluding, a number of remarks should be made regarding the final two consequences.

First, it has to be underlined that during the review and extension process, the Council does not have to look for new terrorist activities in relation to a given person or entity. The emphasis should be placed on the 'risk' of involvement in such activities, not the 'activities' themselves. Thus, no new terrorist acts must be committed in order for an entity to be retained on the list. An assertion to the contrary would be absurd and conflicting with the very purpose of Common Position 2001/931/CFSP and EU sanctions regimes in general. These measures were and are adopted with a preventive purpose in mind,[1] in this case the fight against terrorism and the financing of terrorism.[2] The listing of an entity implies and asset freeze. This does not mean that the ownership of these assets is changed. A listing is not a punitive measure. Once that entity is delisted, it will have full access to the frozen assets.[3] Accordingly, a lower burden of proof lies on the Council.

Second, it is the view of this paper that the Council no longer needs to include in the statement of reasons elements of 'competent authority' decisions when extending a listing. If there is a differentiation between the initial listing and keeping an entity on the list and the latter does not have to follow the requirements of Article 1(4) of Common Position 2001/931/CFSP, then once the first 6 months review process passes, the Council may completely ignore those requirements in relation to a given entity and invoke solely other sources (of course, as long as these sources prove a risk of involvement in terrorist activities). Indeed, the Council may retain in the statement of reasons a section on the initial listing, but this should be judged only in relation to the legal act that first listed the given entity and not subsequent EU legal acts.

4. Conclusions

Although not apparent to the debate, the issues discussed by Court refer to the respect for human rights. In fact, the entire legal debate surrounds the central objective of guarantying human rights when adopting restrictive measures.

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[1] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Polic, paragraphs 4-6, available on 28 December 2017, at http://data.consilium.europa.eu/doc/document/ST-11205-2012-INIT/en/pdf.

[2] Common Position 2001/931/CFSP, preambular paragraphs (1)-(4).

[3] Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures, paragraph 32, available on 28 December 2017, at http://data.consilium.europa.eu/doc/document/ST-15530-2016-INIT/en/pdf.

The recent developments in the case law regarding the LTTE have brought about valuable lessons for the future practice of EU restrictive measure to combat terrorism and the respect for the rights of those targeted.

Essentially, a number of aspects have been made clear with regard to the interpretation of Common Position 2001/931/CFSP. These clarifications will further pave the way the European Union takes in supporting its international sanctions to combat terrorism.

However, these clarifications will also give rise to new questions. It is likely that future debates before European courts will focus on what constitutes a risk and what is the necessary threshold that must be reached in order to prove a risk of involvement in terrorist activities.

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

Commentaire d'arrêt : Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (*Îles Marshall c. Royaume-Uni*, 2016, CIJ)

Adrian-Nicuşor POPESCU[1]
Master – Droit International Public,
Faculté de Droit de l'Université de Bucarest

Résumé : *L'arrêt de la Cour Internationale de Justice, rendu le 5 octobre 2016, a signalé l'approche formaliste de la Cour à l'égard de l'existence d'un différend d'ordre juridique. En fait, la Cour a introduit un nouveau critère pour qu'un différend entre deux États soit constaté : la connaissance de l'opposition exprimée par le demandeur. La décision a été contestée dans la doctrine et aussi dans les opinions dissidentes des juges qui ont voté contre le refus de la Cour d'accepter sa compétence. Cette réaction a été justifiée par l'important enjeu de l'affaire : l'obligation de négocier pour le désarmement nucléaire. Les critiques indiquent avec inquiétude les conséquences indésirables de l'arrêt: une inutile entrave à l'accès à la justice internationale, des soupçons de subjectivisme qui nuisent à l'image de la Cour et l'avenir ambigu des négociations pour le désarmement nucléaire.*

Mots-clés : *désarmement nucléaire, différend, connaissance de l'opposition, formalisme*

[1] *Adrian-Nicuşor Popescu a obtenu la licence en droit à la Faculté de Droit de l'Université de Bucarest et au Collège Juridique Franco-Roumain d'Etudes Européennes. Il est en présent étudiant au Master en Droit International Public à la Faculté de Droit de l'Université de Bucarest. adriannicusorpopescu@yahoo.ro.* Les opinions exprimées dans cet article sont strictement personnelles et n'engagent pas l'institution à laquelle l'auteur appartient.

1. Introduction

« Je tremble toujours qu'on ne parvienne à la fin à découvrir quelque secret qui fournisse une voie abrégée pour faire périr les hommes, détruire les peuples et les nations entières.[1] »

La République des Îles Marshall, un état insulaire du Pacifique, doit se confronter à son histoire troublée. Dans les années 1950 et 1960, les îles ont fait l'objet de plusieurs essais nucléaires conduits par les Etats-Unis. Au présent, les Îles Marshall ont commencé la « croisade » contre les puissances nucléaires. La République insulaire les accuse de ne pas abandonner la course aux armements nucléaires et de ne pas s'acquitter de l'obligation d'initier des négociations de bonne foi au regard du désarmement nucléaire. Le 24 avril 2014, le gouvernement des Îles Marshall a tiré le signal d'alarme et a déposé des requêtes introductives d'instance à la Cour Internationale de Justice (CIJ) contre neuf États: les États-Unis, la Russie, la Chine, la France, l'Inde, le Pakistan, la Corée du Nord, Israël et le Royaume-Uni. Toutefois, la Cour n'a admis que trois plaintes, contre le Royaume-Uni, le Pakistan et L'Inde, car ces États ont accepté la compétence obligatoire de la CIJ.

Ainsi, la Cour Internationale de Justice a eu l'occasion de se prononcer sur le problème épineux du désarmement nucléaire, mais a manqué l'opportunité d'apporter des clarifications juridiques dans un domaine qui intéresse l'humanité entière, en tranchant l'affaire de la première exception préliminaire. Elle a conclut qu'elle n'était pas compétente d'examiner le fond du moment qu'elle n'a pu constater l'existence d'un différend. Coïncidence ou non, les juges qui proviennent des États considérés comme puissances nucléaires ont voté en faveur de l'arrêt qui est rendu grâce au vote du président de la Cour, un juge d'origine française.

On peut se demander si la discussion sur le différend a été la preuve d'une excellente leçon de droit ou d'un formalisme juridique exagéré qui a comme mission d'escamoter le manque de courage de la Cour. De plus, cet arrêt n'a pas suivi le cours normal de la jurisprudence et se place contre le principe de la bonne administration de la justice. Est-ce qu'on peut parler d'une capitulation de la Cour devant les intéresses des grandes puissances ?

Pour expliquer les motifs pour lesquels cet arrêt pragmatique est critiquable, il faut analyser les arguments des parties et le raisonnement de la Cour et,

[1] Voltaire, *Lettres persanes* (cité par M. le juge ad-hoc Bedjaoui dans son opinion dissidente dans l'affaire Armes nucléaires et désarmement, *Les Îles Marshall c. Le Royaume-Uni*, 5 octobre 2016, par. 91)

puis, souligner la réaction de la doctrine qui conteste le point de vue de la Cour et identifier les conséquences négatives de cet arrêt.

2. Un état insulaire, militant acharné contre l'arme nucléaire, devant la Cour Internationale de Justice : les arguments des Parties

Les Îles Marshall, une jeune république du Pacifique, ont été traitées dans le passé comme le théâtre des opérations nucléaires des États-Unis. Soixante-sept essais de bombes atomiques ont choqué la petite nation. Lors de l'opération Bravo, le 1er mars 1954, la bombe testée avait une capacité de destruction mille fois supérieure à celle de la bombe d'Hiroshima. Les effets : des « malformations congénitales monstrueuses », « cancers de la thyroïde, cancers du foie et autres lésions cancéreuses provoquées par les radiations »[1]. Ces sont les motifs pour lesquels les Îles Marshall ont milité contre le désintéressement de certains États envers le désarmement nucléaire. Comme prévu auparavant, la Cour n'a admis que trois requêtes (le Royaume-Uni, le Pakistan et l'Inde). Les affaires sont très similaires, mais on va choisir l'arrêt contre le Royaume-Uni pour cette analyse.

Ainsi, cet État minuscule et souvent ignoré par la communauté internationale a estimé, dans son grief devant la CIJ, que le Royaume-Uni a manqué à ses obligations de progresser vers la suppression de l'arme nucléaire fondées sur le droit international coutumier et conventionnel, à savoir le TNP, Traité sur la non-prolifération des armes nucléaires de 1968, et son article VI : «Chacune des Parties au Traité s'engage à poursuivre de bonne foi des négociations sur des mesures efficaces relatives à la cessation de la course aux armements nucléaires à une date rapprochée et au désarmement nucléaire, et sur un traité de désarmement général et complet sous un contrôle international strict et efficace». L'obligation de négocier de bonne foi le désarmement nucléaire a fait l'objet de l'avis consultatif de 1996 quand la Cour a constaté qu'on ne peut parler d'une « simple obligation de comportement », mais il faut rechercher un « résultat précis par l'adoption d'un comportement déterminé ».[2]

Le Royaume-Uni répond en soulevant plusieurs exceptions dont la première et la plus importante est l'inexistence d'un différend justiciable entre les Parties. L'État défendeur affirme le fait que les éléments de preuve qui

[1] Opinion dissidente de M. le juge Cancado Trindade, par. 277, qui cite *Vienna Conference on the Humanitarian Impact of Nuclear Weapons (8-9 December 2014), p.34*

[2] Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996, par.99

doivent justifier les positions divergentes ne sont pas capables d'attirer la compétence de la Cour. En fait, le Royaume-Uni soutient que les déclarations des Îles Marshall à différentes réunions internationales ont été faites à son insu, en soulignant qu'il n'a pas participé à ces conférences, n'a reçu aucune notification et toutes les accusations ont été faites de manière générale contre toutes les États qui possèdent l'arme nucléaire. Il ajoute que de l'article 43 du *Projet d'articles de la CDI sur la responsabilité de l'Etat* découle un principe de droit international coutumier suivant lequel l'État qui a l'intention d'invoquer la responsabilité d'un autre État doit lui notifier sa réclamation, cette notification étant un élément constitutif de la condition relative à l'existence d'un différend[1]. Pour mettre en évidence que la notification préalable est une condition impérative, le défendeur cite les affaires qui prouvent que le différend doit exister au moment où la requête est soumise à la Cour : *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)* et *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal).* Toutefois, les Îles Marshall considèrent que ces arrêts démontrent que la Cour n'a jamais été très exigeante en ce qui concerne la cristallisation du différend et n'a jamais reconnu l'obligation générale de notifier l'intention d'introduire une requête à la CIJ. De plus, dans l'arrêt *Géorgie c. Russie*, la Cour a constaté que «l'existence d'un différend pouvait être déduite de l'absence de réaction d'un État à une accusation dans des circonstances où une telle réaction s'imposait»[2]. Ils mentionnent que le Royaume-Uni devait ou pouvait avoir connaissance de leurs déclarations publiques et que même le fait de recevoir la notification de la réclamation déposée au CIJ et de répondre de manière divergente, en invoquant des exceptions préliminaires, atteste deux points de vue différentes. Pour prouver l'opposition, ils invoquent, aussi, les votes exprimés par les deux États dans diverses réunions internationales traitant sur le désarmement nucléaire.

3. Une nouvelle condition pour l'existence du différend : l'exigence de la connaissance de l'opposition

[1] Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (*Îles Marshall c. Royaume-Uni*), exceptions préliminaires, arrêt, C.I.J. Recueil 2016, par. 27.

[2] 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, par. 30

Au premier lieu, la Cour examine l'exception préliminaire pour savoir si elle a compétence de juger sur le fond, en vertu du paragraphe 2 de l'article 36 du Statut, et, donc, si on est en présence d'un différend d'ordre juridique. De cette manière, la Cour rappelle que le différend est « un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts » entre les parties (*Concessions Mavrommatis en Palestine, arrêt no 2, 1924, C.P.J.I., p. 11*), que la réclamation de l'une des parties doit se heurter à l'opposition manifeste de l'autre (*Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962, p. 328),* et que « Les points de vue des deux parties, quant à l'exécution ou à la non-exécution de certaines obligations internationales, doivent être nettement opposés » (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950, p. 74*).

Puis, la Cour pose la question si on peut être partie à un différend à son insu. Une question qui, à la première lecture, semble légitime et raisonnable. Elle veut savoir si le défendeur a eu connaissance ou a été en mesure de connaitre l'existence de l'opposition, car le différend fait l'objet d'une appréciation objective. En effet, « un différend existe lorsqu'il est démontré, sur la base des éléments de preuve, que le défendeur avait connaissance, ou ne pouvait pas ne pas avoir connaissance, de ce que ses vues se heurtaient à l'« opposition manifeste » du demandeur (*Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I), p. 26, par. 73*) »[1].

Donc, la Cour introduit un nouveau critère : la connaissance de l'opposition (*awareness*). En outre, la Cour renforce l'idée que le différend doit exister au moment du dépôt de la requête, en opposition avec la thèse que le différend est né lorsque le défendeur exprime ses arguments en désaccord avec ceux du demandeur. Les Îles Marshall affirment que « *rien n'interdit de concevoir que la saisine de la Cour puisse être un mode approprié et parfaitement légitime par lequel l'État lésé « notifie sa demande » à l'État dont la responsabilité internationale est invoquée* »[2], mais la Cour tranche le problème en indiquant : « si des déclarations ou réclamations formulées dans la requête, voire après le dépôt de celle-ci, peuvent être pertinentes à diverses fins — et, en particulier, pour préciser la portée du différend

[1] Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (*Îles Marshall c. Royaume-Uni*), exceptions préliminaires, arrêt, C.I.J. Recueil 2016, par. 41.
[2] Ibid., par. 53.

soumis à la Cour —, elles ne sauraient créer un différend de novo, c'est-à-dire un différend qui n'existe pas déjà »[1].

Ensuite, la Cour se préoccupe des déclarations faites par les Îles Marshall lors de la réunion de haut niveau de l'Assemblée générale sur le désarmement nucléaire et au cadre de la deuxième conférence sur l'impact humanitaire des armes nucléaires. Par exemple, les Îles Marshall ont estimé en 2014 : «… *les États possédant un arsenal nucléaire ne respectent pas leurs obligations à cet égard. L'obligation d'œuvrer au désarmement nucléaire qui incombe à chaque État en vertu de l'article VI du traité de non-prolifération nucléaire et du droit international coutumier impose l'ouverture immédiate de telles négociations et leur aboutissement* ». La Cour semble adopter les arguments de la défense du Royaume-Uni, en critiquant la déclaration vague qui indique un souci plutôt pour l'impact humanitaire des armes nucléaires et pas spécifiquement pour le désarmement. De plus, le Royaume-Uni n'a pas participé à la conférence, n'a pas été accusé en particulier, donc, rien ne conduit à la conclusion qu'on attend une réaction de la part du Royaume-Uni et qu'on peut déduire de l'absence de réaction une divergence de vues. La Cour conclut qu'on ne peut pas dire si le Royaume-Uni avait connaissance ou ne pouvait pas ne pas avoir connaissance, parce que les déclarations ne sont pas suffisamment précises pour créer le contexte pour un différend.

En ce qui concerne la valeur des votes exprimés aux conférences comme éléments de la formation du différend, la Cour exige prudence avant de tirer des conclusions hâtives. Elle conclut que le vote d'un État sur des résolutions contenant de nombreuses propositions ne saurait en soi être considéré comme un élément de preuve pour la constatation d'un différend entre cet État et un autre qui a un vote opposé à l'égard d'une de ces propositions.

Enfin, « la Cour conclut que la première exception préliminaire soulevée par le Royaume-Uni doit être retenue. Il s'ensuit qu'elle n'a pas compétence en la présente espèce au titre du paragraphe 2 de l'article 36 de son Statut »[2].

[1] Ibid., par. 54.
[2] Ibid., par.58.

4. L'existence du différend : un problème artificiel ?

La Cour a reçu plusieurs critiques après cet arrêt controversé. En fait, 5 juges ont joint des opinions dissidentes et la doctrine a réagi[1] en déplorant avec pessimisme l'avenir de la justice internationale. On peut se demander si la Cour a éludé sciemment une réponse délicate et si cet arrêt peut avoir des effets négatifs en ce qui concerne la confiance envers l'impartialité de la Cour et sa capacité de trancher des litiges très importantes pour l'humanité entière, comme le problème de l'arme nucléaire.

Le critère subjectif de la « connaissance » du différend a été le point névralgique de l'arrêt. En fait, la Cour a surpris avec son raisonnement, parce que la jurisprudence antérieure n'annonçait pas une telle rigueur. Dès les arrêts de la CPJI, on peut constater une certaine souplesse : « La Cour ne pourrait s'arrêter à un défaut de forme »[2] ou « Le Statut de la Cour n'exige pas que l'existence de la contestation se soit manifestée d'une certaine manière, par exemple par des négociations diplomatiques… La Cour estime ne pas pouvoir exiger que la contestation se soit formellement manifestée [3]». Même dans une affaire plus récente, *Croatie c. Serbie*, la Cour semblait avoir rompu avec le formalisme : « comme sa devancière, [elle] a aussi fait preuve de réalisme et de souplesse dans certaines hypothèses où les conditions de la compétence de la Cour n'étaient pas toutes remplies à la

[1] Meenakshi Ramkumar and Aishwarya Singh, '*The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?' (2017)* 33 Utrecht Journal of International and European Law p.128–134 ; https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/ - accédé le 8 avril 2018; https://www.ejiltalk.org/no-dispute-about-nuclear-weapons/ - accédé le 8 avril 2018 ; http://www.sentinelle-droit-international.fr/?q=content/bulletin-489-du-16102016 - *Les arrêts décevants rendus par la CIJ dans les affaires opposant les Îles Marshall aux puissances nucléaires* – Pr. Philippe Weckel – accédé le 8 avril 2018 ; Michael A. Becker, *The dispute that wasn't there: judgments in the Nuclear Disarmament cases at the International Court of Justice,* Cambridge International Law Journal, Vol. 6 No. 1, p. 4–26.

[2] Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt no 6, 1925, C.P.J.I., p. 14.

[3] Usine de Chorzów, arrêt no 11, 1927, C.P.J.I., p. 10-11.

date de l'introduction de l'instance mais l'avaient été postérieurement, et avant que la Cour décide sur sa compétence[1]».

De plus, le juge Robinson dans son opinion dissidente considère qu'il n'importe pas que les accusations des Îles Marshall ont été exprimées de manière générale contre tous les États possédant l'arme nucléaire, « étant donné que leur nombre est limité (neuf), et leur identité, connue de tous. Le Royaume-Uni a d'ailleurs explicitement reconnu faire partie de ces États [2]». Ensuite, il affirme qu'aujourd'hui il est difficile de croire que le Royaume-Uni n'a pas été au courent avec la déclaration, même s'il n'a pas participé à la conférence. En fait, le Royaume-Uni avait délibérément choisi de ne pas participer à l'événement, parce qu'il soupçonnait que « certaines actions entreprises dans le cadre de la campagne sur les conséquences humanitaires vont conduire à la conclusion d'une convention interdisant totalement les armes nucléaires [3]», ce qui contrevient à leur approche envers le désarmement nucléaire.

Pourquoi on ne doit pas s'arrêter a un défaut de forme ?

En premier lieu, parce qu'il est contraire au principe de la bonne administration de la justice. Par exemple, dans une telle affaire comme celle analysée, le demandeur peut introduire une autre requête contre le Royaume-Uni et ça va déclencher la répétition de la procédure, qui « serait contraire à la bonne administration de la justice et c'est pour cela entre autres que les défauts procéduraux qui peuvent être corrigés ont généralement, jusqu'à maintenant tout au moins, été tolérés par la Cour[4]». Le juge Yusuf vient consolider cette idée dans son opinion dissidente : « L'introduction d'un critère de la « connaissance » pour établir l'existence d'un différend va non seulement à l'encontre de la jurisprudence établie de la Cour, mais elle nuit également à l'économie judiciaire et à la bonne administration de la justice, puisqu'elle incite à soumettre une nouvelle requête portant sur le même différend. Si l'existence d'un différend est soumise à un élément subjectif ou à une condition de forme telle que la « connaissance », l'État demandeur pourra remplir cette condition à tout moment en engageant une nouvelle procédure devant la Cour. L'État défendeur aura alors bien évidemment connaissance de l'existence du différend dans le cadre de cette nouvelle procédure[5]». Le formalisme

[1] Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), exceptions préliminaires, arrêt, C.I.J. Recueil 2008, p. 441, par. 81.
[2] Opinion dissidente de M. le juge Robinson, par. 60.
[3] Opinion individuelle de Mme. la juge Sebutinde, par. 27.
[4] Opinion dissidente de M. le juge ad-hoc Bedjaoui, par. 84.
[5] Opinion dissidente de M. le juge Yusuf, Vice-President, par.24.

exagéré de la Cour, qui exige une nouvelle requête, alourdit le fardeau du demandeur et si on pense à un État insulaire comme les Îles Marshall, ça va couter très cher. L'arrêt regrettable, à l'opinion du Juge Cancado Trindade[1], assombrit l'avenir de l'accessibilité à la justice internationale.

En tout cas, le Royaume-Uni, le 22 février 2017, a modifié sa déclaration d'acceptation de la juridiction obligatoire, en excluant une demande ou un différend qui n'a pas fait l'objet d'une notification préalable, comprenant l'intention de l'État concerné de soumettre l'affaire à la Cour, au moins six mois avant ladite soumission. Par surcroît, le Royaume-Uni a étouffé, probablement pour toujours, les espoirs des Îles Marshall pour une autre requête, en rejetant « Toute demande ou tout différend résultant du désarmement nucléaire et/ou des armes nucléaires, s'y rattachant ou s'y rapportant, à moins que tous les autres États dotés d'armes nucléaires qui sont parties au Traité sur la non-prolifération des armes nucléaires aient également accepté la compétence de la Cour et soient parties à l'instance en question [2]».

Après l'approche juridique de l'affaire, la doctrine pose la question si le différend est un faux problème qui escamote d'autres raisons de la Cour[3]. Parmi les huit juges qui ont voté l'absence du différend, six d'entre eux sont les ressortissants des puissances nucléaires (la France, les États-Unis, le Royaume-Uni, la Russie, la Chine et l'Inde). Par hasard ou non, ceux qui ont voté contre ne proviennent pas des pays qui possèdent l'arme nucléaire. Le vote du Président français, M. le juge Abraham, a été décisive, mais c'est très intéressante ce qu'il a noté dans sa déclaration. Apparemment, le juge Abraham s'est opposé, auparavant, au formalisme de la Cour et n'a pas soutenu l'élargissement de la notion du différend. Dans les affaires *Géorgie c. Russie* (dans laquelle il s'agissait d'une condition de négociations préalables pour déclencher la mise en œuvre d'une clause compromissoire contenue par la Convention internationale sur l'élimination de toutes formes de discrimination raciale) et *Belgique c. Sénégal*, il a voté pour que la Cour reconnaisse sa compétence face aux arguments qui défendaient l'absence du différend. Pourquoi il a changé d'avis brusquement ? Le juge explique qu'il ne peut pas contraster avec la jurisprudence plus récente de la Cour : « Je ne suis pas sûr que la Cour ait eu raison, avec les arrêts *Géorgie c. Fédération de Russie* et surtout *Belgique c. Sénégal*, d'infléchir notablement son

[1] Opinion dissidente de M. le juge Cancado Trindade, par. 30.
[2] Déclarations d'acceptation de la juridiction obligatoire, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Le 22 février 2017, sur le site http://www.icj-cij.org/fr/declarations/gb - accédé le 8 avril 2018.
[3] https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/ - accédé le 8 avril 2018.

approche antérieure de la condition relative à l'existence du différend. Mais dès lors qu'elle l'a fait en adoptant une solution claire en connaissance de cause, je considère que rien ne justifierait à présent qu'elle s'écartât de cette dernière[1] ». Cette attitude a consolidé l'explication selon laquelle le « parti-pris national » (national bias) pourrait expliquer son approche exigeante sur le différend dans l'affaire concernant le désarmement[2].

5. Conclusions

Quel est le rôle de la Cour aujourd'hui ? Le premier article de la Charte des Nations Unies, dont la Cour doit défendre les principes, affirme qu'il faut « maintenir la paix et la sécurité internationale et à cette fin : prendre des mesures collectives efficaces en vue de prévenir et d'écarter les menaces à la paix et de réprimer tout acte d'agression ou autre rupture de la paix » (l'arme nucléaire est de manière indiscutable une grande menace à la paix), « et réaliser, par des moyens pacifiques, conformément aux principes de la justice et du droit international, l'ajustement ou le règlement de différends ou de situations, de caractère international, susceptibles de mener à une rupture de la paix » (la Cour n'a pas réussi à ajuster le désaccord entre un État qui a souffert à cause de l'arme nucléaire et d'autres États qui s'obstinent dans leur indifférence en ce qui concerne cette question et dont le comportement est indubitablement susceptible de mener à une rupture de la paix). En créant des obstacles à l'examen du fond d'une affaire, la Cour est en train de dévier de sa mission d'organe qui règle pacifiquement les différends. D'ailleurs, « la Cour internationale de justice a manqué, comme conséquence d'un juridisme étriqué, une occasion importante d'apporter une contribution utile, par la clarification du droit, dans un domaine essentiel [3]».

De toute façon, les décisions récentes de la Cour Internationale de Justice sur le problème sensible du désarmement nucléaire suggèrent que le plus grand for du droit international ne s'érige pas dans le type d'organe juridictionnel aventureux. Ce n'est pas la première fois que la Cour a démontré qu'elle a pour but d'éluder les affaires compliquées ; par exemple,

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[1] Déclaration de M. le juge Abraham, Président, par. 12.

[2] Michael A. Becker, *The dispute that wasn't there: judgments in the Nuclear Disarmament cases at the International Court of Justice,* Cambridge International Law Journal, Vol. 6 No. 1, p. 22, cité dans le Journal du droit international "Clunet", no 4/2017, p. 1435.

[3] http://www.sentinelle-droit-international.fr/?q=content/bulletin-489-du-16102016 - *Les arrêts décevants rendus par la CIJ dans les affaires opposant les Îles Marshall aux puissances nucléaires* – Pr. Philippe Weckel – accédé le 8 avril 2018

dans l'avis consultatif sur la déclaration d'Independence du Kosovo de 2010, elle ne s'est pas prononcé sur le droit à la sécession, qui représentait le véritable enjeu de l'affaire. Comment peut-on avoir confiance dans la Cour, lorsqu'on est les représentants d'un État peu important dans la communauté internationale, si la Cour écarte les difficultés en invoquant des détails techniques, surtout quand les grandes puissances sont les État défendeurs. Cet arrêt peut fonctionner comme un avertissement pour les autres États qui veulent déranger la Cour avec des affaires similaires, même si c'est la Cour qui a mis en évidence l'obligation de négocier le désarmement nucléaire et l'incompatibilité de l'arme nucléaire avec le droit humanitaire internationale. Toutefois, le droit international demeure un outil de résistance entre les mains des Etats les plus faibles[1], car, en définitif, le simple fait d'utiliser le contentieux comme stratégie pour faire lumière sur la question du désarmement nucléaire doit être apprécié.

Comme on peut aisément observer, il n'y a aucun avertissement pour les puissances nucléaires. Selon prof. Nico Krisch, on peut douter qu'un tribunal qui capitule si facilement face aux grands intérêts politiques puisse avoir des aspirations à devenir une cour internationale proprement dite[2]. En fait, « la Cour, en faisant preuve d'un excès de formalisme, abandonne et déçoit la communauté internationale et risque de mettre à mal sa réputation [3]». En outre, le juge Bedjaoui observe que l'arrêt de la Cour semble en opposition avec les idées de l'ancien Président des États-Unis, Barrack Obama, qui a fait appel, le 27 mai 2016, à Hiroshima, à une révolution morale pour l'élimination définitive de l'arme nucléaire. Selon lui, le fait que les États responsables ne veulent pas initier cette révolution est déplorable [4].

En fin de compte, les mots de Margaret Thatcher sont très importants dans le contexte de cette affaire : «Un monde sans armes nucléaires serait moins stable et plus dangereux». Est-ce que les tensions entre les États possédant l'arme nucléaire depuis la guerre froide ont constitué un élément essentiel pour maintenir la paix ? On peut croire que la réponse à la question est affirmative si on regarde la jurisprudence de la Cour.

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[1] Meenakshi Ramkumar and Aishwarya Singh, '*The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?'* (2017) 33(85) Utrecht Journal of International and European Law pp. 128–134, p.133.

[2] https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/ - accédé le 8 avril 2018.

[3] Opinion dissidente de M. le Juge Bedjaoui, par. 85.

[4]Ibid., par. 90.

Recenzie de carte / Book Review

International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War (Laurie R. Blank, Gregory P. Noone, Law, Wolters Kluwer Series, 2013, 730 pages)

Elena LAZĂR[1]
Faculty of Law, University of Bucharest

Laurie R. Blank, Professor at Emory University School of Law, where she teaches the law of armed conflict and works directly with students to provide assistance to international tribunals, non-governmental organizations and militaries around the world[2], and Dr. Gregory P. Noone, the Director of the Fairmont State University National Security and Intelligence Program and an Assistant Professor of Political Science and Law, in their comprehensive 730-page research work have succeeded in the almost impossible task of offering an International Humanitarian Law (IHL) handbook which both practicians and students will find very useful, taking into account that very few publications manage to address a broad public at once.

IHL represents a complex and evolving body of law, posing extremely complex problems related to its application in practice and thus relevance of IHL and information related to it varys upon the reader-academia, lawyers, judges, etc. Thus, with more than 30 years of combined experience and expertise teaching and working in the military and academia, Laurie R. Blank and Gregory P. Noone have succeded in creating a comprehensive framework for understanding the law and policy applicable in times of

[1] *Elena Lazăr has graduated the University of Bucharest, Faculty of Law (2010), the LLM in Private Law (2011) and the LLM in European Union Business Law (2011) at the same faculty. She has also obtained her PhD in 2015 in the field of human rights law at the Faculty of Law. In her capacity of teaching assistant at the Law Faculty, she is in charge with seminars on Public International Law and International Organizations and Relations for the second year of undergraduate studies. She also works as a lawyer and as a legal expert on criminal law matters for the EU Commission.* The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

[2] http://law.emory.edu/faculty-and-scholarship/faculty-profiles/blank-profile.html accesed at 21 June 2018

armed conflict, covering both the fields of human rights and national security law[1].

The handbook approaches the following issues: real-life stories, hypothetical scenarios related to day-do day events, the basic legal principles, the protection of civilians, the contemporary weapons unmanned aerial vehicles and cyber operations, the situation of conflicts with terrorist groups and also integrated coverage of related fields, such as human rights and national security law like stated before. Taking all these into account, we appreciate that the textbook provides quite a complete picture of the legal aspects that apply to armed conflict.

The two authors discuss some of the issues currently present and debatable in international law and how these issues line up with the precedent that has been established over the last few hundred years. While obviously an America-centric book, it contains useful excerpts from the case law of a number of international courts and lays out in a clear manner the application of the rules of conflict. Moreover, every section is also accompanied by excerpts of relevant practice, which prove that IHL is very active branch of law and is not all about the Geneva Conventions and other relevant instruments, combining the theoretical approach with the practical one.

Thus, the readers will be able to acknowledge from the handbook the case law that undoubtedly contributed to the development of IHL[2], such as the decisions of the Trial and Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the famous Tadić case, the International Court of Justice's (ICJ) Wall case advisory opinion and the US Supreme Court's decision in Hamdan v. Rumsfeld.

When it comes to the structure of the book, we consider this as the big plus of the book, which is far from being a classical one: the typical chapter titles one could see in most IHL books, such as "Conflict Classification", "Protection of the Civilian Population" or "Means and Methods of Warfare", have been replaced by the intuitive "Why's and How's" structure: Why, What, When, Who, and How. Only the last chapter of the text book approaches the Implementation and Enforcements issues.

Sections in the handbook also approach the issue of cyber-operations and whether the conduct of people taking part in this kind of operations could ever amount to direct participation in hostilities resulting in a loss of

[1] http://www.aspenlawschool.com/books/armed_conflict/default.asp (accesed at 22 May, 2018)

[2] *International Review of the Red Cross* (2016), 97 (897/898), 477–481

protection against direct attack. The two authors address later on the question of the standards for detention in non-international armed conflict, within the chapter on battlefield status in NIAC.

Furthermore, another great plus of the text book is represented by the lists of "questions for discussion" included at the end of each section that provide a good opportunity to assess the theoretical knowledge just acquired and to apply it in practice, aspect extremely useful for the students, if we might say.

If I were to emphasize the so-called weak points, I could not help from noticing though the prevalence of documents emanating from US case law, legislation or practice like previously stated, and the fact that the book currently seems to focus more on aspects related to conduct of hostilities and on the treatment of war prisoners, but dedicates surprisingly few pages to the question of detention and internment. Finally a more structured presentation of the international case law would have been desirable.