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Foreword

Ten years ago, on 3 February 2009, in the Peace Palace in The Hague, the President of the International Court of Justice, Judge Rosalyn Higgins, read the Court's judgment in the case concerning the *Maritime Delimitation in the Black Sea (Romania v. Ukraine).* It was a special judgment by itself – not because it was the last one to be read by Judge Higgins in her capacity as President of the ICJ, since her term was about to complete – hence the relatively fast deliberation of the Court, that delivered its judgment in less than five months since the end of the oral hearings - but, more important, because it was the 100th judgment of World Court in a contentious case.

Thus, it was a landmark of the activity of this institution that, despite being endlessly criticized for countless reasons, has been playing an undeniably major role in settling inter-State disputes and shaping International Law. As well, the judgment turned out to be the first one adopted in unanimity, with no appended dissenting or separate opinions or declarations – another *premiere* in itself, never repeated afterwards. Moreover, considering its merits, the judgment represented a milestone in the evolution of the international case-law on maritime delimitation, since it cemented the "equidistance/special circumstances" method, which was defined by the Court as the rule to be applied in all cases where it is feasible. Thus, the *Maritime Delimitations in the Black Sea* became "the leading authority" of the case-law related to the delimitation method.

Beyond that, for us, Romanians, this judgment was *the judgment.* It was the culmination of a process that lasted for more than 40 years, a process of solving a dispute that, albeit being a technical one in nature, had multiple political, economic and even sociological connotations. The question of the delimitation of the continental shelf and exclusive economic zones in the Black Sea had been subject to protracted negotiations, first with the Soviet Union and then with its successor, Ukraine, up to a point when it was seen as one of the most sensitive and complicated issues on the bilateral Romanian-Ukrainian agenda. Along these years, Romania also approached the then-in-the making law of the sea (in the framework of the United Nations Conferences on the Law of the Sea) in such a way as to uphold its positions in the delimitation negotiations – hence its prominent role in drafting the current article 121 of the Montego Bay Convention, namely the definition and influence of rocks in maritime delimitation – Serpents' Island being, undoubtedly, at stake here.

Romania's decision to seize the International Court of Justice to solve the issue of delimitation proved beneficial not only to the delimitation problem itself (since it made its resolution possible), but – very important –

as well to the advancement of the Romanian-Ukrainian cooperative agenda, finally freed from this burden.

The judgment was a success for Romania – it recognized our country's sovereign rights and jurisdiction over maritime spaces that comprised roughly 80% of the disputed area. Equally important, the judgment was a victory for the International Law – and more specifically, a role-model on how International Law can and should be effectively used to promote one State's foreign policy objectives. Finally, it was an acknowledgement of the Romanian school of International Law – the role of the "Romanian part" of the team that dealt with the delimitation matter was a substantial one, recognized as such by the eminent professors that gave legal counsel to Romania throughout the procedures.

The *Romanian Journal of International Law* marks the tenth anniversary of the 2009 judgment with a special issue, featuring articles that refer to the case-law of the ICJ on maritime delimitation and also covering various other matters on the law of the sea or maritime law, some of particular importance in the current geo-political context. Among the latter, the authors address, *inter alia*, the relations between the law of the sea and the European Convention on Human Rights, the European Union's involvement in shaping and applying the law of the sea or the question of the protection of the underwater cultural heritage.

Of particular interest because of their relevance are the information regarding the inclusion in the work of the International Law Commission of the legal effects of the sea-level rise, a phenomenon which, by its consequences, goes far beyond questions of the law of the sea, touching upon statehood and basic human rights, as well as the articles on piracy and challenges posed by the on-going migration by sea.

At this anniversary moment, by focusing on these topical questions of the law of the sea, the *Romanian Journal of International Law* not only marks the 2009 judgment and its signification for the Romanian foreign policy and diplomacy and, as well, for the family of the Romanian international lawyers, but, at the same time, brings its instrumental contribution to the development of international law in these fields.

Cosmin Dinescu,

Secretary General of the Ministry of Foreign Affairs of Romania

Former Co-Agent of Romania before the International Court of Justice

Cuvânt înainte

În urmă cu zece ani, pe 3 februarie 2009, în Palatul Păcii din Haga, Președinta Curții Internaționale de Justiție, doamna judecătoare Rosalyn Higgins, a dat citire hotărârii Curții din cauza privind *Delimitarea maritimă în Marea Neagră (România c. Ucrainei)*. A fost o hotărâre specială în sine – nu pentru că a fost ultima hotărâre pronunțată de Judecătoarea Higgins în capacitatea sa de Președintă a CIJ, aceasta ajungând la finalul mandatului (de aceea și deliberarea relativ rapidă a Curții, care a pronunțat hotărârea la mai puțin de cinci luni de la finalul pledoariilor orale) – dar, mai important, pentru că a fost a 100-a hotărâre a Curții Internaționale într-un caz contencios.

Hotărârea a marcat astfel un moment important al activității acestei instituții care, în ciuda criticilor nenumărate, joacă neîndoielnic un rol major în soluționarea diferendelor inter-statale și în modelarea Dreptului internațional. De asemenea, hotărârea s-a dovedit a fi prima adoptată în unanimitate, fără opinii sau declarații disidente sau separate – altă premieră în sine, nerepetată ulterior. De asemenea, pe fond, hotărârea a reprezentat o etapă importantă în dezvoltarea jurisprudenței internaționale privind delimitarea maritimă, cimentând metoda „echidistanței/circumstanțelor speciale", definită de către Curte ca regula aplicabilă în toate cauzele unde este posibilă. Astfel, cauza privind *Delimitarea maritimă în Marea Neagră* a devenit „autoritatea principală" în jurisprudența privind metodele de delimitare.

Pe lângă acestea, pentru noi, românii, aceasta a fost *hotărârea*. A reprezentat momentul culminant al unui proces care a durat mai bine de 40 de ani, prin care s-a soluționat un diferend care, deși de natură tehnică, a avut numeroase conotații politice, economice și chiar sociologice. Chestiunea delimitării platoului continental și a zonelor economice exclusive în Marea Neagră a fost subiectul unor negocieri îndelungate, mai întâi cu Uniunea Sovietică și apoi cu succesoarea sa, Ucraina, până în punctul în care era considerată una dintre cele mai delicate și complicate probleme de pe agenda bilaterală româno-ucraineană. Pe parcursul acestor ani, România a abordat procesul de codificare si dezvoltare al dreptului mării (în cadrul Conferințelor Națiunilor Unite privind Dreptul Mării) într-o manieră menita a-si sustine si promova poziția din cadrul negocierilor privind delimitarea – astfel tara noastra a avut un rol de seamă în redactarea prezentului articol 121 din Convenția de la Montego Bay, anume definiția și influența stâncilor în delimitarea maritimă – Insula Șerpilor fiind, fără îndoială, miza.

Decizia României de a sesiza Curtea Internațională de Justiție pentru a soluționa problema delimitării s-a dovedit benefică nu doar problemei în sine (făcând posibilă rezolvarea acesteia), dar – foarte important – și avansării agendei de cooperare între România și Ucraina, eliberată astfel de această povară.

Hotărârea a fost un succes pentru România – a recunoscut drepturile suverane și jurisdicția țării noastre asupra unor zone maritime ce reprezentau circa 80% din zona în dispută. La fel de important, hotărârea a fost o victorie pentru Dreptul internațional și, în special, un exemplu al felului în care Dreptul internațional poate și trebuie să fie folosit în mod eficient pentru a promova obiectivele politicii externe ale unui stat. În fine, a fost o recunoaștere a Școlii românești de Drept internațional – rolul „părții române" a echipei care s-a ocupat de chestiunea delimitării a fost unul substanțial, recunoscut ca atare de profesori eminenți care au consiliat juridic România pe parcursul procedurilor.

Revista Română de Drept Internațional marchează a zecea aniversare a hotărârii din 2009 printr-un număr special, cuprinzând articole care se referă la jurisprudența CIJ asupra delimitării maritime, precum și la alte probleme legate de dreptul mării sau de dreptul maritim, unele de importanță deosebită în contextul geopolitic actual. Printre acestea din urmă, autorii discută, *inter alia*, relațiile dintre dreptul mării și Convenția Europeană a Drepturilor Omului, implicarea Uniunii Europene în conturarea și aplicarea dreptului mării sau chestiunea ocrotirii patrimoniului cultural subacvatic.

De interes deosebit prin relevanță sunt informațiile privind includerea pe agenda de lucru a Comisiei de Drept Internațional a efectelor juridice ale creșterii nivelului mării, un fenomen care, prin consecințele sale, merge dincolo de probleme de dreptul mării și atinge chestiuni privind statalitatea sau drepturile fundamentale ale omului, precum și articolele privind pirateria sau provocările puse astăzi de migrația pe mare.

În prezentul moment aniversar, concentrându-se pe aceste chestiuni de dreptul mării, *Revista Română de Drept Internațional* nu doar că marchează hotărârea din 2009 și importanța sa pentru politica externă și diplomația României și pentru întreaga familie de specialiști români în Drept internațional, însă, în același timp, aduce o contribuție instrumentală în dezvoltarea Dreptului internațional în aceste domenii.

Cosmin Dinescu,

Secretar General, Ministerul Afacerilor Externe al României
Fost co-agent al României în fața Curții Internaționale de Justiție

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

Equidistance – Special Circumstances: A Return to the Geneva Convention of 1958 or a Continuing Uncertainty?

***Ion GÂLEA*[1]**

Abstract: *Since the date of 3 February 2019 marks the 10th anniversary of the judgment of the international Court of Justice in the Maritime Delimitation in the Black Sea (Romania v. Ukraine) case, the study proposes an analysis of the relevant case-law in the field of maritime delimitations, in order to ascertain the existence of a trend towards the consecration of the "equidistance – special circumstances" as the most pertinent method for international courts and tribunals, to effectuate maritime delimitations. The study demonstrates that the Black Sea case has been a turning point, which established, as a matter of "acquis judiciaire", that the equitable result envisaged by the relevant law (articles 74 and 83 of UNCLOS, reflecting customary international law) is to be achieved by the use of the "equidistance – special circumstances" method (except for "compelling reasons"). The line of cases which started with the Black Sea delimitation provided, as a matter of legal certainty, the predictability that this method will be used in the application of articles 74 and 83 of UNCLOS. However, the study shows that certain difficulties persist with respect to the "way in which" the method will be applied, especially in the light of certain special circumstances, such as "concavity" or "cut-off effect".*

Key-words: *continental shelf and exclusive economic zone, maritime delimitation, equidistance/special circumstances, equitable result*

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1. Introduction

The date of 3 February 2019 will mark the 10th anniversary of the judgment of the international Court of Justice in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*[1]. It has been not only a landmark for the recent Romanian history, but an important point in the jurisprudence related to maritime delimitations. Both before and after this case, jurisprudence evolved. The purpose of this study is to analyze the jurisprudential trends and the very fine balance between "certainty and predictability", on one side, and „flexibility" (or "uncertainty") as to the perspectives of future delimitation cases, on the other side[2]. Of course, observing the role of the *Black Sea* case in the evolution of case-law is an important objective.

The conventional international law on maritime delimitations resides on two similar articles of the United Nations Convention on the Law of the Sea[3] – articles 74 and 83 – which throw little light on how a particular delimitation should be effected. Their text (applicable, respectively, for the continental shelf and the exclusive economic zone) provides simply that delimitation "*shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution*". This "vagueness" of the convention law has not always been the case, because, by the beginning of the development of the international law on the continental shelf, the 1958 Geneva Convention on the Continental Shelf provided that, in absence of agreement, "*and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance/[median line] from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured*"[4].

It is well known that the International Court of Justice acknowledged in 1969 that the principle of equidistance enshrined in the above quoted article 6 of the Geneva Convention neither reflects a declaratory customary rule of international law, at the moment of its adoption, nor constituted the origin of a subsequent development of such a norm[5]. The Court recalled that the

[1] *Maritime Delimitation in the Black Sea*, ICJ Reports, 2009, p. 61.

[2] For the difficulties related to the concept of equity: L. D. M. Nelson, "The Roles of Equity in the Delimitation of Maritime Boundaries", in *American Journal of International Law* vol. 84, issue 4 (1990), p. 837–858.

[3] UNTS, vol. 1833, no. 31363.

[4] UNTS, vol. 499, p. 311, article 6, para. 1 and 2.

[5] *North Sea Continental Shelf*, Judgement, ICJ Reports 1969, p. 3, 45, para. 81.

International Law Commission proposed the equidistance – special circumstances norm "with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*"[1]. The applicable customary international law, as from the *North Sea Continental Shelf Decision,* was to be the "equitable principles, taking into account the relevant circumstances"[2], which was later somehow reflected in the United Nations Convention on the Law of the Sea[3].

Nevertheless, in case of a delimitation case, the "equitable principle" does not help very much the technical experts and the cartographers. Therefore, case-law evolved, with different trends, and international courts and tribunals tried to apply different methods in order to provide more concreteness to equity[4]. From this perspective, an important place is held by the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*[5], because, even if the Court had referred in earlier cases to the method named "equidistance – special circumstances", it was for the first time when the method was comprehensively explained and detailed[6]. Even if it was mentioned just as a "method" and not a "rule", it has been followed

[1] *Ibid.* p. 38, para. 62.

[2] *Ibid.* p. 55, para. 101.

[3] For general considerations on the reflection of the 1969 judgment in the UNCLOS and beyond, see Prosper Weil, *Law of Maritime Delimitation: Reflections*, Grotius, Cambridge, 1989, p. 1-327.

[4] For methods of delimitation: Leonard Legault, Blair Hankey, "Method, Opositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation", in Jonathan I. Charney, Robert W. Smith (ed.), *International Maritime Boundaries,* vol. I, Martinus Nijhoff Publishers, 1993, p. 203-243; Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*. Publications on Ocean Development 42. Leiden, The Netherlands: Martinus Nijhoff, 2003; B. H. Oxman, "International Maritime Boundaries: Political, Strategic and Historical Considerations." *University of Miami Inter-American Law Review* vol 26, issue 2 (1994–1995), p. 243–296.

[5] *Maritime Delimitation in the Black Sea, ICJ Reports, 2009,* p. 61.

[6] *Ibid.* p. 101-103, para. 115-122.

by the same Court or by other international courts and tribunals in subsequent cases[1].

As Alain Pellet put it, the *Maritime Delimitation in the Black Sea* was a "refounding case" ("un arrêt refondateur")[2], for the main reason that it reverted, in practical terms, the certainty of the law on maritime delimitations back to article 6 of the 1958 Geneva Convention, which was "denied" as a matter of customary international law by the 1969 *North Sea Continental Shelf Cases.* The purpose of this study would be to explore the way in which the method called "equidistance – special circumstance" was applied before and after the *Black Sea* case and to analyse the "degree of certainty" brought by the case-law developments. Thus, the question that arises is whether the "shift back", as a matter of customary law, to the "article 6 of the 1958 Convention" is real and whether it enshrines sufficient predictability to a delimitation process.

The article would attempt to examine the delimitation cases before and after the *Maritime Delimitation in the Black Sea* from two perspectives: the choice of the method and the way in which the method was applied (in particular, what would be the special circumstances required for adjustment of the line and how the adjustment should be performed).

2. Choice of the method of delimitation before the *Maritime Delimitation in the Black Sea*

2.1. Initial rejection of equidistance

After the 1969 *North Sea Continental Shelf Cases*, there was little light on the particular method to be used in order to put in practice the equitable

[1] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, p. 624; In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014, Registry PCA; ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, accessed 20 August 2018 – not published yet in the ITLOS Reports); Joined Cases *Maritime Delimitation in the Caribbean Se and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, general List no. 157 and 162, Judgment of 2 February 2018, not reported yet in ICJ Reports, available at http://www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf (consulted 20 December 2018).

[2] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", in Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Ed. Hamangiu, Bucureşti, 2014, p. 31-45.

principles which configured the applicable customary (and, then, conventional) law on the maritime delimitations.

Even under the regime of the 1958 Convention on the Continental Shelf, the Arbitral Tribunal deciding upon the *Anglo-French Continental Shelf Case*[1] was confronted with a reservation made by France to article 6 of the Convention, which had the effect of rendering article 6 inapplicable as between the two countries"to the extent, but only to the extent, of the reservations"[2] (more precisely, in the area of the Channel Islands, expressly excluded by the French reservation). The Court of Arbitration held that "*the fact that Article 6 is not applicable as between the Parties to the extent that it is excluded by the French reservations does not mean that there are no legal rules to govern the delimitation of the boundary in areas where the reservation operates*"[3]. Nevertheless, it is important that the Court of Arbitration considered that"the practical significance" between applying article 6 and not applying it is"*very small*", because, in the present case, the application of rules of customary international law led to the same result[4]. More precisely, the equidistance principle was found to be"conditional" upon the non-existence of special circumstances[5].

The method chosen by the Arbitral Tribunal seemed, therefore, not to depend on the formal applicability of article 6 of the 1958 Geneva Convention:

> "*the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances*"[6].

The Anglo-French Continental Shelf Case is also important for advancing the concept of"limited effect" of certain features. The Court admitted that certain islands (Ushant and Scilly), of a certain size and populated, cannot

[1] Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, RIAA, VOLUME XVIII pp. 3-413.

[2] *Ibid.* p. 42, para. 61.

[3] *Ibid.* p. 42, para. 62.

[4] *Ibid.* p. 43-44, para. 65.

[5] *Ibid.* p. 45, para. 70.

[6] *Ibid.* p. 56, para. 97.

be disregarded without"refashioning geography"[1] (term employed years later in the *Maritime Delimitation in the Black Sea*, with respect to the Serpents Island[2]). Nevertheless, the Court had to find a method"of remedying in an appropriate measure the distorting effect on the course of the boundary" caused by these features[3]. What is also important is that the method chosen to remedy this effect was not the abandonment of equidistance: the Court relied on the practice of States, represented by"*some modification or variant of the equidistance rather than its total rejection*" and considered that the appropriate method was to give"*less than full effect*" to certain features in applying the equidistance method[4].

A first case involving a higher degree of difficulty in identifying the delimitation method was the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya*)[5] of 1982. Neither of the parties asked for the application of the equidistance. Libya had the strongest position, asking the Court to adjudge that"*the equidistance method is in itself neither a 'rule' nor a 'principle' and is not necessarily 'equitable' since its application under particular circumstances may lead to inequitable results*" and to acknowledge that in the particular case, the application of the equidistance would be "*inequitable, inappropriate, and not in conformity with international law*"[6]. Although Tunisia "previously argued " in favour of the equidistance at least for a portion of the disputed area, it acknowledged that this method would lead to a result which were inequitable to Libya[7]. Nevertheless, in its submissions, Tunisia asked for the concrete application of the bisector method ("*a line parallel to the bisector of the angle formed by the Tuniso-Libyan littoral in the Gulf of Gabes or […] be determined according to the angle of aperture of the coastline of the Tuniso-Libyan frontier*"[8]).

[1] *Ibid.* p. 116, para. 248.

[2] *Maritime Delimitation in the Black Sea*, ICJ Reports, 2009, p. 110, para. 149.

[3] Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, RIAA, VOLUME XVIII. p. 116, para. 248.

[4] *Ibid.* p. 116, para. 249. See also Robert Kolb, *Case Law on Equitable Maritime Delimitation. Digest and Commentaries,* Martinus Nijhoff Publishers, 2003, p. 85

[5] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Reports 1982, p. 18.

[6] *Ibid.* p. 31-33, para. 15.

[7] *Ibid.* p. 79, para. 110.

[8] *Ibid.* p. 27, para. 15.

Court examined a wide range of relevant circumstances[1]. The Court noted the establishment by the parties of a de facto line of "26" east of north, which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas"[2]. Although the parties presented extensive arguments based on geology, the Court did not pay significant attention to these elements, noting that the relevant circumstances „*are not limited to the facts of geography and geomorphology*"[3]. The Court also examined historic rights and economic considerations as part of relevant circumstances and decided that their relevance for the delimitation is limited[4].

The delimitation method used by the Court in the Tunisia/Libya case was based on the bisector/perpendicular on the coastline, „inspired" in the first sector from the *de facto line* established by the parties (the angle of 26" form the meridian) and a the second sector, by a line „parallel to a line drawn from that point bisecting the angle between the line of the Tunisian coast (42") and the line along the seaward coast of the Kerkennah Islands (62"), that is to Say at an angle of 52" to the meridian"[5].

Two elements could be observed in the Tunisia/Libya case: first, the Court took into account the „change of direction" of the Tunisian coast, from a point on the parallel passing through the Gulf of Gabes (the area where the coast changed direction)[6]; second, it appeared in practice that the Kerkannah Islands were given in a way „half effect" in terms of the angle under which they have influenced the delimitation line.

The *Tunisia/Libya Case* was shortly followed by the *Gulf of Maine*[7] ruling of the Camber of the Court, which triggered similar uncertainties related to the choice of the method of delimitation. While Canada argued for a line based on the"equidistance – special circumstance" rule, stemming from article 6 of the 1958 Geneva Convention (in force between the Parties), the United States proposed a line based on the"perpendicular" to the general

[1] For an outline of the relevant circumstances analysed by jurisprudence in the 1980s, see Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances." *International and Comparative Law Quarterly* 40.1 (1991), p. 1–33.

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Reports 1982, p. 71, para. 96.

[3] *Ibid.* p. 64, para. 81.

[4] *Ibid*, p. 76, para. 105 (as the delimitation of continental shelf was not seemingly affecting the historic fishery rights of Tunisia) and p. 77, para. 107.

[5] *Ibid.* p. 89, para. 129.

[6] *Ibid.* p. 88, para. 126.

[7] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 246.

direction of the coast[1]. As the parties asked the Chamber to draw a single maritime boundary separating not only the continental shelf, but also the superjacent waters[2], the Chamber decided that the applicable law was represented"*by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result*"[3]. The Chamber referred also to the article 6 of the 1958 Geneva Convention, and underlined that the use of the equidistance method"*is, however, subject to the condition that there are no special circumstances in the case which would make that criterion inequitable, by showing such division to be unreasonable and so entailing recourse to a different method or methods or, at the very least, appropriate correction of the effect produced by the application of the first method*."[4]

The Chamber chose its own method of delimitation, notwithstanding the proposals made by the parties. It aimed to achieve"*an equal division of the area of overlapping created by the lateral superimposition of the maritime projections of the coasts of the two States*"[5]. It chose to establish three segments. In the first segment, the Chamber decided that the recourse to the geometric equidistance would imply difficulties linked to the "uncertainty as to sovereignty over the Machias Seal Island"[6] and, therefore, chose another geometric method, namely the bisector, described as follows:

> "*one may justifiably draw from point A two lines respectively perpendicular to the two basic coastal lines here to be considered, namely the line from Cape Elizabeth to the international boundary terminus and the line from that latter point to Cape Sable. These perpendiculars form, at point A, on one side an acute angle of about 82" and on the other a reflex angle of about 278". It is the bisector of this second angle which the Chamber considers that it should adopt for the course of the first segment of the delimitation line.*"[7]

The second segment was chosen on the basis of a"corrected median line"[8], while the third (and the longest) segment was determined, on the basis

[1] *Ibid.* p. 287-288, para. 77-78.
[2] *Ibid*, p. 301, para. 116.
[3] *Ibid.* p. 300, para. 112.
[4] *Ibid.* p. 300, para. 115.
[5] *Ibid.* p. 331, para. 209.
[6] *Ibid.* p. 332, para. 211.
[7] *Ibid.* p. 333, para. 213.
[8] *Ibid.*, p. 337, para. 223.

of”simplicity”, by drawing of a perpendicular to the closing line of the Gulf[1].

Both the *Tunisia/Libya* and the *Gulf of Maine* cases prove the rather „confuse” situation that the customary international law proscribing the”equitable principles” offered. The ICJ (and its Chamber) insisted on”equitable principles”, while the predictability as to the identification of a potential solution was reduced. Both cases are relevant for emphasizing a combination of methods: perpendicular/bisector/even adjusted median in the central sector of the *Gulf of Maine* delimitation.

The choice of another method of delimitation was also the option of the Arbitral Tribunal in the *Guinea-Guinea Bissau* dispute[2]. The Tribunal decided not to apply equidistance, because of the “concavity” of the coasts of the relevant States, and because of the possibility of “enclavement”/”cutting-off” of the maritime areas of Guinea (between those of Guinea Bissau and Senegal)[3]. The Tribunal took into consideration the entire context of the geography of the Western African Coast and chose a totally different method: the delimitation was defined following the “southern limit of the 1886 Convention” (by reference to the so-called “Pilots Passage” and to the parallel 10°40'N) to 12 miles west of Alcatraz, and then the Tribunal established an azimuth to the south west, a straight line with a bearing of 236°, *grosso modo* perpendicular to the Almadies-Shilling line”[4].

2.2. The beginning of a return towards a”methodology”

While the *Tunisia/Libya* and the *Gulf of Maine* cases were relevant for outlining certain difficulties stemming from the choice of the method of delimitation, a series of cases that followed it seemed to opt for the application of the equidistance – special circumstances methodology.

A first case of such series was the *Libya/Malta Continental Shelf Case*[5] of 1985, where the Court applied the customary international law (as Libya

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[1] *Ibid.* p.337-338, para. 224.

[2] *Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary*, Award by the Arbitral Tribunal, 14 February 1985, International Law Materials, Vol. XXV, No. 2, Mar. 1986, p. 251-305. See also Kathleen A. McLlarky, Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, February 14, 1985, 11 Maryland Journal of International Law (1987), p. 93-121.

[3] *Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary*, p. 296, para. 107-109.

[4] *Ibid.*, p. 298, para. 111.

[5] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13.

was not a party to the 1958 Convention and the UNCLOS was not yet in force). While applying the"equitable principles", the Court rejected the"rift-zone" argument of Libya[1] and established the"staged approach":

> "*The Court intends to proceed by stages ; thus, it will first make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result*"[2].

The Court applied the median line in order to establish the provisional delimitation[3]. The Court found appropriate, in order to achieve an equitable solution, to shift the delimitation line in order to"lie closer to the coasts of Malta"[4]. Nevertheless, it seems a little unclear why the Court chose a particular method of"shifting" the provisional median line, in order to transpose it"in an exactly northward direction"[5]:

> "*In the light of these circumstances, the Court finds it necessary, in order to ensure the achievement of an equitable solution, that the delimitation line between the areas of continental shelf appertaining respectively to the two Parties, be adjusted so as to lie closer to the coasts of Malta. Within the area with which the Court is concerned, the coasts of the Parties are opposite to each other, and the equidistance line between them lies broadly West to East, so that its adjustment can be satisfactorily and simply achieved by transposing it in an exactly northward direction*"[6].

Despite the "unclear" decision related to the way in which the line was shifted, the Libya/Malta case is important, for setting for the first time the "staged" approach, which was the basis of the delimitation methodology consecrated by the *Maritime Delimitation in the Black Sea*[7].

The approach towards developing a method of equidistance-special circumstances was further ascertained in the *Jan Mayen Case (Denmark/Norway)*[8] of 1993. The case is interesting from the point of view

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[1] *Ibid.* p. 36-37, para. 41.
[2] *Ibid.* p. 46, para. 60.
[3] *Ibid.* p. 47, para. 63.
[4] *Ibid.* p. 51, para. 71.
[5] *Ibid.* p. 51, para. 71.
[6] *Ibid.* p. 51, para. 71.
[7] ICJ Reports, 2009, p. 101-103, para. 115-122.
[8] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, ICJ Reports 1993, p. 38;

of the applicable law: since the Court has rejected the Norwegian argument that a delimitation has already been effected in 1965 through an agreement between the parties[1], the Court found that the delimitation of continental shelf was governed by article 6 of the 1958 Geneva Convention on the Continental Shelf, while the delimitation of the fisheries zones (exclusive economic zones) was governed by customary international law – namely equitable principles/relevant circumstances[2]. The situation might seem similar to the *Gulf of Maine* case, previously presented. However, the Court held that, whether in the *Gulf of Maine* it was precluded to apply article 6 of the 1958 Convention because of the "Parties' agreement to ask for a single maritime boundary"[3]. In our view, the argument for the difference between the two cases may seem rather loose. However, it allowed for a step forward: unifying the application of the two sets of rules – article 6 of the 1958 Convention and customary international law:

> "*If the equidistance-special circumstances rule of the 1958 Convention is […] to be regarded as expressing a general nom based on equitable principles, it must be difficult to find any material difference […] between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles*"[4].

Thus, the Court chose to draw a provisional median line[5] and to examine the "special"/"relevant" circumstances which may call for its adjustment. It has to be mentioned that the Court underlined that "*is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law*"[6]. Examining the particular features of the Jan Mayen Island, the Court held that the disparity of coastal lengths represents a special/relevant circumstances that requires shifting the line towards Jan Mayen[7]. The Court also examined fishing of capelin, presence of ice in the areas to be delimited, as special/relevant circumstances and decided that the final line should be situated between the median line and the 200 miles line off the coasts of Greenland. The method chosen by the Court to define the exact

[1] *Ibid.* p. 52, para. 32.
[2] *Ibid.* p. 57-58, para. 44.
[3] *Ibid.* p. 57, para. 43.
[4] *Ibid.* p. 58, para. 46.
[5] *Ibid.* p. 62, para. 53.
[6] *Ibid.* p. 62, para. 56.
[7] *Ibid.* p. 69, para. 69.

line was the division of the overlapping area in three zones, followed by the equal division of "zone 1" and non-equal division of "zones 2 and 3"[1].

In the following case-law, the Court applied the same approach – drawing first a provisional equidistance line and then examining the special circumstances which might ask for the adjustment of the line in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[2]. Since the disputed area was rather limited, the Court has been asked to delimit both the territorial seas and the exclusive economic zones/continental shelves. While applying formally different rules (equidistance/special circumstances in case of the territorial sea and equitable principles/relevant circumstances in case of the other maritime zones), it is important to quote a paragraph from the judgment emphasizing the fact that the two different rules lead, in fact, to the same approach:

> "*The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated*"[3].

In fact, the Court applied the same approach to both the territorial sea and the exclusive economic zones/continental shelves: drawing a provisional equidistance line and verifying the effect of special circumstances. The Court examined whether special circumstances would require the adjustment of the provisional line, examining aspects related to the pearling industry, claimed by Bahrain[4], as well as the disparity between the lengths of the coasts, claimed by Qatar[5], and came to the conclusion that adjustment is not necessary[6]. The Court also examined the effect of the maritime feature called Fasht al Jarim: it decided not to take it into consideration for the delimitation of the continental shelf and exclusive economic zone, as it, "*if*

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[1] *Ibid.* p. 79-81, para. 91-92; see also Robert Kolb, *op. cit.*, p. 446-475.

[2] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, p. 40; see also Barbara Kwiatkowska, "The Qatar v. Bahrain Maritime Delimitation and Territorial Questions Case", Ocean Development and International Law, vol. 33, issue 3-4, July 2002, p. 227–262.

[3] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001., p. 111, para. 231.

[4] *Ibid.* p. 112-113, para. 235-236.

[5] *Ibid.* p. 114, para. 241-243.

[6] Robert Kolb, *op. cit.*, p. 547-553.

given full effect, would distort the boundary and have disproportionate effects".[1]

The same approach was followed by the Court in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria[2]:* the Court found that the "equitable principles/relevant circumstances method" is very similar to the "equidistance/special circumstances" applicable to the territorial sea and "involves first drawing an equidistance line, the considering whether there are factors calling for the adjustment or shifting of the line in order to achieve an equitable result"[3]. The Court defined the relevant coastlines and the location of the base points used in the construction of the line.

The Cameroon/Nigeria case is also relevant for the argument of concavity, invoked by Cameroon as a special circumstance. The Court decided that, even if "concavity of a coastline may be a circumstance relevant to delimitation", it can only be so "*when the concavity lies in the area to be delimited*". Thus, the "concave" sectors of the Cameroonian coast faced primarily the island of Bioko (belonging to Equatorial Guinea)[4]. The Court also decided that other circumstances like the disparities between coastal length, the presence of the Bioko Island and the practice of oil concessions do not require the adjustment of the equidistance line, which reflects the "equitable result"[5].

Case-law of arbitral tribunals in the 1990s and 2000s also seemed to favour the application of the equidistance/median line method. Thus, following a first difficult award on sovereignty issues[6], the Arbitral Tribunal ruled in the second award within the *Eritrea/Yemen* case[7] that the single maritime boundary would be represented by the median line. Nevertheless, the divergences between the parties referred to the construction of the median line[8]. The *Barbados – Trinidad Tobago Arbitration[1]* also confirmed the two step approach to be followed:

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[1] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, p. 114-115, para. 247.

[2] *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, p. 303.

[3] *Ibid.* p. 441, para. 288.

[4] *Ibid.* p. 445, para. 297.

[5] *Ibid.* p. 448, para. 306.

[6] In the Matter of an Arbitration Pursuant to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 October 1998, RIAA, vol XXII, p. 209-332.

[7] Award of 17 December 1999 RIAA, vol XXII p. 335-410.

[8] *Ibid.* p. 362-364, para. 113-128; Robert Kolb, *op. cit.*, p. 506-525.

> "*The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point […]. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result*"[2].

Nevertheless, in the eastern sector of the delimitation, the Tribunal found that "the disparity of the Parties' coastal lengths resulting in the coastal frontages abutting upon the area of overlapping claims is sufficiently great to justify an adjustment"[3]. The Tribunal rejected the claim of Trinidad Tobago to proceed to an adjustment following a specific azimuth, but, indeed, proceeded to such adjustment. The following paragraph appears relevant on the approach used by the Tribunal to adjust the equidistance line:

> "*There are no magic formulas for making such a determination and it is here that the Tribunal's discretion must be exercised within the limits set out by the applicable law. The Tribunal concludes that the appropriate point of deflection of the equidistance line is located where the provisional equidistance line meets the geodetic line that joins (a) the archipelagic baseline turning point on Little Tobago Island with (b) the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit. This point gives effect to the presence of the coastal frontages of both the islands of Trinidad and of Tobago thus taking into account a circumstance which would otherwise be ignored by an unadjusted equidistance line*"[4].

The Tribunal determined the "turning point" and the "terminal point" (not an azimuth): "*the terminal point is where the delimitation line intersects the Trinidad and Tobago-Venezuela agreed maritime boundary, which as noted establishes the southernmost limit of the area claimed by Trinidad and Tobago*"[5].

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[1] Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, RIAA, vol. XXVII p.147-251.

[2] *Ibid.* p. 214-215, para. 242.

[3] *Ibid.* p. 240, para. 350.

[4] *Ibid.* p. 243, para. 373.

[5] *Ibid.* p. 243, para. 374.

According to the same approach, the Arbitral Tribunal in the *Guyana – Suriname* delimitation case[1] rejected Suriname's claim to apply the angle bisector method[2], as well as the claim of Suriname to avoid the cut-off effect caused by a provisional equidistance[3]. The Tribunal established first the provisional equidistance line and, following the examination of certain alleged special circumstances (geographic features, conduct of parties), found that no adjustment is necessary. It would be useful to quote the assessment of the Tribunal as regards the geographic characteristics (the cut-off effect claimed by Suriname): "*In short, international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature*"[4].

2.3. A point of incertitude – the Nicaragua-Honduras case

Even the above mentioned case-law developments encouraged the gradual establishment of a "method" that would somehow "unify" the "rules" relating to equidistance/special circumstances and equitable principles/relevant circumstances, the *Nicaragua-Honduras* case[5] of 2007 threw again a degree of incertitude as to the method to be used, as the International Court of Justice chose to apply the bisector method. The Court stated clearly that:

> "*The jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate*"[6].

Nevertheless, in this particular case there existed justified reasons not to apply the equidistance/special circumstances „method". First, neither of the

[1] Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA, vol. XXX p.1-144.

[2] *Ibid.* p. 57-58, para. 221.

[3] *Ibid.* p. 70, para. 259.

[4] *Ibid.* p. 104, para. 374.

[5] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659.

[6] *Ibid.* p. 741, para. 272. See also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case", under publication in Analele Universității București, 2018.

parties put forward as the main argument the drawing of a provisional equidistance line as the starting point of the delimitation[1]. Nicaragua asked for "the bisector of two lines representing the entire coastal front of both states", which would be determined by an azimuth[2], while Honduras put forward the argument of a tacit agreement to use the 15th parallel as the boundary (however, Honduras referred also to the bisector as producing equitable results and mentioned that the 15th parallel would also represent an adjusted and simplified equidistance line)[3]. Moreover, Nicaragua argued that the "instability of the mouth of the River Coco, combined with the very small and uncertain nature of the offshore islands and cays", would make fixing points and constructing equidistance "unduly problematic"[4]. On its term, Honduras was in agreement that "the mouth of the River Coco "shifts considerably, even from year to year", making it "necessary to adopt a technique so that the maritime boundary need not change as the mouth of the river changes"[5].

The Court itself found that:

> "*Given the set of circumstances in the current case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts*".[6]

What is also important to underline is that in the *Nicaragua – Honduras* case the Court declined to use equidistance both for the territorial sea, and for the exclusive economic zone and continental shelf. UNCLOS was in force between the parties and article 15 provided expressly for equidistance/special circumstances in case of the territorial sea, while articles 74 and 83 referred to the equitable result, in case of the exclusive economic zone and continental shelf. The Court referred expressly to the "exception" provided by the existence of special circumstances, envisaged by article 15[7].

Under these circumstances, the Court determined the relevant coastal fronts and chose the bisector line at an azimuth of 70°14′41.25″[8]. Subsequently,

[1] *Ibid.* p. 742, para. 275.
[2] *Ibid.* p 741, para. 273.
[3] *Ibid.* p. 742, para. 274.
[4] *Ibid.* p. 741, para. 273.
[5] *Ibid.* p. 742, para. 274.
[6] *Ibid.* p. 743, para. 280.
[7] *Ibid.* p. 745, para. 281.
[8] *Ibid.* p. 749, para. 287-289.

the bisector line was adjusted only to provide 12 miles territorial sea to certain islands that the judgment has attributed to the parties[1].

The *Nicaragua – Honduras* case provided some uncertainty to the future perspectives of judicial delimitation, to the extent that the judgment would be read at a glance. In fact, both the parties and the Court found that the particular circumstances of the case made the construction of a provisional equidistance line unfeasible. The Court also referred to the previous *Gulf of Maine* case and pointed out that in that particular case it was impossible to construct an provisional equidistance line because by Special Agreement the parties asked that delimitation would start in a specific point[2]. Although, indeed, the reasons for the Court not to apply the provisional equidistance are grounded, the case could not be ignored as creating a certain degree of uncertainty with regard to future perspectives of applying the method "equidistance/special circumstances"[3].

3. The Black Sea Case – a turning point? Evolution of case-law beyond 2009

3.1. The importance of the *Maritime Delimitation in the Black Sea*

It is not the purpose of this study to make an in-depth analysis of the *Maritime Delimitation in the Black Sea* case, but we consider important to underline three main features for which it may be considered a turning point in the law related to the delimitation of maritime areas. As it has been presented, the case-law before the Black Sea case provided for a certain degree of incertitude with respect to the predictability of the methodology to use in a delimitation case.

First, as Alain Pellet underlined in a commentary to the Black Sea case, the judgment "reestablished the order and the method, where the 1969 case set the disorder" ("*Il rétablit de l'ordre et de la méthode là où l'arrêt de 1969 avait engendré le désordre"*)[4]. It is not the law that is established (or "re-established") by the Romania – Ukraine decision, but a firm methodology to apply the law: the equidistance – special circumstances method. It could be questioned whether, following the Black Sea case, "equidistance-special circumstances" becomes "law" (as Alain Pellet puts it, the case is

[1] *Ibid.* p. 752, para. 304-305.

[2] *Ibid.* p. 743, para. 279.

[3] Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the Nicaragua/Honduras Case", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 68 (2008), p. 903-937, 933-934.

[4] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 39.

"refounding firmly the law that has been abandoned in 1969"[1]) or "method do apply the law" (the law itself being articles 74 and 83 of UNCLOS).

In our view, it could be argued the International Court of Justice made through the Romania-Ukraine case a firm "*infra legem*" establishment that the "equidistance-special circumstances" method is the way in which articles 74 and 83 of UNCLOS will be applied. It could be considered as a matter of judicial interpretation of these rather vague articles, but, in any case, what is important is that it offers predictability. In the end, it does not matter whether "equidistance – special circumstances" represents "law"[2] or "judicial interpretation of the law" or "method to apply law": what it matters is the firmness of the future perspective that the Court (or any international court) will apply it in a delimitation case.

Secondly, in a "pedagogical manner"[3], the Court described the way in which it shall apply the "equidistance – special circumstances method". The Court presented in detail the three stages that it shall use: i) the drawing of a provisional equidistance/median line, ii) the examination of possible factors or circumstances that may lead to the adjustment or shifting of the equidistance line, in order to achieve an equitable result and iii) applying the proportionality test in order to verify the equitable character of the result[4]. The Court also provided clarification as to the overall method that includes: the determination of the relevant coasts[5], relevant maritime areas[6], and selection of base points[7].

In this sense, it has to be emphasized that even the parties presented extensive arguments related to the application of article 121 para (3) or (1) of UNCLOS to the Serpents' Island, the Court did not provide an interpretation to article 121. Nevertheless, the Serpents' Island was counted

[1] *Ibid.*

[2] See, for example, Malcolm D. Evans, "The Law of the Sea", in Malcolm D. Evans (ed.), *International Law,* Oxford University Press, 2006, p. 623-657, p. 648: "for all practical purposes accepted what it rejected in the North Sea cases, that the equidistance/special circumstances approach reflects customary international law"; Ion Galea, , "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[3] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 38.

[4] *Maritime Delimitation in the Black Sea, (Romania v. Ukraine),* ICJ Reports, 2009, p. 101-103, para. 115-122.

[5] *Ibid.* para. 77-105.

[6] *Ibid.* para. 106-114.

[7] *Ibid.* para. 123-149.

neither as relevant coast[1], nor as a base point[2], nor as a special circumstance[3]. In the words of the Court,

> "*To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorize*"[4].

Thirdly, the case is important for the way in which the Court analyzed the special circumstances (labelled "relevant circumstances" in the decision). Even if Alain Pellet criticizes the decision for "mixing" the second and third stages of the methodology[5] (as the disproportion between the coasts was treated both in the second stage – relevant circumstances and in the third – test of proportionality), we appreciate that what it is important from this case is the fact that the Court found that none of circumstances which have been examined required for the adjustment of the equidistance line: disproportion between lengths of coasts, the enclosed nature of the Black Sea and existing delimitations in the region, the presence of Serpents' Island, the conduct of the parties (oil and gas concessions, fishing activities and naval patrols, any cutting-off effect and security considerations of the parties[6].

In the perspective of future delimitation cases, a special importance seems to be enjoyed by the "cutting-off effect", invoked by many States in different instances. Thus, it would be useful to point out the Court's considerations on this issue – because the paragraph below tends to accept the idea that "cutting-off" may have existed in case of the lines initially proposed by the parties, but not in the case of the line drawn by the Court:

> "*The Court observes that the delimitation lines proposed by the Parties, in particular their first segments, each significantly curtail the entitlement of the other Party to the continental shelf and the exclusive economic zone. The Romanian line obstructs the entitlement of Ukraine generated by its coast adjacent to that of*

[1] *Ibid.* p. 97-98, para. 102.

[2] *Ibid.* p. 110, para. 149.

[3] *Ibid.* p. 122-123, para. 187; see also see also Coalter G. Lathrop, "Maritime Delimitation in the Black Sea (Romania v. Ukraine)", American Journal of International Law, Vol. 103, 2009, p. 543-549, 547.

[4] *Ibid.*, p. 110, para. 149.

[5] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 39-40.

[6] *Maritime Delimitation in the Black Sea, (Romania v. Ukraine),* ICJ Reports, 2009, para. 158-204.

Romania, the entitlement further strengthened by the northern coast of Ukraine. At the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular its first sector between the Sulina dyke and the Sacalin Peninsula. By contrast, the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on this ground"[1].

There is no need to underline once more the tremendous importance the *Maritime Delimitation in the Black Sea* had for Romania: almost 80% of the disputed area, representing 9700 km^2 of the disputed 12.200 km^2, together with the advantage of extracting a very sensitive issue of the bilateral agenda and allowing for the Romanian – Ukrainian relations to fully develop[2]. What we would like to underline is the importance of the case for future developments in the law on maritime delimitations: first, because it anchored the "equidistance/special circumstances" method into legal certainty and, second, because it conferred a certain tendency or predictability in the sense that the provisional equidistance line seemed to appear as "invulnerable" as possible to the challenge for adjustment following the examination of special circumstances (the provisional equidistance line, which coincides with the final line of the Court, is depicted in annex I).

3.2. Confirmation of the choice of the method by subsequent case-law

Subsequent case-law witnessed cases where rarely the parties were in agreement as to the method to be used for delimitation.

A first "challenge" was represented by the case before the International Tribunal for the Law of the Sea between Myanmar and Bangladesh[3]. The position of Bangladesh (which was constantly upheld in the subsequent case

[1] *Ibid.*, p. 127, para. 201.

[2] Bogdan Aurescu, *Avanscena și culisele procesului de la Haga. Memoriile unui tanar diplomat.* Ed. Monitorul Oficial, 2009, p. 210-256; Adrian Năstase, Bogdan Aurescu, *Drept international. Sinteze.* Ed. a IX-a, Ed. CH Beck, 2018, p. 232; James Crawford, Vaughan Lowe, Alain Pellet, Daniel Muller, Simon Olleson, "A brief evaluation of the International Court of Justice decision of 3 February 2009 in the case concerning Maritime Delimitation in the Black Sea*",* Romanian Journal of International Law, no. 8 (January – June 2009), p. 97-110.

[3] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4.

against India of 2014) was that the method equidistance – special circumstances produced an inequitable result, because of the concave coasts of the northern Bay of Bengal ("double concavity") and because of the cut-off effect it produces[1]. Thus, Bangladesh argued that the method to be applied should be "the angle-bisector method in delimiting the maritime boundary between Bangladesh and Myanmar in the exclusive economic zone and on the continental shelf", "specifically the 215° azimuth line"[2]. Myanmar, on its turn, argued that the law has evolved since the adoption of the 1982 Convention on the law of the Sea and invoked the *Black Sea* case, in order to argue that the Tribunal should "apply the now well-established method for drawing an all-purpose line for the delimitation of the maritime boundary between the Parties"[3].

The Tribunal observed that jurisprudence evolved and noted that "*over time, the absence of a settled method of delimitation prompted increased interest in enhancing the objectivity and predictability of the process*"[4]. The Tribunal expressly referred to the *Black Sea* case, observing that on this occasion "*the ICJ built on the evolution of the jurisprudence on maritime delimitation. In that case, the ICJ gave a description of the three-stage methodology which it applied* [and the Tribunal proceeded to describe the three stage steps"[5]. Finally, the Tribunal decided that

> *"[…] jurisprudence has developed in favour of the equidistance/relevant circumstances method. This is the method adopted by international courts and tribunals in the majority of the delimitation cases that have come before them.*
>
> *The Tribunal finds that in the present case the appropriate method to be applied for delimiting the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is the equidistance/relevant circumstances method*"[6].

The *Myanmar – Bangladesh* case was important because it involved a geographical context characterized by concavity (even "double concavity"), not very different from the 1969 *North Sea* case. Nevertheless, the Tribunal recognized that "jurisprudence has evolved" and relied its decision on the method described in the *Black Sea* case. Nevertheless, the *Myanmar – Bangladesh* case brought a degree of uncertainty as to the "way in which"

[1] *Ibid.* p. 61-62, para. 210-213, 216.
[2] *Ibid.* p. 62, para. 215, 217.
[3] *Ibid.* p. 64, para. 222.
[4] *Ibid.* p. 65, para. 228.
[5] *Ibid.* p. 66, para. 233.
[6] *Ibid.* p. 67, para. 238-239.

the method should be applied (as it will be shown below), because the Tribunal adjusted the equidistance line exactly towards the azimuth of 215°[1] (which was the bisector line requested by Bangladesh).

In the *Nicaragua – Colombia* dispute[2], adjudged by the Court in 2012, the Court had to achieve the delimitation between the Nicaraguan mainland coast and the Colombian islands of San Andrés, Providencia and Santa Catalina[3]. The parties had different views: while Colombia supported the method to draw a provisional equidistance line that could subsequently be adjusted in order to produce an equitable result, Nicaragua relied on the 2007 judgment in the *Nicaragua - Honduras* case in order to argue that "here may be factors which make it inappropriate to use the methodology of constructing a provisional equidistance/median line and then determining whether there are circumstances requiring its adjustment or shifting"[4]. Nicaragua argued that the use of the equidistance/special circumstances method would be "wholly artificial" because it would "treat the islands as though they were an opposing mainland coast"[5] and suggested that the Court should just "enclave" the Colombian islands[6]. The Court was very clear in pointing out that the methodology it will use would be the three stages approach described in the *Black Sea* case: *"[…] has made clear on a number of occasions that the methodology which it will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages*" [7] and proceeded to explain in the same "pedagogic" manner these three stages[8]. The Court rejected the use of another method and held that the

[1] *Ibid.* p. 89, para. 334; see also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment,* ICJ Reports 2012, p. 624.

[3] On the role of islands in delimitation, see John Briscole, Peter Prows, "Role of Islands in the Generation of Boundaries at Sea", in Clive H. Schofield, Seokwoo Lee, Moon-Sang Kwon (ed.), *The Limits of Maritime Jurisdiction,* Brill, 2014, p. 79-111; for the role of islands in previous delimitations in the Carribean Sea, see Chris Carleton, "Maritime Delimitation in Complex Island Situations: A Case Study on the Caribbean Sea", in Rainer Lagoni, Daniel Vignes (ed.), *Maritime Delimitation,* Martinus Nijhoff Publishers, 2006, p. 153-188.

[4] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment,* ICJ. Reports 2012, p. 694, para. 185.

[5] *Ibid,* p. 693, para. 185.

[6] *Ibid.* p. 694, para. 186.

[7] *Ibid.* p. 695, para. 190.

[8] *Ibid.* p. 695-697, para. 191-194.

elements invoked by Nicaragua might represent special circumstances, to be analyzed in the second or third stages of the delimitation:

> "*The Court recognizes that the existence of overlapping potential entitlements to the east of the principal Colombian islands, and thus behind the base points on the Colombian side from which the provisional equidistance/median line is to be constructed, may be a relevant circumstance requiring adjustment or shifting of the provisional median line. The same is true of the considerable disparity of coastal lengths. These are factors which have to be considered in the second stage of the delimitation process; they do not justify discarding the entire methodology and substituting an approach in which the starting-point is the construction of enclaves for each island, rather than the construction of a provisional median line*"[1].

The *Peru – Chile* delimitation[2] represented a particular case, because the Court found that an agreed delimitation on the geographical parallel exists within the limit of 80 nautical miles[3]. Nevertheless, beyond this limit, the Court applied the same three-stage methodology, quoting the previous *Black Sea* and *Nicaragua – Colombia* cases[4].

The *India – Bangladesh* dispute[5] could be seen also as a "challenge" to the equidistance – special circumstances method, as it took place in the same geographic context characterized by concavity of the coasts in the Bay of Bengal.

On one hand, Bangladesh kept the same position as in the case against Myanmar and relied on the *Nicaragua – Colombia* and *Myanmar – Bangladesh* decision, to argue that "while both decisions nominally adopted the three-stage equidistance/relevant circumstances method, the ultimate delimitations departed significantly from equidistance". Moreover, Bangladesh argued that the ITLOS applied, in fact, in the 2012 decision

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[1] *Ibid.* p. 697, para. 197; nevertheless, whether the *Black Sea case* was voted unanimously, in the *Nicaragua – Colombia* case, for example, Judge Ronny Abraham considered in his separate opinion that the drawing of a provisional equidistance line "is not only highly inappropriate in this case, but that it is even virtually impossible" – *Separate opinion of Judge Abraham*, ICJ Reports, 2012, p. 736, para. 24; see also Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 38.

[2] *Maritime Dispute (Peru v. Chile)*, Judgment, ICJ Reports 2014, p. 3.

[3] *Ibid.* p. 57, para. 149.

[4] *Ibid.* p. 65, para. 180.

[5] In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014, Registry PCA.

against Myanmar, the angle bisector line, "albeit without so stating", because the 215° azimuth was finally chosen to adjust the provisional equidistance line and it coincided with the bisector proposed by Bangladesh[1]. As it can be noted, Bangladesh "speculated" the difficulties or uncertainties related to the concrete application of the equidistance-special circumstances method and requested the Court to apply the angle-bisector line, relying on the *Nicaragua – Honduras* case[2].

On the other hand, India argued that international jurisprudence has developed in favour of equidistance[3] and that "the leading authority for the modern law on maritime delimitation is the Black Sea judgment"[4].

The Tribunal noted the divergent views of the parties and we find important that it made certain considerations on the evolution of case-law:

> "Since articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method—if the States concerned cannot agree—is left to be determined through the mechanisms for the peaceful settlement of disputes. In addressing this question, international courts and tribunals are guided by a paramount objective, namely, that the method chosen be designed so as to lead to an equitable result and that, at the end of the process, an equitable result be achieved. [..] *This Tribunal wishes to add that transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process. The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an acquis judiciaire, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention*" (emphasis added)[5].

Based on the examination of the case-law, the Tribunal held that "*equidistance/relevant circumstances method is preferable unless, as the International Court of Justice stated in Nicaragua v. Honduras, there are "factors which make the application of the equidistance method*

[1] *Ibid.* p. 91-92, para. 316.
[2] *Ibid.* p. 93, para. 323.
[3] *Ibid.* p. 92, para. 319.
[4] *Ibid.* p. 96, para. 330.
[5] *Ibid.* p. 98, para. 339.

inappropriate" […] This is not the case here. Bangladesh was able to identify base points on its coast, as well as on the coast of India"[1].

A case in which the Chamber of the International Tribunal for the Law of the Sea applied strictly the equidistance – relevant circumstances method was the delimitation between *Ghana and Cote d'Ivoire* of 2017[2]. Again, the views of the parties as to the method to be used differed: Cote d'Ivoire supported the angle-bisector method, as the "most appropriate" in the present case, because it would take into account the "macro-geographical area"[3], while Ghana argued firmly that equidistance is the "now standard method" and explained that the geographical context of the coastlines of the two States offered "a textbook case for the maritime boundary between the two States to follow an equidistance line"[4].

The Special Chamber of the Tribunal rejected the argument of Cote d'Ivoire, which contended that "unlike the equidistance/relevant circumstances methodology – the angle bisector methodology is free from subjective factors"[5]. At the same time, the argument based on the "macro-geographical context" was rejected, as the Chamber considered that the delimitation "has to be equitable in result for the two Parties concerned", not involving the rights and interests of third States[6]. Therefore, the Special Chamber found that:

> "*the international jurisprudence concerning the delimitation of maritime spaces in principle favours the equidistance/relevant circumstances methodology. It further finds that the international decisions which adopted the angle bisector methodology were due to particular circumstances in each of the cases concerned. This international jurisprudence confirms that, in the absence of any compelling reasons that make it impossible or inappropriate to draw*

[1] *Ibid.* p. 99-100, p. 945-946; see also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[2] ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, accessed 20 December 2018 – not published yet in the ITLOS Reports); see aslo Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[3] *Ibid.* p. 80, para. 272.

[4] *Ibid.* p. 79, para. 265-266.

[5] *Ibid.* p. 83, para. 282.

[6] *Ibid.* p. 83, para. 283.

a provisional equidistance line, the equidistance/relevant circumstances methodology should be chosen for maritime delimitation."[1]

The latest case of maritime delimitation – a "double" dispute between *Nicaragua and Costa Rica*, both in the Caribbean Sea and in the Pacific Ocean (judgment of 2 February 2018)[2], did not raise difficult problems with respect to the choice of methodology: the Court used in both areas the three-stages method described in the *Black Sea* case[3]. The case is, indeed, relevant for the next sub-section of the study, involving the way in which he method was applied, respectively the way in which the provisional equidistance line was adjusted in order to respond to certain special circumstances.

3.3. The way in which the method was applied: adjustment of the provisional equidistance line

The *Black Sea* case provided, as mentioned above, a general view that the provisional equidistance line would be subject to the minimum degree of influence as a consequence of the special circumstances. However, the Court arrived at this conclusion in the case between Romania and Ukraine upon the basis of a line which did not coincide either with Romania's or with Ukraine's claim: it was the provisional equidistance line drawn by the

[1] *Ibid.* p. 86, para. 289; see also Constantinos Yiallourides, Elizabeth Rose Donnelly, "Part I: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean", EJIL Talk!, 19 October 2017, available at https://www.ejiltalk.org/part-i-analysis-of-dispute-concerning-delimitation-of-the-maritime-boundary-between-ghana-and-cote-divoire-in-the-atlantic-ocean/ (accessed 20 December 2018) and "Part II: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean", EJIL Talk!, 20 October 2017, available at https://www.ejiltalk.org/part-ii-analysis-of-dispute-concerning-delimitation-of-the-maritime-boundary-between-ghana-and-cote-divoire-in-the-atlantic-ocean/ (accessed 20 December 2018). The authors point out that: "the ITLOS Special Chamber evidenced a desire to contribute to the development of consistent delimitation jurisprudence, and confirmed that the 'equidistance/relevant circumstances method' is now standard in a delimitation process – regardless of whether the coasts of claiming States parties are opposite or adjacent to one another. Importantly, it adhered to the three-step methodology identified and employed by the International Court of Justice (ICJ) in *Black Sea"*.

[2] Joined Cases *Maritime Delimitation in the Caribbean Se and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, general List no. 157 and 162, Judgment of 2 February 2018, not reported yet in ICJ Reports, available at http://www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf (consulted 20 December 2018).

[3] *Ibid.*, p. 53, para. 135, p. 75, para. 176.

Court[1]. Therefore, on one hand, it is certain that jurisprudence confirmed that equidistance-special circumstance is the acknowledged method to achieve an equitable result, but, on the other hand, in each case, the method is applied in a fine balanced manner, based on the assumption that „each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable"[2].

Thus, following the *Black Sea* case, in all the cases, except for the *Ghana – Cote d'Ivoire* dispute, the international courts and tribunals proceeded to the adjustment of the equidistance line.

The *Ghana – Cote d'Ivoire* was characterized by the relative simpleness of the geographical context, the coasts of the two parties being rather straight. Nevertheless, Cote d'Ivoire requested the adjustment of the equidistance line, as a consequence of the „cut-off effect" generated by the "concavity" of the coast[3]. The Special Chamber of ITLOS rejected this argument and held that *"the existence of a cut-off effect should be established on an objective basis and [...] the decision as to the existence of a cut-off effect must take into account the relevant area in which competing claims have been made*"[4]. The Chamber explained that, even if a cut-off effect exists, it is "not as pronounced as in, for example, the case of the Bay of Bengal"[5], it comes into being at a great distance from the coast and, if the equidistance line would have been adjusted, this would be "to the detriment of Ghana would in fact cut off the seaward projection of the coast of Ghana"[6]. Annex II depicts the general equidistance line and the geographical context.

Maybe the most difficult case was the *Myanmar – Bangladesh* delimitation, as it occurred next after the *Black Sea* case, but involved a geographical context characterized by the concavity of the coast of Bangladesh, in the

[1] See, for example, *Maritime Delimitation in the Black Sea, (Romania v. Ukraine),* ICJ Reports, 2009, p. 127, para. 201; the Court chose its own line by taking as a relevant point the land end of the Sulina dike, not the sea end, as Romania has asked for.

[2] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean,* para. 153; *ITLOS Case no. 16, Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, ITLOS Reports 2012, p. 86, para. 317.

[3] ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, accessed 20 December 2018 – not published yet in the ITLOS Reports), p. 117-118, para. 411-415.

[4] *Ibid.* p. 120, para. 423.

[5] *Ibid.* p. 120, para. 424.

[6] *Ibid.* p. 120, para. 425; see also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

Bay of Bengal. Bangladesh – after invoking the use of the angle-bisector method and asking for a bisector line to be determined at the 215° azimuth line – presented, as a subsidiary argument, the cut-off effect generated by the concavity of the coast. The Tribunal decided to operate an adjustment:

> *„ [...] there is reason to consider an adjustment of the provisional equidistance line by drawing a geodetic line starting at a particular azimuth. In the view of the Tribunal the direction of any plausible adjustment of the provisional equidistance line would not differ substantially from a geodetic line starting at an azimuth of 215°. A significant shift in the angle of that azimuth would result in cut-off effects on the projections from the coast of one Party or the other*"[1].

One could note that, „as a matter of coincidence", the azimuth chosen by the Tribunal was exactly the angle bisector supported initially by Bangladesh. This led Bangladesh to argue, in the later case against India, that, in fact, the Tribunal applied the angle-bisector method without naming it so[2].

Another important element of the *Myanmar – Bangladesh* judgment is the determination of the point in which the adjustment of the equidistance line should begin. The Tribunal decided that "the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward projection of the Bangladesh coast"[3]. The Tribunal presented the exact coordinates of the point of deflection and motivated its choice as follows:

> "*The Tribunal has selected the point on the provisional equidistance line that is due south of the point on Kutubdia Island at which the direction of the coast of Bangladesh shifts markedly from northwest to west, as indicated by the lines drawn by the Tribunal to identify the relevant coasts of Bangladesh*"[4].

Annex III shows the adjustment of the provisional equidistance line and the point from which the line was deflected.

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[1] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 89, para. 334.

[2] In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014, Registry PCA, p. 91-92, para. 316.

[3] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 88, para. 329; Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[4] *Ibid.* p. 89, para. 331.

It appears that the solution to apply formally the equidistance – special circumstances method and to adjust the provisional line on the basis of the angle-bisector was not only a "compromise" between the arguments of the parties, but also a compromise solution between the judges of the Tribunal – and, therefore, it allowed for a "shallow" motivation. As judge Wolfrum pointed out, "*there is very little reasoning explaining why the adjusted line must be deflected at point B1 and none at all why the line should follow an azimuth of 215.[…] I have no reason to doubt that this line constitutes an equitable result, but other lines may equally have done so. However, the way in which the Tribunal reaches this conclusion again lacks transparency*"[1]. At the same time, Judge Gao explained that he has voted in favour of "*the the 215° angle-bisector line, rather than the so-called equidistance line generated by the equidistance/relevance circumstances method*"[2].

The case between *India and Bangladesh* was characterized by a similar geographical context – concavity of the coast of Bangladesh. While India argued for no adjustment of the provisional equidistance line, Bangladesh asked that the line would be adjusted as a result of the concavity. The Arbitral Tribunal decided to adjust the provisional equidistance line and pointed out that two conditions must be met in order for a cut-off effect to generate adjustment: first, the provisional equidistance must "prevent a coastal State from extending its maritime boundary as far seaward as international law permits" and, second, the solution would fall short of the "equitable" criterion, this evaluation requiring "an assessment of where the disadvantage of the cut-off materializes and of its seriousness"[3].

Contrary to the *Myanmar – Bangladesh* case, the Arbitral Tribunal did not adjust the provisional equidistance as to the "angle bisector line" required by Bangladesh (Bangladesh argued for an azimuth of 180° (based on angle bisector), while the Tribunal decided to adjust the line to the azimuth of 177° 30′ 00″[4]. The adjustment of the provisional equidistance line is depicted in annex IV.

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[1] Declaration of Judge Wolfrum, p. 140.

[2] Separate opinion of Judge GAO, p. 229, para. 100; see also Ravi A. Balaram, "Case Study: The Myanmar and Bangladesh Maritime Boundary Dispute in the Bay of Bengal and Its Implications for South China Sea Claims", Journal of Current Southeast Asian Affairs, vol. 31, issue 3 (2012), p. 85-104, 96.

[3] *In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India*, award of 7 July 2014, Registry PCA, p. 122, para. 417.

[4] *Ibid.* p. 147, para. 478.

Nevertheless, the choice of the Tribunal is even "less transparent" or "less motivated" than the *Myanmar – Bangladesh* case: the Tribunal did not motivate why it chose this azimuth and why it chose a particular deflection point. It pointed out only that "the adjusted delimitation line does not unreasonably limit the entitlement of India" and "adjusted delimitation line avoids turning points and is thus simpler to implement and administer by the Parties"[1].

The International Court of Justice seemed to have a rather different approach to the adjustment of the provisional equidistance line, although the geographical circumstances in each case were, indeed, different. Thus, in the *Nicaragua – Colombia* case, the Court was confronted with a median line generated, on one side, by the Nicaraguan mainland and islands close to the coast, and, on the other side, by the Colombian islands of Providencia/Santa Catalina, San Andres and Alburquerque Cays. The Court chose a complex method of simplifying the line, but, essentially, it departed from the assumption that the line was achieved by "*giving a weighting of one to each of the Colombian base points and a weighting of three to each of the Nicaraguan base points. That is done by constructing a line each point on which is three times as far from the controlling base point on the Nicaraguan islands as it is from the controlling base point on the Colombian islands*"[2]. The line was further simplified by the Court, in order to avoid a large number of turning points and to give sufficient effect to the projection of the Nicaraguan coast, which was "more than eight times the length of Colombia's relevant coast"[3]. Annex V depicts the way in which the line was drawn.

In the most recent case, of the *Nicaragua – Costa Rica* "double" delimitation in the Caribbean Sea and the Pacific Ocean, requests for adjustment of the provisional equidistance line were made by both parties. As in other cases, arguments based on "concavity" and the "cut-off effect" played an important role.

In case of the Caribbean Sea, Nicaragua asked the adjustment of the provisional line, as a result of the cut-off effect caused by "the convex and

[1] *Ibid.* p. 147, para. 479-480.

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 709-710, para. 234.

[3] *Ibid.* p. 710, para. 235.

north-facing nature of Costa Rica's coastline" [1]. Costa Rica asked at the same time that the provisional line should be adjusted in its favour, due to the "three-State-concavity situation". Thus, Costa Rica argued that "the combination of convexity and concavity can only be relevant when a State occupies a central position between two States along a convex or concave coast"[2]. At the same time, Costa Rica argued that, should the Court adopt base-points on the Corn Islands, the provisional equidistance line should be adjusted as to give no effect to these Islands, having in mind "their location at a distance from the mainland coast"[3] (the Court held that the Corn Islands should be taken as relevant coast and base-points, as they "amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf")[4]..

The Court, indeed, decided that, in the case of the Corn Islands, "given their limited size and significant distance from the mainland coast, it is appropriate to give them only half effect"[5]. Thus, the Court adjusted the provisional equidistance line in favour of Costa Rica, by constructing two lines (one with full effect to the Corn Islands, one with no effect, and identifying a simplified median line between them. The Court rejected the arguments based on cut-off and concavity, arguing that the cut-off effect is, in cases claimed by both parties, "not significant/not sufficiently significant, especially at a distance from the coast"[6].

In the Pacific Ocean, again, the cut-off effect generated by certain features was the debated element: Nicaragua argued that placing base points on the Santa Elena Peninsula and on the Nicoya Peninsula generates a shift to the north of the provisional equidistance line, thus cutting-off its coastal projection. Nicaragua characterized the cut-off effect as "marked and unjustified"[7]. Costa Rica argued that no adjustment is needed.

The Court analyzed separately the two features: the Santa Elena Peninsula and the Nicoya Peninsula. As to the Santa Elena Peninsula, it found that it

[1] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean*, p. 58, para. 148; for this case, see Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.,* sections III and IV.

[2] *Ibid.* p. 58, para. 149.

[3] *Ibid.* p. 59, para. 151.

[4] *Ibid.* p. 54, para. 140.

[5] *Ibid.* p. 59, para. 154.

[6] *Ibid.* p. 60, para. 155, 156; Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*, section IV.

[7] *Ibid.* p. 85, para. 191.

"control[s] the course of the provisional equidistance line from the 12-nautical-mile limit of the territorial sea up to a point located approximately 120 nautical miles from the coasts of the Parties. The Court considers that such base points have a disproportionate effect on the direction of the provisional equidistance line"[1]. Therefore, the Court decided to adjust the line, by giving half effect to the Santa Elena Peninsula. At the same time, the Court found that no adjustment is needed in case of the Nicoya Peninsula, which is "a feature with large landmass, corresponding to approximately one seventh of Costa Rica's territory, and with a large population" and a "a prominent part of Costa Rica's mainland"[2].

The overall solution in the *Nicaragua – Costa Rica* delimitation seems balanced, in order to achieve an equitable result: the provisional line was adjusted in favour of Costa Rica in the Caribbean Sea and in favour of Nicaragua in the Pacific. In both cases, the Court did not adhere fully to the arguments of the party requesting adjustment (as Costa Rica claimed no effect for the Corn Islands in the Caribbean Sea, while Nicaragua criticized the cut-off effect generated by two peninsulas). One could note, in the same time, that the technique developed by the ICJ in the two cases: *Nicaragua – Colombia* and *Nicaragua –Costa Rica* appears to be, in our opinion, somehow more predictable: the Court chose to give half effect or one third effect to certain features (islands or peninsulas). The way in which the lines were adjusted, in the Caribbean Sea and the Pacific Ocean, is depicted in annex VI.

4. Conclusion

The law related to maritime delimitations evolved a lot. As pointed out by the Arbitral Tribunal in the *India - Bangladesh* case, the case-law represents *"an acquis judiciaire, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice"*[3]. Certainly, case-law brought more predictability to the delimitation process. Parties to a case before an international Court could anticipate, within a certain margin, the way in which the delimitation will be effected. Following the above (rather lengthy) examination of the relevant case-law, we think that two elements of conclusion could be drawn.

[1] *Ibid.* p. 85-86, para. 193.

[2] *Ibid.* p. 86-87, para. 195-196; Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.,* section IV.

[3] *Supra, Section II.2.*

First, we wish to emphasize that, as results from the tendencies in the jurisprudence, the *Maritime Delimitation in the Black Sea* has been a turning point, in the sense that, following this case, as a matter of "acquis judiciaire", articles 74 and 83 of UNCLOS are to be applied by using the method "equidistance – special circumstances", except for "compelling reasons", which could be rather exceptional, such as instability of the coastline that triggers impossibility to select base points. This conclusion is also emphasized by the Joint Declaration of the three Judges – Nelson, Chandrasehkhara Rao and Cot, in the *Myanmar – Bangladesh* case:

> "Priority is given today to the equidistance/relevant circumstances method. Resort to equidistance as a first step leads to a delimitation that is simple and precise. However, complicated the coastline involved is, there is always one and only one equidistance line, whose construction results from geometry and can be produced through graphic and analytical methods. […] *As the International Court of Justice stated authoritatively in the Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment*, it is only if there are compelling reasons that make this unfeasible on objective geographical or geophysical grounds, such as the instability of the coastline, that one should contemplate another method of delimitation, for instance the angle bisector method"[1]. (Emphasis added)

Thus, if after the 1969 *North Sea* judgment, the applicable law, contained in the formula "equitable principles", did not throw much light as to how the equitable result would be achieved, the case-law that developed following the *Black Sea* case brings an important degree of detail and predictability: parties could certainly expect that any international court or tribunal would use the three stages approach of the equidistance/special circumstances method, as a matter of legal certainty (except for "compelling reasons"). All the cases following *Romania v Ukraine* applied this method, notwithstanding the complexity of the geographical context. In our view, it is not about "modifying" the law prescribed by articles 74 and 83 of UNCLOS, but of bringing legal details as to the interpretation and application of this law, by means of "aquis judiciaire". Thus, not even that the current situation could be seen as a return to the legal consecration of the "equidistance/special circumstance" in article 6 of the Geneva Convention

[1] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Joint Declaration of Judges Nelson, Chandrasehkhara, Rao and Cot, p. 134.

of 1958, but the current jurisprudence – based law offers even more predictability.

Second, if the case-law brought a high degree of certainty as to the question *whether* the "equidistance/special circumstances method" will be applied, the same case-law threw a shadow of uncertainty as to *how* it will be applied. It was noted that the special circumstances that generated the highest degree of uncertainty were concavity and the"cut-off effect" generated by it.

Just after the *Maritime Delimitation in the Black Sea*, the *Myanmar – Bangladesh* case brought an important degree of uncertainty, because even if it rejected the argument of Bangladesh for the use of the angle-bisector method, in fact the Tribunal adjusted the equidistance line towards the same azimuth as the angle-bisector requested by Bangladesh, without providing extensive reasoning. At the same time, the reasoning for choosing the point of deflection of the provisional equidistance line was rather scarce. This rather „untransparent" approach was somehow continued in the *India – Bangladesh* delimitation (as the Arbitral Tribunal did not provide extensive reasons for choosing the azimuth of the adjusted line and the point of deflection). These two cases threw a light of concern as to the predictability of future delimitations, even if it cannot be contested that the decision rendered were equitable.

The International Court of Justice chose other method for adjustment of the equidistance line, which, in our view, seems more objective and predictable: it granted limited effect (half effect or one third effect) to certain features and built a "weighted line" or "half effect line". In any case, such a way to construct an equidistance line is more objectively determined than choosing an azimuth (without providing an objective reason for it).

In the end, the way in which the"equidistance – special circumstances" should be applied in practice remains unclear, even if „each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable"[1] .

The unclear situation of the way in which the "equidistance/special circumstances method" is to be applied was summarized very eloquently by Judge Cot in his separate opinion in the *Myanmar – Bangladesh* case:

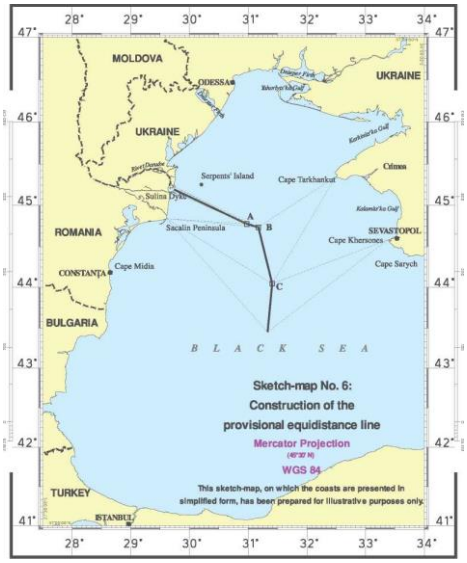
> "*In other words, confusion reigns. The re-introduction of the azimuth method deriving from the angle-bisector theory results in mixing*

[1] *ITLOS Case no. 16, Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, ITLOS Reports 2012, p. 86, para. 317.

disparate concepts and reinforces the elements of subjectivity and unpredictability that the equidistance/relevant circumstances method is aimed at reducing"[1].

Annex I

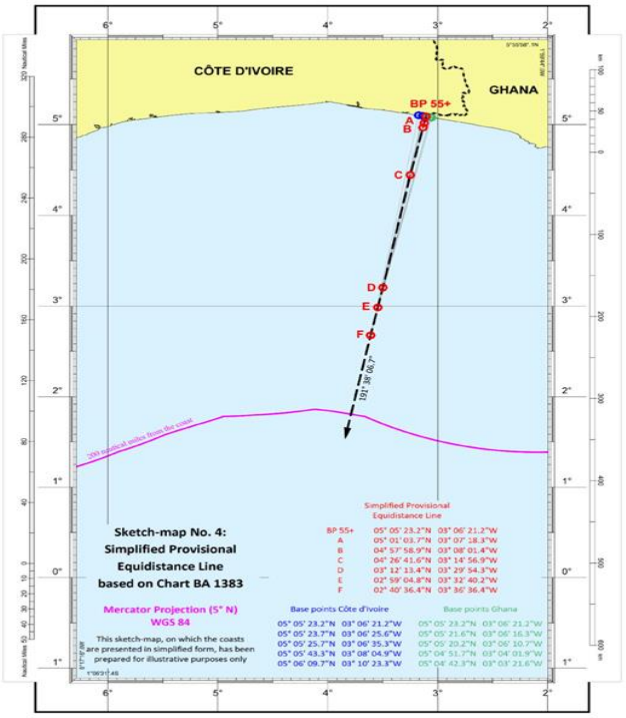
Provisional equidistance line and final line in the *Maritime Delimitation in the Black Case* (source: ICJ Reports, 2012, p. 114, 133)



[1] *Ibid.*, p. 190.

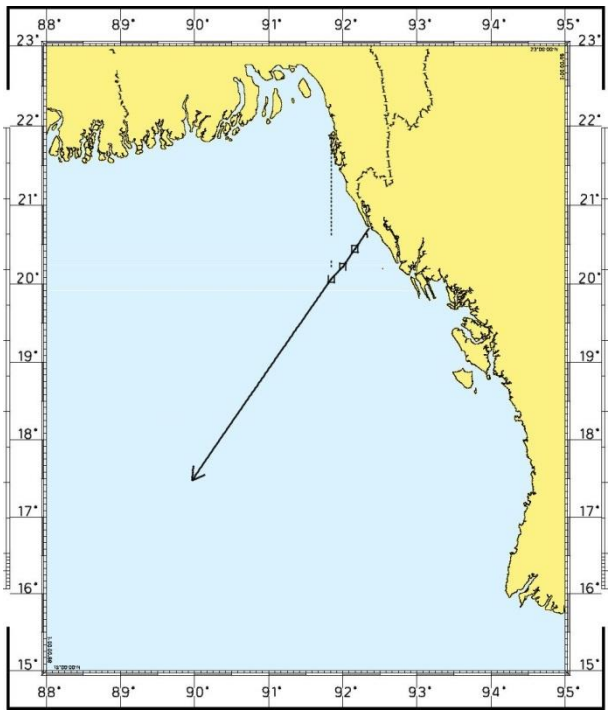
Annex II

Equidistance line in the Ghana – Cote d'Ivoire case (source: ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)*, p. 114)



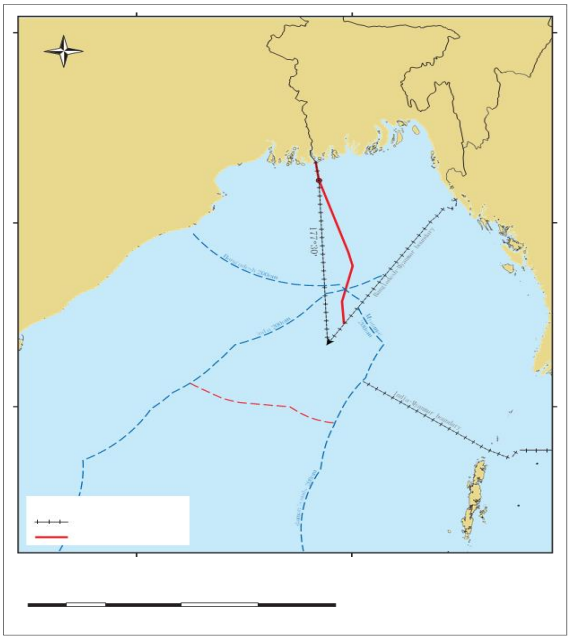
Annex III

Adjustment of the provisional equidistance line in the Myanmar – Bangladesh dispute (source: ITLOS Reports, 2012, p. 91).



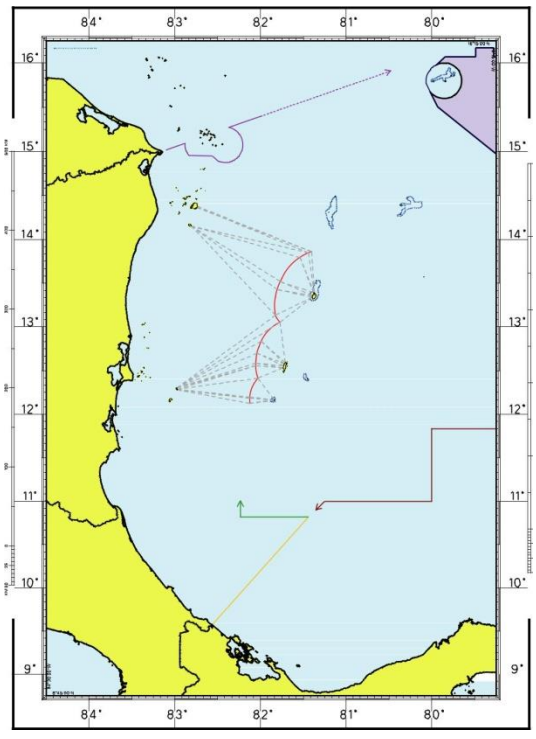
Annex IV

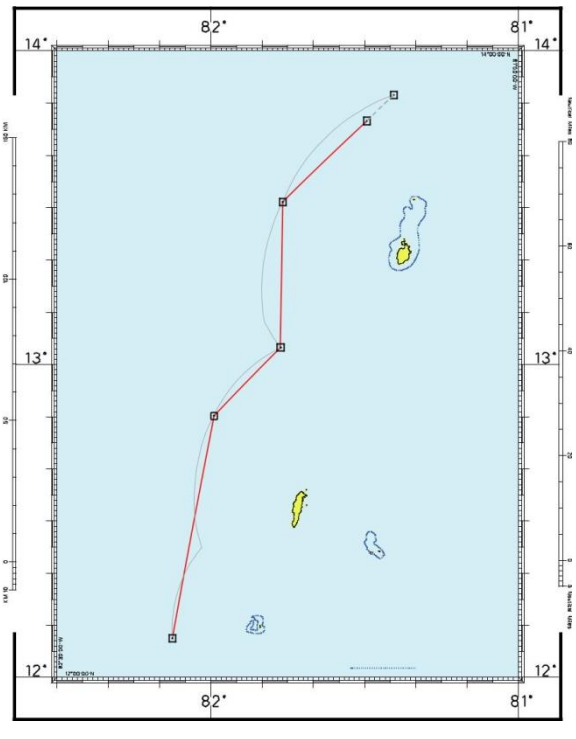
Adjustment of the provisional equidistance line in the India – Bangladesh dispute (source: *In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India*, award of 7 July 2014, Registry PCA, p. 149)



Annex V

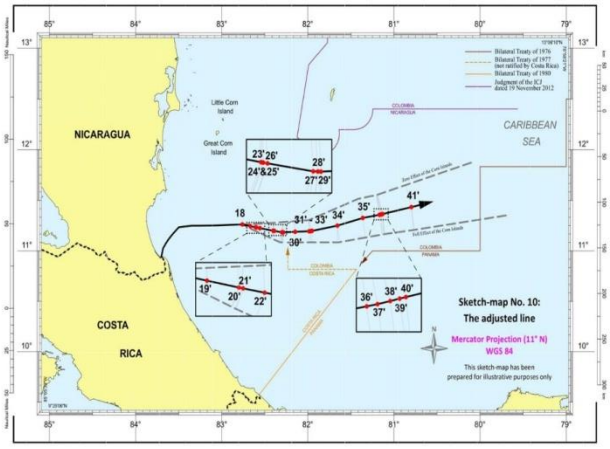
Adjustment of the provisional equidistance line in the Nicaragua – Colombia dispute (source: ICJ Reports, 2012, p. 711-712)

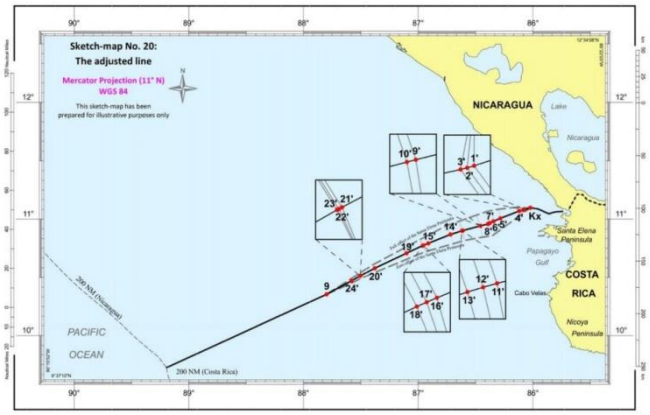




Annex VI

Adjustment of the provisional equidistance line in the Nicaragua – Costa Rica dispute in the Carribean Sea and in the Pacific Ocean (Source: Joined Cases *Maritime Delimitation in the Caribbean Se and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, general List no. 157 and 162, Judgment of 2 February 2018p. 62, 89)





Migration by Sea – Current Challenges in International Law

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Abstrac: *Migration by sea represents a topic that brings to attention controversial issues, mostly due to the difficulty of achieving the right balance between the two interests at stake- assuring the security and integrity of borders and respecting the rights of irregular migrants that travel by sea. Another challenge and quite a delicate issue is related to the fight against terrorism in the context of recent migration crisis from the past few years. This paper aims to provide on one hand the framework picture of the international legal instruments that deal with this topic in order to emphasize their potential flaws and on the other hand to briefly analyze the bilateral agreements concluded by States in order to better deal with the migratory flow.*

Key-words*: irregular migrant, terrorism, search and rescue, safety place.*

1. Introduction

Irregular migration by sea seems to be one of the most apparent contemporary political and legal challenges, since it brings to the table various interests at stake like the protection of the internal borders, the fight against terrorism and human rights. How can one assure both the integrity and security of our borders and also respect the international obligations

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related to the protection of human rights at the same time? This conflicting question is still left unanswered. Public international law struggles to find an appropriate legal solution, the existing rules proving many times to be either inappropriate or insufficient.

In order to address this topic, the paper will tackle firstly (2) the legal framework that deals with this issue at international level, then an analysis of (3) bilateral arrangements on migration will be made and lastly (4) we will deal with the terrorism threats related to migration by sea.

Before proceeding to our topics, we feel the need to clarify the terms that will be used in this paper in order to avoid confusion. Thus, by the term '*irregular migration'* we understand the crossing of a State's borders without that State's permission. Since people migrate for different reasons and in addition not all of them are primarily refugees, or have filed for asylum, the term '*irregular migrant*' will be used in this paper to refer to the people found on board of the vessels carrying migrants in violation of international and national laws. Thus, irregular migrants are people that cross international borders outside of the formal, regularized migration channels.[1] Although there is a trend to restrict the use of the term 'irregular migration' to cases of human trafficking mostly, we will use this notion in its broader meaning- migration to a destination country in violation of international and national immigration laws of that country, like previously stated. Also we need to emphasize that migration can be regarded as either voluntary or forced, the latter category usually including refugees (it is important to state the fact that the term refugee has a very specific and narrow meaning and it does not include all forced migrants, but we will not address this issue in the present paper).

Moving further, the expression '*Departure State*' will be used to refer to the State from where irregular migrants chose to start their migration journey, whereas the term '*Transit State*' refers to the State that is passed through/transited by the migrants with the purpose of reaching their destination. Lastly, the '*Destination State*' will be used to refer to the coastal State of chosen destination where migrants wish to enter territory illegally.

[1] Richard Perruchoud, (Ed.), *Glossary on Migration* (Geneva: IOM, 2004), p. 34, available online: http://publications.iom.int/bookstore/free/IML_1_EN.pdf

One more question needs to be provided with an answer before delving into our subject and that is - Why migration by sea and not only migration? The answer might seem genuine, but sea migration constitutes perhaps one of the most challenging and frequent phenomena nowadays and this is also according to the International Organization for Migration[1]. In addition, in the Mediterranean Sea, only in 2015, the number of arrivals increased, with more than a million persons reaching the EU by sea, and nearly 4,000 perishing en route. [2] The migration crisis in Europe thus, does not refer only to the significant numbers of people crossing into Europe via irregular channels, but also to the substantial number of migrants reported dead or missing trying to cross the Mediterranean Sea. What causes these tragic effects of migration by sea? One reason might consist in the insufficient or unclear legal framework.

2. International Legal framework on migration by sea- a lacunar one?

The international law of sea that regulates partially or tries to regulate the sea migration issues[3] are the International Convention for the Safety of Life at Sea 1974 (SOLAS Convention[4], the International Convention on Maritime Search and Rescue 1979 (SAR Convention)[5] and the United Nations Convention on the Law of the Sea 1982 (UNCLOS)[6]. Each of these conventions gained wide acceptance from the international community—the

[1] Missing Migrants Project, 'Latest Global Figures: Migrant Fatalities Worldwide' (International Organization for Migration (IOM) 2017) <https://missingmigrants.iom.int/latestglobal-figures>.

[2] UNHCR, 'Refugees & Migrants Sea Arrivals in Europe: Monthly Data Update' (Bureau for Europe, December 2016) 1 <https://data2.unhcr.org/en/documents/download/53447>; UNHCR, 'Mediterranean: Dead and Missing at Sea: January 2015–31 December 2016' (2017) <https://data2.unhcr.org/en/documents/download/53632>.

[3] Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein & Brian Opeskin (2018). *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, International and Comparative Law Quarterly, p. 317

[4] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).

[5] International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (SAR Convention)

[6] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

SOLAS Convention presently has 164 parties; the SAR Convention has 112 parties; and UNCLOS has 168 parties.[1]

Starting with the UNCLOS, the notion of immigration has been used in the corpus of the convention six times (articles19 (2) (g); 21 (1) (h); 33 (1) (a); 42 (1) (d); 60 (2); 182 (b). The sixth occurrence is not relevant for the fight against illegal immigration at sea, it concerns privileges and immunities of persons acting within the framework of the Authority. Although we find certain provisions on the immigration phenomena, there is no clear and non-ambiguous framework related to it, as we are going to show further on.

According to art. 92 of the UNCLOS, a state has exclusive jurisdiction over ships flying its flag. Article 98 (1) enshrines the humanitarian obligation for the master of a ship flying its flag to *a) assist any person found at sea in danger of being lost, and (b) proceed with all possible speed to the rescue of persons in distress.* What is curious is that UNCLOS neither provides a definition of the term 'ship', nor is there a uniform concept in the law of the sea.[2] Apparently, from the state practice, very small vessels, that proved to be often used by irregular migrants, are not registrable as ships within the meaning of UNCLOS and, as a consequence, such boats cannot rely on the freedom of navigation at high seas or the right to innocent passage in coastal waters, rights granted to the flag states. The beneficiaries of the obligation stemming from article 98 mentioned above incumbent to the states, are persons in 'danger' or 'distress'; and the nature of the obligation is to 'render assistance' and 'rescue', but again, we find no definitions of these terms. Thus, this lacuna has left room for disputes, whether as to when a rescue operation is required and when it is completed. Furthermore, seriously endangering the ship crew or its passengers by the master is not a requirement, which shows us that the protection granted to this category of migrants is not effective. Moreover, the provision in Article 98(1) LOSC quoted above uses the wording 'any person found at sea', without mentioning what specific area like exclusive economic zone (EEZ) or high seas. In addition, the phrase 'any person' might also include irregular

[1] http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf

[2] Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein & Brian Opeskin (2018). *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, International and Comparative Law Quarterly, 67(2), p. 320

migrants found anywhere at sea since there is no precise specification as to the area. [1]

Article 98 (2) provides that *"Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighboring States for this purpose".* It results thus an obligation to cooperate with the other neighboring coastal States. But does "cooperation" stand for? It could be argued that cooperation implies a proactive action in order to acquire a certain result, it implies working or acting together or jointly, but is there any sanction provided by UNCLOS for not cooperating? The answer is no. Is there any general customary law based obligation in public international for States to cooperate? The answer to this question would still be no. Furthermore, this article asks coastal States to cooperate only "*where circumstances so require*". What does this phrase mean? Apparently it is for the States to appreciate what those circumstance are…There are thus several lacunas that seriously impair the effectiveness of the duty to cooperate.

Suppose that the irregular migrants are found in a registrable ship within UNCLOS. According to Article 17 of UNCLOS, foreign ships enjoy the right to innocent passage in its territorial waters. But is the passage of a ship full of migrants innocent? Under what circumstances? According to Article 19(2) (g) of UNCLOS, passage is not innocent if it is prejudicial to the peace, good order or security of the coastal state, particularly if it engages in the loading or unloading of persons contrary to the immigration laws and regulations of the coastal state. The problem arises with respect to the ships transporting irregular migrants who only intend to cross/transit the sea territory without entering inland waters. Are they also undermining the good order of the coastal State within the meaning of Article 19? We would imply that the answer to this question should be negative, since the word „transit" has not been used by the authors of the UNCLOS and thus since article 19(2) of the LOSC does not state that the simple carriage of irregular

[1] Jasmine Coppens, *Migrants at Sea A Legal Analysis of a Maritime Safety and Security Problem*, Dissertation presented to the Faculty of Law of Ghent University, 2012-2013, p. 20

migrants[1] while traversing through the territorial sea renders the passage non-innocent, it may be argued that a vessel carrying irregular migrants does not breach per se the right of innocent passage.

In the contiguous zone, the coastal state can act to prevent violations of its immigration laws and regulations, under Article 33(1) (a) of UNCLOS. We feel the need here to emphasize the fact that the issue of illegal/irregular migration is almost absent from the Convention, article 33 of the UNCLOS being the only legal basis for exercising the police of the seas beyond the territorial sea. It might be stated that the right to hot pursuit could be also an option, but pursuing article 111 of UNCLOS, even if this right can even lead to the use of 'necessary and reasonable force for the purpose of *searching, seizing and bringing into port* the suspected vessel, it only serves to enforce the rights of the coastal state, where a foreign ship violated regulations in the territorial waters or contiguous zone and did not comply with a stop signal.[2] Furthermore, in the context of irregular migration, the right of hot pursuit cannot start in the exclusive economic zone (EEZ), taking into account the fact that coastal States do not enjoy jurisdictions over immigration matters in the EEZ.[3] So, it appears that this right is not applicable in all situations. And another question that arises from the provisions of the UNCLOS- what happens when the ship is situated outside contiguous zone? The coastal State, as well as third States find themselves, without the legal tools or title to intervene on a ship engaged in migrants on the high seas or beyond their contiguous zone. Only the flag State is competent authority, in accordance with the UNCLOS and the customary rule of exclusive the jurisdiction of the flag state on the high seas. No exception to this rule is provided for in fight against irregular immigration. Under Article 94(1)–(4) of UNCLOS, safety at sea is part of the flag state's obligation to exercise exclusive jurisdiction and control over its ships.

In the SAR Convention, rescue is described as "*an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety*."[4] Until the adoption of the SAR Convention, there was actually no international system covering search and

[1] Shadi Elserafy, *The Smuggling of Migrants across the Mediterranean Sea: States' Responsibilities and Human Rights*, Master's thesis in Peace and Conflict Transformation - May 2018, p.27

[2] UNCLOS, art. 111

[3] Shadi Elserafy, op. cit., p. 38

[4] SAR Convention, Annex Chapter 1 para. 1.3.2.

rescue operations at sea. In addition, SAR managed to develop an international search and rescue plan.

Under the SAR (search and rescue) Convention, States are required to participate in the development of SAR services '*to ensure that assistance is rendered to any person in distress at sea*', and they must also establish SAR regions by agreement with other States. According to this obligation, the world's seas have been divided into multiple SAR regions, with responsibility assigned to proximate coastal States. The obligation to render assistance plays thus when a ship is in distress, which can often the case in illegal immigration and what was the case in the Tampa case[1].

In this case too, the SAR Convention only provides a definition of a *"distress phase"* and a *"person in distress"* "*A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance*"[2], without determining from which moment a ship or a person may find itself/himself/herself in a situation of distress. It is thus the responsibility of the States to determine the moment when this situation begins and finishes.

The problem is the criteria for establishing which situations are identified as being of immediate assistance can vary according to the State facing the situation and while for a state the vessel should be on the point of sinking, for another state might be sufficient for the vessel to be unsafe. However, the ILC stated that – *although a situation of distress may at most include a situation of serious danger – it is not necessarily one that jeopardizes the*

[1] *On August 26, 2001, at the request of the Australian Coast Guard, a Norwegian freighter, the Tampa, carries relief to a ship in serious trouble in international waters carrying 438 migrants, mostly of Afghan origin. The Tampa made it for the Christmas Island, Australian territory and nearest port. The next day, August 27, the Australian government refused them permission to disembark and ordered the Tampa to leave its territorial waters. The captain of Tampa refused to obey as her boat was not equipped to carry so many passengers (capacity of 50 people). The captain had also been denied by Indonesia 12 hours away. The Tampa entered Australia's territorial waters because of the sanitary situation on board and the state of health of several passengers and issued a distress signal. August 29, the Australian Army took control of Tampa to prevent the migrants from entering the island. The case found its resolution on 1st September when New Zealand and Nauru agreed to undertake an assessment themselves of the validity of asylum claims*

[2] SAR Convention, Annex Chapter 1 para. 1.3.13.

life of the persons concerned.[1] The decision in the *Kate A. Hoff*[2] case comes to backup this view, establishing that it is not required for the vessel to be '*dashed against the rocks'* before a claim of distress can be invoked.

SAR Convention also adds the obligation for the State responsible for the SAR area to promptly find a place of safety for disembarkation**:** chapter 3 § 3.1.9 : *"The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable."* Taking a look at these provisions, the following question arises: what is it a safety place? According to resolution MSC.167 (78) adopted by the Maritime Safety Committee (MSC)[3] in 2004, "a place of safety […] is a location where rescue operations are considered to terminate" and it is a place: "where the survivors' safety of life is no longer threatened" "where their basic human needs (such as food, shelter and medical needs) can be met" "from which transportation arrangements can be made for the survivors' next or final destination"

The International Convention for the Safety of Life at Sea (SOLAS) also imposes important obligations to States in terms of search and rescue. In particular, they are committed to monitoring coasts and supplying any information regarding their own rescue means. In addition, it provides that coastal States should establish facilities for search and rescue at sea**:** Chapter V, Regulation 7: *"Each Contracting State undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary […]"*

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[1] ILC, *Yearbook of the International Law Commission* (New York: ILC, 1973), Vol. II, 134, para.4, available online: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1973_v2_e.pdf

[2] General Claims Commission United States and Mexico, *Kate A. Hoff v. The United Mexican States*, 2 April 1929, 4 *UNRIAA* 444 (1929)

[3] http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf

There is also an obligation for ship masters to proceed with all speed to the assistance of persons in distress at sea**:** chapter V, Regulation 33(1): *"The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so […]".* Although the expression "is bound" might suggest the fact that we are dealing with an imperative norm, we cannot help ourselves from asking whether the obligation to render assistance is one of result or of means? Interpreting article 98 of the UNCLOS together with the provisions of SAR and SOLAS, the obligation to provide assistance to persons in distress at sea does not seem an absolute one. On the one hand, it is limited by the risk that the ship, the crew or the passengers may run during the rescue operation. On the other hand, the said operation must only be carried out by the master of the ship "*in so far as he can do so*". As a consequence, the obligation to render assistance may be defined as an "obligation of means", thus, not always respected by States.[1]

Thus, although there is an obligation to render assistance to people in danger at sea, as we have seen, the definition of distress appears to be quite vague, granting in addition a great margin of appreciation to shipmasters and States to decide whether persons are in distress or not. Moreover, since these multilateral instruments have not proved their efficiency, in balancing the two interests at stake, national borders security and the protection of the irregular migrants' life, States have tried to solve these issues bilaterally, by concluding agreements with other states, in order to protect their interests.

3. What's in it for me?

What's in it for me? This is the question that States tried to answer when concluding agreements, known as 'readmission agreements', with transit and departure States, having as main objectives to prevent and suppress the smuggling of irregular migrants and protect their national borders.

[1] Kiara Neri, *Le droit international face aux nouveaux défis de l'immigration clandestine en mer*, Revue québécoise de droit international, 26.1 (2013), p. 133

One example of this kind of agreement would be the one concluded between EU and Turkey. To this end, the EU concluded a readmission agreement with Turkey in 2016 known as the EU-Turkey Deal. At its core[1], the agreement aimed to address the overwhelming flow of smuggled migrants and asylum seekers (especially Syrians) traveling across the sea from Turkey to the Greek islands by allowing Greece to return to Turkey "all new irregular migrants". In return, EU Member States increased resettlement of Syrian refugees residing in Turkey, accelerated visa liberalization for Turkish nationals, and boosted existing financial support for Turkey's refugee population.[2]

How does the return process work in fact? It appears that Syrians arriving in Greece by sea, to claim asylum are currently shuffled through a so-called admissibility procedure. In addition, if a foreigner wishes to apply for asylum (almost no one is currently doing so in Greece, to be able to continue his journey), his application will be "examined" on the spot, or in other words, his application can be rejected without being analyzed on the substance. : if he has gone through Turkey (now "safe country" - **safe third country** (Article 38 of the Asylum Procedures Directive[3]: where the person has not already received protection in the third country but the third country can guarantee effective access to protection to the readmitted person) "or a country of" first asylum " (**first country of asylum** Article 35 of the Asylum Procedures Directive: where the person has been already recognized as a refugee in that country or otherwise enjoys sufficient protection there) that can offer him" sufficient protection ", his application will automatically be deemed" inadmissible "and he will be returned to Turkey. He will be able to appeal this decision before a judge (for example by explaining that as a Kurd, Turkey is not a safe country for him), who will also decide on the spot. Those who do not apply for asylum could be immediately embarked.

[1] http://europa.eu/rapid/press-release_MEMO-16-963_en.htm

[2] EU-Turkey Statement, EC Press Release 144/16 (8 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>; Seventh Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 470.

[3] Directive 2013/32/eu of the European Parliament and of the Council of 26 June 2013 , The Asylum Procedures Directive sets common procedures for EU Member States for granting and withdrawing international protection. It provides people fleeing persecution or serious harm and applying for international protection in the EU with a high level of safeguards and enables Member States to operate efficient asylum procedures.

Why this deal? What's in it for Turkey and what's in it for EU? Ankara wanted to use the Syrian crisis to pressure the EU to achieve its political goals like EU accession and also its financial benefits. As in for EU, they were afraid of refugees. So the admission agreement seemed a win-win for both parties. But is this pact a flawless one? Taking a deeper look into this agreement it might seem nothing more than a barter between states making vulnerable human beings as irregular migrants, a bargaining chip.

In these circumstances, we ask ourselves? Is it Turkey really a safe place? The question that may seem simple at first glance is actually quite complex. The main stumbling block is how to interpret the fifth requirement of Article 38 (1) of the Asylum Procedures Directive, according to which the asylum seekers concerned must, in order for the third country in question to be considered as safe, "*to be able to seek recognition of refugee status and, if that status is granted, to enjoy protection in accordance with the Geneva Convention*". Since Turkey offers only a temporary form of protection to non-European asylum seekers because it has maintained a geographical reservation to the Geneva Convention which it has ratified, the Commission considers that protection "equivalent" to the Geneva Convention is sufficient to meet this requirement. But is it so…?

It was also the case of Italy, who concluded a bilateral agreement[1] with Libya in 2017, that aims to combat "*an economy based on illicit drugs, which causes hundreds of deaths in the Mediterranean, thousands of desperate people looking for a better life*" according to the memorandum of the agreement.[2] Asking ourselves the same question, what's in it for both countries that made them reach a bilateral agreement, the answer might be found if we just take a look at the historic context in both countries.

In addition, as the situation in Libya quickly deteriorated and insecurity spread after the fall of Gadhafi regime, migrants and asylum-seekers,

[1] https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf

[2] Memorandum of Understanding of 2 February 2017 on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic

frightened by those events decided to leave Libya through what seemed to them perhaps the safest route: the sea and crossing the Mediterranean to reach what it appeared to be the"easiest" place-Italy (due to geographical reasons: Libya's west coast is extremely close Europe's southernmost outposts of Malta and the Italian island of Lampedusa).

On the other hand, it appears as a consequence of outbreak of the civil war in 2011-2012 to have been also a flow of irregular migrants coming to Libya, so the other way round, mainly from West Africa, the Horn of Africa and Syria. It thus looks like we are facing a double flow of migrants: from Libya to Italy (in 2014 when 120,000 arrived in Sicily mostly from Libya)[1] and from Africa and Syria to Libya, which determines these two countries to have a common interest: dealing with migration in the most efficient way possible.[2]

As a result, the first step showing the cooperation between these states was the agreement signed between Italy and Libya on 13 December 2000, with the aim of establishing cooperation in the fight against terrorism, organized crime, illicit traffic of narcotics and illegal immigration[3], followed by the signing of the Libyan-Italian Friendship treaty in 2008[4]. This close "cooperation" on the containment of "illegal immigration" was based on joint patrols in the Mediterranean and the assignment to Italian companies of the implementation process of electronic controls on Libya's southern border. In order to further enhance this cooperation that has been interrupted due to the outburst of the civil war, in 2017 it has been concluded a new bilateral agreement, the Italy-Libya deal.

The memorandum of the agreement, surprisingly only a 3-page-long document is structured in a preamble and an operative section (composed of 8 articles), using quite a generic and might we say legally imprecise language. Furthermore, taking a quick look at the terminology used by the memorandum, the wording chosen by its authors are *clandestine* or *illegal*

[1] Data from the Italian Ministry of the Interior, Department for Public Security, Central Directorate for Migration and Border Police. See the ISMU website: *Sbarchi anno 2014*, http://www.ismu.

[2] Mattia Toaldo, *Migrations Through and From Libya: A Mediterranean Challenge*, IAI Working Papers, 2015, p. 5

[3] http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;7.

[4] http://www.asgi.it/wp-content/uploads/public/accordo.italia.libia.2000.pdf.

migrants. We do not find the word „refugee" in the text, which might lead us to the conclusion that its main focus is reducing entries to Italy and preventing departures from Libya, at no matter what cost.

So if it were implemented in accordance to its wording, migrants could find themselves blocked and pushed-back at the Libyan border or be intercepted by the Libyan coast guard when departing to Europe by sea and transferred back to reception camps, waiting to be repatriated or voluntary returned to their countries of origin, with no respect whatsoever of their human rights, including the non-refoulment principle.[1]

Taking a short glance at these two agreements, it appears that the main intentions behind them are to enhance borders control at sea, prevent the flow of migrants from reaching European countries like Greece and Italy and to avoid responsibilities under human rights law and refugee law.

Irregular migration has also long been used as a mean to perpetrate fear related to the terrorist threat as a way to manipulate Europe into supporting these kind of agreements like those presented above, regardless of gross violations of human rights and of international conventions. But is there really any reason to fear?

4. Irregular migration by sea –real threat to national security?

Apparently, in the light of the attacks from the past few years, mainly those from France and Germany, as more migrants of Muslim origin come to Europe, the panic over potential attacks in European cities increases, spreading fears that terrorists can be mistaken for migrants or refugees when disembarking in external border countries.

In addition, migration by sea policy, particularly in regard to managing who comes in and out of a country and resides there, while being quite a sensitive topic, represents one area where national and international law

[1] See article 33 of the 1951 UN Convention relating to the Status of Refugees, "*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*."

enforcement can act against international terrorism. The problem here is: How do we act against terrorism without breaching the rights of those who travel by sea? Where punitive measures are involved, there is often quite a thin line separating those from the denial of individual rights and freedoms enshrined in international multilateral instruments.

While acknowledging the potential risk of human rights curtailment and other sensitivities in this respect, it is certain that terrorism exploits perceived weaknesses that might further its objectives and irregular migrants are indeed vulnerable people and thus targets of terrorist movements.

In order to address this issue, the UN Secretary-General, in his 2016 report on *the Oceans and the Law of the Sea*[1], restated that the smuggling of migrants is one of the main threats to maritime security and called upon all States *to cooperate to take measures in accordance to international law* to combat these threats. Since this wording appears itself to be unclear and quite ambiguous, we cannot help ourselves from wondering whether the expression "threats to maritime security" includes terrorism. Also another question arises here: how can we respond to those threats?

The answer to this question is provided by UN Security Council Resolution 2240 (2015), in which the Security Council authorized inspection of vessels on the high seas off the coast of Libya that are reasonably suspected of migrant smuggling or human trafficking,[2] Resolution issued under Chapter VII of the UN Charter, which concerns threats to the peace, breaches of the peace, and acts of aggression.

It appears that when implementing responses to a threat, such as terrorist attacks, a securitization framework may allow for drastically responses that prioritize ameliorating the security concerns, and while it is clear that geographically speaking, Europe cannot be hermetic, sea border control must be strengthened and migrants sorted into acceptable infrastructure and human conditions.

Can we really prove a direct link between migration and terrorism, between contemporary migratory flows and Islamist attacks, between migrants and

[1] http://undocs.org/A/71/74/add.1
[2] http://unscr.com/en/resolutions/doc/2240

jihadists? Can we absolutely return all irregular sea-migrants out of fear of terrorist attacks? Perhaps, as host countries are generally more stable, it might seem possible that in the same way, if not more likely, these migrations by sea led to better conditions and in the long run have a negative impact on political violence, including terrorism.

5. Conclusion

The legal framework governing the smuggling of irregular migrants by sea, presented in this paper, although complex and stemming from various branches of international laws, proves to be conflicting and ambiguous, leaving room for interpretation and this brings the fundamental humanitarian purpose of the search and rescue missions under threat. The securitization, militarization and criminalization policy of sea boat migration have many times proved to render the international legal framework governing the law of sea useless, eroding the spirit of cooperation that is so essential to their effectiveness.

While it is crystal clear that the issue of migrant smuggling is a multifaceted problem with many dimensions affecting not only States, but also individuals, perhaps the only long term policy that could have a positive impact on the irregular migration flow is the one that is based on democracy principles and respects human rights in the States where migrants are fleeing from and to. As we have illustrated in this paper migration crisis is the result of long-standing conflicts and inequalities and the right way to deal with it is by treating the cause and not the symptoms.

L'Interaction entre le Droit de la Mer et la Convention Européenne des Droits de l'Homme

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Résumé: *L'interaction entre le droit de la mer et la Convention européenne des droits de l'Homme a été analysée pour la première fois en début des années 2000. De nouveaux défis sont apparus depuis, l'analyse de la jurisprudence plus récente de la Cour de Strasbourg révélant une diversité extraordinaire de situations où droits de l'homme et droit de la mer se rencontrent. Quoique le rencontre entre droits de l'homme et droit de la mer ne soit bouleversant pour aucun des deux domaines, l'objectif de la présente étude est de trouver un fil conducteur dans la jurisprudence concernant l'application de la Convention européenne des droits de l'Homme en lien avec l'exercice des droits de l'homme dans les zones maritimes. Le premier constat serait que l'applicabilité de la Convention en contexte maritime ne repose pas sur des principes consacrés par le droit de la mer, telle l'extension coutumière des compétences des Etats riverains dans les zones maritimes adjacentes ou bien le principe de la juridiction de l'Etat de pavillon. Le deuxième constat serait que le contenu des droits garantis par la Convention est modulé en fonction des obligations connexes des Etats parties consacrées par le droit international de la mer.*

Mots-clés: *droit de la mer, droits de l'Homme, Cour européenne des droits de l'Homme*

1. Introduction

A l'occasion de la conférence *Actualité du droit des mers fermées et semi-fermées* coorganisée par le Centre de droit international et l'Association

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roumaine de droit international le 30 mai 2016 à Bucarest, Mme Brumar, l'Agente de la Roumanie auprès de la Cour européenne des droits de l'homme[1] attirait l'attention sur l'interdépendance entre le droit international de la mer et la Convention européenne des droits de l'homme dans des circonstances des plus inattendues. En bref, l'affaire invoquée, *Plechkov c. Roumanie*[2], touchait au problème de l'absence d'une ligne de délimitation claire entre la zone économique exclusive roumaine et celle bulgare en Mer Noire, ce qui rendait imprévisible le champ d'application territoriale de la législation roumaine sur la répression de la pêche illégale.

La tentation de mettre en relation l'affaire *Plechkov* avec d'autres affaires au carrefour du droit de la mer et la Convention européenne des droits de l'Homme (CEDH) m'était par la suite tempérée par la lecture de l'avertissement du professeur Paul Tavernier qui, dans son étude concernant l'articulation du droit de la mer et de la CEDH[3] soulignait le caractère très hétérogène de affaires qui font l'objet de l'étude[4]. A partir du constat que les situations qui imposent une lecture combinée du droit de la mer et de la CEDH sont nombreuses et diverses et ne se limitent pas, du point de vue territorial, aux zones sur lesquelles les Etas exercent leur souveraineté ou des compétences exclusives, serions-nous dans l'impossibilité de trouver un fil conducteur ?

La doctrine qui avait proposé une approche territoriale du champ d'application de la CEDH[5] avait souligné quelques aspects intéressants liés à l'applicabilité de la Convention en mer. Premièrement, l'applicabilité de la CEDH en contexte maritime ne repose pas sur des principes consacrés par le droit de la mer, telle l'extension coutumière des compétences des Etats riverains dans les zones maritimes adjacentes ou bien le principe de la juridiction de l'Etat de pavillon. Deuxièmement, comme le remarquait le professeur Tavernier[6], la Cour européenne des droits de l'Homme, dont la vocation première n'est pas d'appliquer le droit de la mer, a néanmoins réussi à accommoder ses solutions avec celui-ci.

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[1] Catrinel Brumar, "Pertinence de la jurisprudence de la CEDH sur les délimitations maritimes", *Actualité du droit des mers fermées et semi-fermées*, Colloque de Bucarest organisé par le Centre de droit international (CEDIN) et Association roumaine de droit international (ADIRI), 30 mai 2016 (*Actes du Colloque* en cours de publication)

[2] Cour EDH, *Plechkov c. Roumanie*, arrêt du 16.09.2014

[3] Paul Tavernier, "La Cour européenne des droits de l'Homme et la mer", in *La mer et son droit. Mélanges offerts à Laurent Lucchini et à Jean-Pierre Quéneudec*, Pedone, Paris, 2003, pp. 575-591

[4] *Ibid.* p. 576

[5] Syméon Karagiannis, "Le territoire d'application de la Convention européenne des droits de l'homme, Vaetera et nova", RTDH 61/2005, Anthemis, Bruxelles p. 50.

[6] Paul Tavernier, *supra*, p. 589

Ainsi, l'application de la CEDH en contexte maritime a dû s'accorder avec le régime juridique spécifique de la mer territoriale (I), de la zone économique exclusive et du plateau continental (II), ainsi que de la haute mer (III).

2. En mer territoriale

Concernant l'applicabilité de la CEDH en mer territoriale, il convient d'abord de préciser que celle-ci est liée à l'exercice de la juridiction de l'Etat côtier. Dans les eaux intérieures, dans les ports ou dans la mer territoriale cela pose, en principe, le moins de difficultés, vu que dans ces zones l'Etat exerce sa pleine souveraineté.

Pourtant, comme le souligne le professeur Syméon Karagyannis[1], un effort d'harmonisation des règles de la Convention avec celles du droit de la mer peut être s'avérer nécessaire lorsqu'il s'agit de l'exercice du droit au passage inoffensif dans la mer territoriale, consacré par l'article 27 de la Convention des Nations Unies sur le droit de la mer, ayant aussi un caractère coutumier[2]. Dans l'affaire *Compagnie de navigation de la république islamique d'Iran c. Turquie*[3] il s'agissait de l'immobilisation et de la saisie de la cargaison d'un navire de commerce enregistré sous pavillon chypriote, transportant des armes de contrebande vers le Chypre. La Cour décidait que la CEDH était applicable, sans préciser si l'acte litigieux consistait en l'application de la législation turque contre la contrebande d'armes dans la mer territoriale ou bien en l'exercice par la Turquie de certaines compétences de police réglementées par la Convention de Montreux[4].

Si la Cour qualifiait la Convention de Montreux de *« lex specialis »* sans vraiment se prononcer sur son applicabilité, alors que la loi spéciale l'emporte toujours sur la loi générale, c'était, selon le professeur Karagiannis, pour montrer que, peu importe le fondement territorial ou autre de la juridiction exercée par un Etat partie à la CEDH, ce dernier reste responsable de ses actes. Sur la question de savoir si la consécration du droit de passage inoffensif reflétait une exception au principe de la juridiction de

[1] Paul Tavernier, *supra*, p. 589

[2] *Convention des Nations Unies sur le droit de la mer* de Montego Bay du 10 décembre 1982, disponible sur http://www.un.org/french/law/los/unclos/closindx.htm,

[3] Cour EDH, *Compagnie de navigation de la république islamique d'Iran c. Turquie*, arrêt du 01.12.2007, §93

[4] *Convention relative au droit de passage inoffensif dans le détroit des Dardanelles, de Bosphorus et de Marmara*, Montreux, 11.11.1936.

l'Etat sur sa mer territoriale, le professeur Karagiannis rappelait le libellé de l'article 2, §3 de la Convention sur le droit de la mer de 1982 (*"la souveraineté sur la mer territoriale s'exerce dans les conditions prévues par les dispositions de la Convention et les autres règles du droit international"),* en soulignant que, de manière générale, souveraineté maritime et souveraineté terrestre pourraient ne pas être "*des notions identiques, mais de faux amis"*.[1]

A partir de ce constat, il devient clair que l'applicabilité de la CEDH dans des affaires concernant des navires sous pavillon étranger ne pouvait pas avoir, selon la Cour de Strasbourg, un fondement territorial. Le profil bas de l'Etat côtier dans sa mer territoriale est *"consubstantiel à la notion même de mer territoriale"* et pourrait même représenter une condition pour avoir une mer territoriale [2]. Le droit de passage inoffensif serait similaire à certains points de vue avec l'immunité de juridiction et son régime juridique est régit par des normes spéciales.

La jurisprudence de la Cour EDH relative à l'application de la Convention en contexte maritime concerne le plus souvent des interventions des Etats parties visant de navires battant pavillon étranger dans des zones maritimes autre que la mer territoriale.

3. Le plateau continental et la zone économique exclusive

L'affaire *Bendréus c. Suède*[3] concernait la décision de la Suède de protéger d'un mur de béton l'épave d'un navire naufragé au fond de la Mer Baltique, sur le plateau continental de la Finlande. Il s'agissait d'une action commune de tous les Etats intéressés : l'Etat de pavillon du navire, l'Etat auquel appartenait la plateforme continentale et les Etats de nationalité des victimes, qui s'étaient mis d'accord sur les agissements qui faisaient l'objet de la requête. Une fois les actions communes entièrement assumés par la Suède devant les familles des victimes du naufrage, la Commission européenne des droits de l'Homme a décidé de ne pas chercher plus loin si l'adoption et la mise en œuvre de l'acte litigieux relevait ou non de la juridiction de l'Etat défendeur. Ainsi, l'applicabilité de la CEDH à l'égard des agissements d'un Etat partie était encore une fois dissociée de toute approche territoriale qui aurait pu résulter de l'application du principe de l'exclusivité de la juridiction de l'Etat côtier sur son plateau continental.

[1] Syméon Karagiannis, *supra*, p. 50
[2] Syméon Karagiannis, *supra*, p. 50
[3] Commission EDH, *Bendréus c. Suède*, décision du 8.09.1997

Dans l'affaire *Xhavara c. Italie et Albanie*[1] concernant la mise en œuvre d'une politique commune italo-albanaise de prévention de la migration clandestine, la Cour de Strasbourg a considéré qu'un incident lié à l'arraisonnement par un navire italien, à 25 milles des côtes italiennes, d'un autre navire soupçonné de transporter des immigrants albanais, n'entrait en principe pas dans la sphère de la juridiction italienne. Néanmoins, un accord bilatéral italo-albanais autorisait les bateaux militaires italiens à arraisonner, dans les eaux internationales ou dans les eaux territoriales albanaises, tout bateau (y inclus les bateaux arborant le pavillon d'un Etat tiers) transportant des citoyens albanais s'étant soustraits au contrôle des autorités albanaises. Cette-fois-ci, l'extension de la juridiction italienne dans les eaux albanaises est basée sur l'accord entre les deux Etats. L'affaire avait néanmoins été déclarée irrecevable pour non-épuisement des voies de recours internes.

Si les accords entre les Etats côtiers ont été invoqués à plusieurs reprises par la Cour EDH afin de conclure que l'Etat défendeur exerçait sa juridiction dans certaines zones maritimes qui ne lui appartenait pas, le problème inverse, de l'absence de délimitation claire des compétences, a également été invoqué devant la Cour. Il s'agit de l'affaire *Plechkov c. Roumanie* (*supra*). Le requérant, M. Plechkov, était le capitaine et en même temps le propriétaire d'un navire de pêche battant le pavillon bulgare. Son bateau a été intercepté par les autorités roumaines dans une zone maritime qui, selon la Roumanie, faisait partie de sa zone économique exclusive (ci-après ZEE).

La législation roumaine applicable au moment du jugement du requérant définissait l'étendue de la ZEE par référence aux principes de la Convention des Nations Unis sur le droit de la mer, notamment au principe de la délimitation par accord entre les états voisin. Selon la Cour de Strasbourg, en absence d'un accord entre la Roumanie et la Bulgarie, les dispositions de la législation roumaine n'étaient pas assez claires pour permettre de déterminer avec précision le champ d'application territoriale des dispositions concernant la pêche illicite. Pour cette raison, la condamnation de M. Plechkov à une peine de prison avec sursis et la confiscation de ses outils de pêche pour avoir illégalement pêché dans une zone dont l'étendue n'était pas déterminée ont constitué des violations des droits garantis par les articles 7 de la CEDH et 1 Protocole I de la CEDH.

La violation de la Convention par la Roumanie résultait ainsi, d'un côté, du non-respect de la condition de la légalité des infractions et des peines, à cause du manque de clarté et de prévisibilité du champ d'application territorial de la législation roumaine en matière de pêche dans la ZEE. D'un

[1] Cour EDH, *Xhavara et 15 autres c. Italie et Albanie*, décision du 11.01.2001

autre côté, les ingérences dans le droit de respect de ses bien n'était pas légale pour la même raison, car la confiscation de l'équipement de pèche et de la capture, en vertu de la législation roumaine, n'étaient pas non plus des conséquences claires et prévisibles des actions du requérant.

Toujours concernant la pêche, une affaire très intéressante avait antérieurement été présentée devant la Cour de Strasbourg, en début des années 2000[1]. L'intérêt de cette affaire-là, *Posti et Rakho c. Finlande,* a consisté, d'un côté, dans la qualification en tant que biens, au sens de l'article 1 du Protocole I de la CEDH, des droits de pêche que le requérant exerçait dans les eaux de l'Etat, sur la base des baux à long terme. D'un autre côté, la Cour de Strasbourg a clairement précisé que la réglementation plus restrictive des activités de pêche côtière ne devait pas s'analyser en discrimination opérée entre les pécheurs côtiers et ceux opérant en haute-mer.

La mise en jeu de l'article 14 CEDH concernant l'interdiction de la discrimination reposait sur le principe de la non-discrimination entre pêcheurs côtiers et pêcheurs en haute mer, énoncé par la Constitution finlandaise. Ce qui est intéressant est que le gouvernement défendeur n'a pas invoqué en sa défense la différence de régime juridique international des deux espaces maritimes. La justification de la différence de traitement a consisté tout simplement dans l'intérêt légitime de préserver les stocks de poisson, l'Etat ayant la liberté de choix des moyens, notamment en limitant les périodes et les zones de pêche.

4. En haute mer

Concernant l'intervention des autorités françaises en haute mer afin de réprimer des infractions de trafic de drogue, dans l'arrêt *Medvedyev et autres c. France*[2], la Cour de Strasbourg a conclu que l'exercice exclusif et continu exercées par les agents français sur le navire était déterminant pour définir la juridiction de la France sur les personnes se trouvant au bord :*"eu égard au contrôle absolu et exclusif exercé de manière continue et ininterrompue par ces agents sur le navire et son équipage dès son interception, ils relevaient de la juridiction de la France au sens de l'article 1 de la Convention."* [3]

[1] Cour EDH, *Posti et Rakho c. Finlande*, arrêt du 24.09.2002, voir également Paul Tavernier, *supra*, p. 588

[2] Cour EDH, *Medvedyev et autres c. France*, arrêt du 29.03. 2010

[3] *Ibid.*

La Cour de Strasbourg est très soucieuse de préciser que *"l'élément déterminant dans ce type de cas est* ***l'exercice d'un pouvoir et d'un contrôle physiques sur les personnes en question****" (n.s.).* Ainsi, la compétence de la Cour résulte du fait que les victimes relevaient de la juridiction française, qui, à la différence des affaires précédentes, *"n'avait pas pour seul fondement le contrôle opéré par l'Etat contractant sur les bâtiments, l'aéronef ou le navire où les intéressés étaient détenus."*[1]Un autre élément pertinent aurait pu être la compétence universelle des Etats afin de réprimer certaines infractions internationales[2], mais la Cour a préféré ne plus cumuler des arguments, en soulignant aussi la force du critère du contrôle physique exercé par les agents étatiques sur les personnes au bord du navire.

Dans l'affaire *Hirsi Jamaa*[3] la Cour rappelait que les opérations en haute mer (de sauvetage d'un navire en danger cette fois-ci) n'avaient pas vocation *per se* à attirer les passagers sous la juridiction de l'Etat qui intervenait. En revanche, la Cour a procédé à une lecture combinée des règles concernant l'imputabilité et du droit de la mer (concernant la juridiction de l'Etat de pavillon sur les actes commis au bord de ses navires):

D'ailleurs l'Italie ne saurait soustraire sa "juridiction" à l'empire de la Convention en qualifiant les faits litigieux d'opération de sauvetage en haute mer. En particulier, la Cour ne saurait souscrire à l'argument du Gouvernement selon lequel l'Italie ne serait pas responsable du sort des requérants en raison du niveau prétendument réduit du contrôle que ses autorités exerçaient sur les intéressés au moment des faits. Or, la Cour remarque que dans la présente affaire les faits se sont entièrement déroulés à bord de navires des forces armées italiennes, dont l'équipage était composé exclusivement de militaires nationaux. De l'avis de la Cour, à partir du moment où ils sont montés à bord des navires des forces armées italiennes et jusqu'à leur remise aux autorités libyennes, les requérants se sont trouvés sous le contrôle continu et exclusif, tant de jure que de facto, des autorités italiennes. Aucune spéculation concernant la nature et le but de l'intervention des navires italiens en haute mer ne saurait conduire la Cour à une autre conclusion. » (§64)

Ainsi, la Cour de Strasbourg a constaté dans l'affaire *Hirsi Jamaa* que les requérants relevaient de la juridiction italienne tant *de jure* que *de facto* ;

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[1] *Ibid.*

[2] Daniela-Anca Deteșeanu, "Evoluţii ale jurisprudenţei Curţii Europene a Drepturilor Omului privitoare la principiul *nullum crimen/nulla poena sine lege* în cazul crimelor internaţionale", in *"Liber amicorum Nicolae Popa – Studii juridice în onoarea Prof. Dr. Nicolae Popa"*, Hamangiu, București, 2009

[3] *Cour EDH, Hirsi Jama a et a. c. Italie*, Requête No. 27765/09, 23 fév. 2012

tout comme dans l'affaire *Mevedyev*, l'élément déterminant pour l'existence du lien juridictionnel entre l'Etat et les requérants se confond tout simplement avec les critères d'attribution des faits aux Etats.

5. Conclusion

La jurisprudence relativement abondante et très diverse prouve, avant tout, que le décore marin n'est pas inhabituel pour l'exercice les droits garantis par la CEDH. Il convient pourtant de souligner que le droit coutumier concernant l'extension des compétences étatiques en mer a très peu d'influence sur l'applicabilité de la Convention, qui est liée plutôt à une approche fonctionnelle de la "juridiction" des Etats parties. L'ouverture vers le droit de la mer est néanmoins visible lors de l'analyse de la légalité des ingérences et des obligations positives relatives aux droits garantis par la CEDH. Ainsi, le droit à la vie, le droit à la liberté et sureté, la légalité des infractions et des peines, le droit de propriété, etc., sont mis en lien avec certains droits et obligations spécifiques au droit de la mer – obligation de sauvetage, droit de passage inoffensif, droit de pêche, principe de la juridiction de l'Etat côtier ou de l'Etat de pavillon.

Comentarii privind activitatea organizaţiilor internaţionale în domeniul dreptului internațional/

Commentaries regarding the Activities of International Bodies in the Field of International Law

The Legal Effects of the Sea-Level Rise on the Work Programme of the UN International Law Commission

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Abstract: *During its 70th session of 2018, the UN International Law Commission decided to include, in its Long-Term Work Programme the topic "Sea-level rise in relation to international law". This decision was based upon a proposal made by five members of the Commission, including the author of the present article. This paper presents the rationale behind the mentioned proposal, the contents of the syllabus included in the Report of the International Law Commission concerning its 70th session of 2018 and the prospects for this topic on the agenda of the Commission.*

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Key-words: *Sea-level rise, legal effects, International Law Commission, baselines, maritime spaces, maritime delimitation, statehood, population*

1. Introduction

During the 70th session of the International Law Commission (hereinafter ILC, the Commission), in 2018, five of its members submitted a proposal on the inclusion in its Long-Term Work Programme the topic "Sea-level rise in relation to international law", to be examined and developed in the frame of a Study Group to be establishes by the Commission.

The five members were Bogdan Aurescu (Romania), Yacouba Cissé (Cote d'Ivoire), Patrícia Galvão Teles (Portugal), Nilüfer Oral (Turkey), Juan José Ruda Santolaria (Peru). The composition of this initiative group was balanced as to its geographic representation, and it included only new members of the Commission, that is members at their first ILC mandate.

The reason of making such a proposal was briefly explained in the paper prepared by the five members in order to argue why this topic should be included in the Long-Term Work Programme, which at the end of the ILC decision-making process was transformed into a more synthetic syllabus, attached as an annex to the Annual Report of the Commission for its 70th session.[1]

While the first draft paper, partially elaborated by the author of this article in December 2017, was titled "Legal Effects of Ocean/Sea level rise in International Law", after discussions among the members of the group it became "Effects of Sea-level Rise in International Law", and after debates in the Commission and following certain suggestions by some members it ended as "Sea-level rise in relation to international law". Irrespective of the final title chosen, it is obvious from the text of the mentioned syllabus that the topic included in the Long-Term Work Programme of the ILC is about the legal effects, in various areas of international law, of this phenomenon.

According to the syllabus, "sea-level rise has become in recent years a subject of increasing importance for a significant part of the international community — more than 70 States are or are likely to be directly affected by sea-level rise, a group which represents more than one third of the States of the international community. Indeed, as is well known, this phenomenon

[1] See document A/73/10, Annex B / Sea-level rise in relation to international law, p. 326-334, http://legal.un.org/docs/?path=../ilc/reports/2018/english/annex_B.pdf, last visited on 28.12.2018.

is already having an increasing impact upon many essential aspects of life for coastal areas, for low-lying coastal States and small island States, and especially for their populations. Another quite large number of States is likely to be indirectly affected (for instance, by the displacement of people or the lack of access to resources). Sea-level rise has become a global phenomenon and thus creates global problems, impacting on the international community as a whole."[1]

The proposal of this item was based on the fact that sea-level rise, as a physical phenomenon, is already documented as being likely to accelerate in the future. It is mentioned as such in the 2030 Agenda for Sustainable Development, as well as in the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, where it is estimated that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100.[2]

But it is important to stress that the proponents of the inclusion of sea-level rise in the Long-Term Work Programme of the ILC did not intend to examine issues related to international environmental law within the scope of the topic. Nor they wanted to deal with "causation, responsibility and liability".[3]

Their intention was to start from considering sea-level rise as a factual phenomenon, already scientifically proved, and already producing negative consequences on a large number of States (around 70 States directly affected, and many others indirectly affected),[4] and to examine the legal effects and implications of it in three main areas: law of the sea, statehood and protection of persons affected by sea-level rise.[5]

In selecting these areas, the members of the group started from identifying the most relevant questions preoccupying States: "what are the legal implications of the inundation of low-lying coastal areas and of islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones, whether by agreement or adjudication? What are the effects upon the rights of States in relation to those maritime zones? What are the consequences for statehood under international law should the territory and population of a State disappear? What protection do

[1] Paragraph 1 of the syllabus.

[2] See paragraph 3 of the syllabus, footnote 2.

[3] See paragraph 14 of the syllabus: "This topic deals only with the legal implications of sea-level rise. It does not deal with protection of environment, climate change *per se*, causation, responsibility and liability."

[4] See paragraph 1 of the syllabus.

[5] See paragraph 12 of the syllabus.

persons directly affected by sea-level rise enjoy under international law?"[1]

2. Level of Support for the Topic and Previous Work of ILC and of other Bodies

2.1. Level of Support for the Topic

Sea-level rise legal effects, as a topic to be included on the work programme of the ILC, has enjoyed more and more support in the last years. While campaigning for the ILC seat, from the direct contacts with various diplomatic representatives, the author of this article noted the great interest of many UN member States for this topic, and so the other colleagues from the group which initiated the demarche of including it on the Long-Term Work Programme of the Commission.

At the same time, as mentioned in the syllabus, during the 72nd session of the UN General Assembly, in October 2017, 15 delegations in the Sixth Committee have asked its inclusion in the work programme of the Commission, while other 9 mentioned its importance in their national statements. Also during an informal meeting held on 26 October 2017, in New York, at the Permanent Mission of Romania, 35 States which attended showed a positive interest for the Commission to undertake this topic. More to that, in January 2018, Micronesia has asked the Commission to take over this topic, by sending a written request, with arguments, titled "Legal Implications of Sea-level Rise".[2]

During the 73rd session of the UN General Assembly, the number of supportive States increased. Out of 50 statements by delegations, during the debates in the 6th Committee in October 2018, which mentioned the topic following its inclusion by the ILC on its Long-Term Work Programme, 25 welcomed this decision of the Commission and asked for its inclusion on the active agenda of the ILC,[3] 11 welcomed its inclusion on the Long-Term Work Programme,[4] 6 expressed interest in the topic[5] and only 4 were

[1] See paragraph 4 of the syllabus.

[2] Se paragraphs 6-7 of the syllabus.

[3] Australia, Canada, Colombia, Micronesia, Fiji, Gambia (on behalf of the African Group), Vatican, Malawi, Marshall Islands (on behalf of the Pacific Forum), Monaco, Mexico, Mauritius, Portugal, Papua New Guinea, Peru, Poland, New Zealand, Romania, Samoa, Seychelles, Slovenia, South Africa, Bahamas (on behalf of CARICOM), Tonga, Vietnam.

[4] Denmark (also on behalf of Finland, Island, Norway, Sweden), Ecuador, Estonia, Israel, Salvador, Sierra Leone, Indonesia, Republic of Korea, Togo, Uruguay, UK.

[5] Brazil, China, Italy, Japan, Thailand, Turkey.

against,[1] one delegation[2] expressed certain reservations, but without opposing as such, and one delegation mentioned the topic without qualifying its position.[3] But the number of supportive States is higher than these figures, taking into account that some of the statements were made on behalf of regional groups or bodies.

2.2. Previous Work of the ILC and of other Bodies

The Commission made some incidental references to the issue of sea-level rise in its previous work: in the commentary to the draft articles on the *Protection of persons in the event of disasters*, completed by the Commission in 2016,[4] and in the Fourth Report on the *Protection of the atmosphere*, examined during the 69th session of the Commission, in 2017 (after debates, the Commission decided to provisionally adopt a paragraph in the preamble and another paragraph where sea-level rise is mentioned).[5]

At the same time, it is important to mention that the topic of the effects of sea-level rise was by the International Law Association (ILA), in two of its Committees: first in the ILA Committee on *Baselines under the International Law of the Sea*, the work of which was finalised in 2012, and in the dedicated Committee on *International Law and Sea Level Rise*, created in 2012. The works of this Committee are still under way, but it already finalised its research on the law of the sea and protection of people's implications of sea-level rise, while it continues its activity regarding statehood.[6]

3. The Issues to be examined by the ILC

As already mentioned above, if included on the current agenda of the Commission, the Study Group to be created will focus on three main areas: legal effects of sea-level rise on the law of the sea, on statehood and on the protection of persons affected by sea-level rise. As proposed by the five ILC members who initiated the inclusion of the topic on the Long-Term Work

[1] Cyprus, Czech Republic, Greece, Slovakia.

[2] United States of America.

[3] Permanent Court of Arbitration.

[4] See paragraph 9 of the syllabus.

[5] See paragraph 8 of the syllabus. On that occasion, the author of this paper asked for the Commission to take over this topic separately, as a matter of priority. See the intervention of Bogdan Aurescu (A/CN.4/SR.3357, *Provisional summary record of the 3357th meeting. Held at the Palais des Nations, Geneva, on Friday, 12 May 2017, at 10 a.m. Contents: Protection of the atmosphere (continued). Provisional application of treaties. Report of the Drafting Committee*, p.3).

[6] See paragraphs 10 and 11 of the syllabus.

Programme, the Commission excluded from the scope of examination by the future Study Group not only the environmental issues, causation, liability and responsibility, but it also stressed that: "The three areas to be examined should be analysed only within the context of sea-level rise notwithstanding other causal factors that may lead to similar consequences. Due attention should be paid, where possible, to distinguish between consequences related to sea-level rise and those from other factors."[1]

Also, very importantly, paragraph 14 of the syllabus underlines that "this topic will not propose modifications to existing international law, such as the 1982 U.N. Convention on the Law of the Sea".[2]

So, the issues to be examined by the Commission, regarding the law of the sea implications of the sea-level rise were suggested as follows: (i) Possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces which are measured from the baselines; (ii) Possible legal effects of sea-level rise on maritime delimitations; (iii) Possible legal effects of sea-level rise on islands as far as their role in the construction of baselines and in maritime delimitations; (iv) Possible legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of the coastal State and its nationals in maritime spaces in which boundaries or baselines have been established, especially regarding the exploration, exploitation and conservation of their resources, as well as the rights of third States and their nationals (e.g., innocent passage, freedom of navigation, fishing rights); (v) Possible legal effects of sea-level rise on the status of islands, including rocks and on the maritime entitlements of a coastal State with fringing islands; (vi) Legal status of artificial islands, reclamation or island fortification activities under international law as a response/adaptive measures to sea-level rise.[3]

The issues to be examined by the Commission on statehood were proposed as follows: (i) Analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable; (ii) Legal assessment regarding the reinforcement of islands with barriers or the erection of artificial islands as a means to preserve the statehood of island States against the risk that their land territory might be completely covered by the sea or become uninhabitable; (iii) Analysis of the legal fiction according to which, considering the freezing of baselines and the respect of the boundaries established by treaties, judicial judgments or arbitral awards, it could be

[1] See paragraph 14 of the syllabus.
[2] *Ibid*.
[3] Paragraph 15 of the syllabus.

admitted the continuity of statehood of the island States due to the maritime territory established as a result of territories under their sovereignty before the latter become completely covered by the sea or uninhabitable; (iv) Assessment of the possible legal effects regarding the transfer — either with or without transfer of sovereignty — of a strip or portion of territory of a third State in favour of an island State whose terrestrial territory is at risk of becoming completely covered by the sea or uninhabitable, in order to maintain its statehood or any form of international legal personality; (v) Analysis of the possible legal effects of a merger between the island developing State whose land territory is at risk of becoming completely covered by the sea or uninhabitable and another State, or of the creation of a federation or association between them regarding the maintenance of statehood or of any form of international legal personality of the island State.[1]

Regarding the issues related to the protection of persons affected by sea-level rise, the syllabus mentions: (i) The extent to which the duty of States to protect the human rights of individuals under their jurisdiction apply to consequences related to sea-level rise; (ii) Whether the principle of international cooperation be applied to help States cope with the adverse effects of sea-level rise on their population; (iii) Whether there are any international legal principles applicable to measures to be taken by States to help their population to remain in situ, despite rising sea levels; (iv) Whether there are any international legal principles applicable to the evacuation, relocation and migration abroad of persons caused by the adverse effects of sea-level rise; (vi) Possible principles applicable to the protection of the human rights of persons displaced internally or that migrate due to the adverse effects of sea-level rise.[2]

All these aspects need to be carefully considered and developed by the Study Group during its work, if established by the Commission and if the topic is included on its active agenda, hopefully starting with its 71st session, in 2019. It is to mention that the paper initially elaborated by the five members of the ILC and presented to, and debated within the Commission's Working Group on the Long-Term Work Programme already tackled at some length each of the three fields of interest presented in the syllabus, but, for reasons of brevity, the syllabus only included the issues to be examined without any other considerations.

[1] Paragraph 16 of the syllabus.
[2] Paragraph 17 of the syllabus.

4. Other Aspects reflected in the Syllabus

The remaining part of the syllabus focused on the method of work of the Commission on this topic and on the fulfilment of the criteria for selection of a new topic.

On the method of work, it is argued that the creation of a Study Group is the best choice for this topic, taking into account the need for flexibility[1] in approaching the subject and the complexity and variety of the facets of the topic. Study Groups were already used in the past by the Commission, the most successful example being the Study Group on the *Fragmentation of International Law* (2002-2006).

The syllabus mentions that the Study Group will perform "a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues, and it will analyze the existing international law, including treaty and customary international law, in accordance with the mandate of the International Law Commission, which is to perform codification of customary international law and its progressive development."[2] It is argued further that "this effort could contribute to the endeavors of the international community to respond to these issues and to assist States in developing practicable solutions in order to respond effectively to the issues prompted by sea-level rise".[3]

Then, the syllabus argues that the topic meets the requirements for selection of a new topic, as set forth in the ILC Report of the 50th session of 1998.[4]

First it is argued that the topic reflects the needs of States in respect of the progressive development and codification of international law, since more than a third of the existing States of the international community are likely to be directly affected by the sea-level rise and are keenly interested in this topic, and "there may be broader impacts to the international community at large, since another large number of States are likely to be indirectly affected by sea-level rise (for instance, by the displacement of people, the lack of access to resources)." It is also stressed that "Sea-level rise has become a global phenomenon, and thus creates global problems, impacting in general on the international community of States as a whole" and that

[1] Paragraph 19 of the syllabus.
[2] Paragraph 18 of the syllabus.
[3] *Ibid*.
[4] Paragraph 21 of the syllabus.

"this interest is shared by a variety of States, from very different geographic locations, including landlocked countries, which shows the amplitude of the States' interest."[1]

Second, it is mentioned that the topic benefits already from an emerging State practice, especially with regard to issues related to the law of the sea (such as maintaining baselines, construction of artificial islands, and coastal fortifications) and the protection of persons affected by sea-level rise (such as the relocation of local communities within the country or to other countries, and the creation of humanitarian visa categories). It is also mentioned that certain relevant practice exists, inter alia, in relation to governments in exile as examples of maintaining statehood in absence of control over territory.[2]

Third, it is noted that the topic is feasible "because the work of the Study Group will be able to identify areas ripe for possible codification and progressive development of international law and where there are gaps", and that "the aspects to be examined have a high degree of concreteness".[3]

Last but not least, the syllabus stresses that that "it is beyond any doubt that this topic (…) reflects new developments in international law and pressing concerns of the international community as a whole."[4]

The Conclusion of the syllabus mentions the outcome of the work of the Study Group: a Final Report, accompanied by a set of Conclusions.

5. Conclusion

The inclusion of the topic on Sea-level rise in relation to international law on the Long-Term Work Programme of the ILC was an important step forward, but it is only the beginning of a complex and challenging endeavour of the Commission on that matter. It needs first to be included on the active agenda of the ILC, at the same time with the creation of the Study Group dedicated to this topic, and hope is that this will take place during its 71st session in 2019.

The increasing support for the inclusion of this topic on the agenda of the ILC must be noted as well. But a very important materialization of this support would be expressed through the concrete availability of States to

[1] See paragraph 22 of the syllabus.
[2] See paragraph 23 of the syllabus.
[3] See paragraph 24 of the syllabus.
[4] See paragraph 25 of the syllabus.

share examples of their practice relevant for the work of the ILC on this topic.

Beyond the procedural steps, the decision of the ILC to take over this topic has a certain significance, since it is a topic which responds to the needs and interest expressed by a quite large number of UN member States. By responding promptly to these expressions of needs and interest, the Commission shows that it is willing and able to commit its energy to contribute to finding solutions to issues of pressing concern for the international community. This shows that the process of codification of customary international law and its progressive development is not decoupled from the actual developments and dynamism of international relations and environment. From this perspective, the meaning of the Commission's decision to deal with this topic goes even beyond the importance of taking over this topic *per se*, which is indeed a very welcoming evolution in the activity of the ILC.

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

10 Years after the Maritime Delimitation in the Black Sea: the Precedential Value of the International Court of Justice's Judgment in *Romania v. Ukraine Case*, 3rd of February 2009

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Abstract:

The aim of this paper is that of presenting the precedential value of the International Court of Justice 's judgment in the Maritime Delimitation in the Black Sea (Romania v. Ukraine Case) , delivered by this court on the 3rd of February 2009. The subject matter of the dispute concerned the establishment of a single maritime boundary delimiting the continental shelf and the exclusive economic zones between Romania and Ukraine in the Black Sea. Thus, the paper will first give a general overview of the ICJ's jurisprudence in maritime delimitations cases before 2009 (Section II); it will continue with a brief presentation of the main principles and jurisprudence lines reiterated and/or established by the ICJ, in 2009, in the Maritime Delimitation in the Black Sea Case (Section III); it will then touch upon and briefly analyse the next three cases on maritime delimitations in respect of which the ICJ delivered judgments on 2012, 2014 and 2018 (Section IV) and, finally, conclude by underlining the precedential value of the ICJ's judgment in the Maritime Delimitation in the Black Sea Case for the jurisprudence of the ICJ in maritime delimitations cases (Section V).

Key-words: *maritime delimitation, continental shelf, EEZ, Black Sea, Serpents' Island, equidistance method, three stages methodology in maritime delimitations, maritime boundary, UNCLOS, base points, provisional equidistance line, disproportionality test, equitable result*

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1. Introduction

The aim of this paper is that of presenting the precedential value of the International Court of Justice (ICJ)[1]'s judgment in the *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine Case*)[2], delivered by this court on the 3rd of February 2009. The subject matter of the dispute concerned the establishment of a single maritime boundary delimiting the continental shelf and the exclusive economic zones between Romania and Ukraine in the Black Sea. As the Court observed, "the maritime boundaries delimiting the continental shelf and the exclusive economic zone are not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law costal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty"[3].

As at that point in time Romania hasn't had a declaration in respect of the acceptance of the compulsory jurisdiction of the ICJ[4], the dispute was

[1] Hereinafter referred to as ICJ.

[2] *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), Judgment of 3rd of February 2009, *I.C.J. Reports* 2009, p. 61-134.

[3] *Idem*, para. 217.

[4] In 2015, through *Law no. 137/2015*, published in M. Of. no. 408 of 10th of June 2015, Romania has made a declaration, under article 36 (2) of the ICJ Statute, through which it has accepted the compulsory jurisdiction of the Court. This declaration states as follows: "Romania declares that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, meaning on the condition of reciprocity, the jurisdiction of the International Court of Justice, in accordance with Article 36 (2) of the Statute of the Court, in relation to all legal disputes related to facts or situations arising after this declaration is made, other than:

(a) any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement for its final and binding decision;

(b) any dispute with any State which has accepted the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of the Statute less than twelve months prior to filing an application bringing the dispute before the Court or where such acceptance has been made only for the purpose of a particular dispute;

(c) any dispute regarding to the protection of the environment;

(d) any dispute relating to, or connected with, hostilities, war, armed conflict, individual or collective self-defense or the discharge of any functions pursuant to any decision or recommendation of the United Nations, the deployment of armed forces abroad, as well as decisions relating thereto;

(e) any dispute relating to, or connected with, the use for military purposes of the territory of Romania, including the airspace and territorial sea, or maritime zones subject to its sovereign rights and jurisdiction;

brought before the court, by Romania, under article 36 paragraph 1 of the *Statute of the Court* and paragraph 4 (h) of the *Agreement on the Delimitation of the Continental Shelf and the Exclusive Economic Zones in the Black Sea*[1], concluded in 1997, thus through a compromissory clause. The latter provided that: "If these negotiations shall not determine the conclusion of the above-mentioned agreement in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and exclusive economic zones shall be solved by the UN ICJ, at the request of any of the parties, provided that the *Treaty on the regime of the state border between Romania and Ukraine* has entered into force". The Court, taking duly into account the agreements in force between the Parties relating to the delimitation of their respective territorial seas, has stated that it has no jurisdiction to delimit the territorial seas of the Parties and thus will limit itself to the delimitation of the continental shelf and exclusive economic zones.

The law applicable to this case was found to be the 1982 *United Nation Convention on the Law of the Sea (UNCLOS)*[2], namely articles 74 and 83, which texts are identical[3] – except for the fact that Article 74 refers to the

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(f) any dispute relating to matters which by international law fall exclusively within the domestic jurisdiction of Romania.

This Declaration shall remain in force until such time as notice may be given to the Secretary-General of the United Nations withdrawing or modifying this declaration, and with effect from the moment of such notification". See for other details, https://www.icj-cij.org/en/declarations/ro. For comments and preliminary issues see, Bogdan Aurescu, *Romania's Possible Recognition of the Compulsory Jurisdiction of the International Court of Justice – a Cultural Approach Perspective*, *AULB* no. 2/2013, p. 305-311; Laura-Maria Crăciunean, *Aspecte generale privind practica statelor în acceptarea jurisdicției obligatorii a Curții Internaționale de Justiție: o opțiune politică sau una culturală*, *AULB* no. 2/2013, p. 312-319; http://bern.mae.ro/en/romania-news/2575.

[1] Hereinafter referred to as *1997 Additional Agreement*.

[2] Hereinafter referred to as *UNCLOS*.

[3] These Articles provide as follows: „1. The delimitation of the exclusive economic zone [continental shelf] between States with oposite or adjacent coasts shall be effected by agreement on the basis of international law, as reffered to in Article 38 of the *Statute of the ICJ*, in order to achive an equitable solution. 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. 3. Pending agreement as provided for in paragraph 1, the States concerned, in the spirit of understanding and co-operation shall make every effort to enter into provisional arrangments of a practical nature, and during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangments shall be without prejudice to the final delimitation. 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone [the continental shelf] shall be determined in accordance with the provisions of the agreement".

exclusive economic zone and Article 83 to the continental shelf –, the *Additional Agreement of 1997*, including the principles listed in paragraph 4 of this Agreement[1] and the other bilateral treaties concluded between the parties (such as, the *Treaty on Good Neighborliness and Co-operation of 1997* and the *State Border Regime Treaty* which entered into force in 2004). After analyzing all these legal instruments the Court concluded that there is no agreement in force between Romania and Ukraine delimiting between them the exclusive economic zone and the continental shelf and thus, it has, according to the *1997 Additional Agreement*, jurisdiction on this matter.

The Court issued its judgment in the case on the 3rd of February 2009 and by way of it Romania was awarded sovereign rights over 79.34% of the disputed area, more precisely over 9.700 square km, from the 12.200 square km which were under dispute.

This year, on the 3rd of February 2019, there will be 10 years since this judgment was delivered by the Court and it will be interesting to see if and how this judgment was reflected in the work undertaken at a later stage by the Court on issues pertaining to maritime delimitations[2].

Consequently, this paper will first give a general overview of the ICJ's jurisprudence in maritime delimitations cases before 2009 (**Section 2**); it will continue with a brief presentation of the main principles and jurisprudence lines reiterated and/or established by the ICJ, in 2009, in the *Maritime Delimitation in the Black Sea Case* (**Section 3**); it will then touch upon and briefly analyze the next three cases on maritime delimitations in respect of which the ICJ delivered judgments on 2012, 2014 and 2018 (**Section 4**) and, finally, conclude by underlining the precedential value of the ICJ's judgment in the *Maritime Delimitation in the Black Sea Case* for the jurisprudence of the ICJ in maritime delimitations cases (**Section 5**).

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[1] These principles are: "a. the principle stated in article 121 of the *(UNCLOS)* of December 10, 1982, as applied in practice of states and in international case jurisprudence; b. the principles of equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of median line in areas in which coasts are opposite; c. the principle of equity and the method of proportionality, as they are applied in the practice of states and in the decisions of the international courts regarding the delimitation of continental shelf and exclusive economic zones; d. the principle according to which neither of the Contracting Parties shall contest the sovereignty of the other Contracting Party over any of its territory adjacent to the zone submitted for delimitation; e. the principle of taking into consideration the special circumstances of the zone submitted to delimitation".

[2] For an evaluation of this judgment after 5 years from its adoption see also, Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Hamangiu Publishing House, Bucharest, 2014.

2. General overview of the ICJ's rules in maritime delimitations before 2009

Even if, as a matter of principle, delimitation is an aspect of territorial sovereignty when other states are involved, agreement between them is required. Thus, even though unilateral delimitations are valid in domestic law they will not be binding upon third states, internationally.

Maritime delimitations make no exception from this general rule the only difference being that, when the delimitation is made in respect of continental shelf and/or exclusive economic zone, those zones do not become state territory but areas in which the respective states receive sovereign rights which are limited to certain specific activities such as exploration and exploitation of the natural resources (essentially oil and fishing resources) or the maintenance and construction of installations for the exploration of the shelf [1].

As professor Jan Klabbers noted: "in much the same way as it is useful to establish boundaries on land, so too is it useful to have maritime boundaries delimited"[2]. Moreover, "most of the time maritime boundary delimitation is inspired most of all by the desire to achieve clarity in rights over natural resources, be they fish or oil and natural gas"[3].

In principle, two different situations can be envisaged: states can be opposite or adjacent to each other. The *UNCLOS* makes no difference between the two, in terms of rules which are applicable.

The only distinction made in the *UNCLOS* is between the zones which are to be delimited. Thus, the territorial waters are governed by article 15 of the *UNCLOS* which prescribes the equidistance rule, meaning that the boundaries must follow the baseline and be equally distant at every point unless states concerned agree otherwise. Instead, when the continental shelf and/or the exclusive economic zone are under dispute, the previous rule can hardly be applicable as it can raise issues of fairness and inequity, as it was

[1] Antonio Cassesse, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, p. 89-90.

[2] Jan Klabbers, *International Law*, Cambridge University Press, Cambridge, 2013, p. 243.

[3] Jan Klabbers, 2013, p. 246.

evident in the *North Sea Continental Shelf Cases*[1]. Hence, the basic rule is that states should agree on how these two zones will be delimited between them in order to achieve an equitable solution.

But, as articles 74 and 83 of the 1982 *UNCLOS* simply provide that delimitation: "shall be effected by agreement on the basis of international law (…) in order to achieve an equitable result" it was for the international courts and, especially, for the ICJ to develop principles of application and the corresponding jurisprudence in order to give a meaning to this general lines.

Consequently, when it comes to what is meant by "agreement on the basis of international law" in maritime delimitations, in the *Gulf of Maine Case*[2] the ICJ produced **two principles** reflecting what general law prescribes in every case when maritime zones are to be delimited, respectively: **firstly,** there could be **no unilateral delimitations** – and in this respect the ICJ noted that "no maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states. Such delimitation must be sought and effected by means of agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence" – and **secondly,** the final **aim of the delimitation** is to achieve an **equitable solution** – and in this respect the ICJ reaffirmed a fundamental norm of customary international law governing maritime delimitations when it stated that: "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result".

Following the jurisprudence of the ICJ, professor Malcom N. Shaw[3], underlines that there are, already, well established principles, derived from customary law or treaty, applicable to maritime delimitations, whether the delimitation is of territorial sea, continental shelf or economic zone (or of the latter two together). According to him, in all cases, "the appropriate **methodology** to be applied is to **draw a provisional equidistance line** as the starting position and **then see whether any relevant or special**

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[1] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark* and *Federal Republic of Germany v. the Netherlands*), Judgment, *I.C.J. Reports* 1969, p. 51.

[2] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada v. United States*), Judgment, *ICJ. Reports* 1984, p. 246.

[3] Malcom D. Shaw, *International Law*, 8th Edition, Cambridge University Press, Cambridge, 2017, p. 451.

circumstances exist which may warrant a change in that line in order to achieve an **equitable result**"[1]. In his view, while equity is not a method of delimitation and nature cannot be totally refashioned, the meaning of special or relevant circumstances or the criteria that need to be applied were clarified, by way of case-law indications. Consequently, there are seven principles[2] that can be highlighted in this respect, namely:

1. the delimitation should **avoid the encroachment** by one party on the natural prolongation of the other or, its equivalent in respect of the economic zone, **avoid** to the extent possible the **interruption of the maritime projection of relevant coastlines**[3];
2. the **configuration of the coast** may be relevant where the drawing of an equidistance line may unduly prejudice a state whose coast is particularly concave or convex within the relevant area of delimitation when compared with that of its neighbors; but the threshold for this is relatively high[4];
3. a substantial difference in the **lengths of the parties' respective coastlines** is likely to be a factor to be taken into consideration in mitigation of an equidistance line so as to avoid a disproportionate and inequitable result[5];
4. the **presence of islands** or **other similar maritime features** may be relevant to the equities of the situation and may justify a modification of the provisional equidistance line[6];
5. **security considerations** may be taken into account[7] but the precise effects of these are unclear;
6. **resource-related criteria**, such as the distribution of fish stocks[1], have been treated cautiously and have not generally been accepted as relevant circumstance, but exceptions were also made[2];

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[1] *Idem*.

[2] *Ibid*.

[3] *Barbados v. Trinidad Tobago*, Award of 11th of April 2006, *RIAA*, vol. XXVII, p. 214, para. 232.

[4] *Cameroon v. Nigeria*, Judgment, *ICJ Reports* 2002, p. 303, para. 445-6.

[5] *Cameroon v. Nigeria*, Judgment, 2002, p. 303, para. 445-7; *Barbados v. Trinidad Tobago*, 2006, para. 240; *Peru v. Chile*, Judgment, *ICJ Reports* 2014, p. 3, para. 65.

[6] *Anglo-French Continental Shelf*, 54 *ILR*, p. 6; *Qatar v. Bahrain*, Judgment, *ICJ Reports*, 2001, p. 40, para. 114 ff.

[7] *Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*), Judgment, *ICJ Reports* 1985, p. 46, para. 51.

7. the **prior conduct of the parties** may well be relevant, for example, where there is sufficient practice to show that a provisional boundary was agreed[3].

But, as it was the case in the *Maritime Delimitation in the Black Sea*, which will be further presented and analyzed, the ICJ does not always take into account the above mentioned factors. For example, when it established the maritime boundary between Romania and Ukraine, the ICJ covered and discussed all these factors but decided that none of the circumstances invoked by the parties warranted a departure from the provisional equidistance line.

3. Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), ICJ's Judgment of 3rd of February 2009

On the 3rd of February 2009 the ICJ delivered its judgment in the *Maritime Delimitation in the Black Sea Case*. The judgment can be seen as an opportunity for the ICJ to reiterate some of its already established jurisprudential lines, to better explain or structure the methodology it usually applied in maritime delimitations cases and to point out and explain new approaches pertaining to this matter.

In order to emphasis the abovementioned I will follow closely the structure of the judgment and underline, in each separate case, how the Court proceeded. In short, as a first step, the Court established the **relevant coasts** and the **relevant maritime area** of the two opposing states; it continued by stating and explaining its **three steps methodology** conceived as to be applied in maritime delimitations; it then **applied this methodology of delimitation to the case** and finally, it delivered its **judgment**.

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[1] For example, since the principal resource in the area under dispute was capelin, which was centered on the southern part of the area of overlapping claims, the adoption of the median line would have meant Denmark could have not be assured of equitable access to the capelin. Thus, the equitable access to fish stocks for vulnerable fishing communities was considered and agreed as relevant resource-related criteria in *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*), Judgment, *ICJ Reports* 1993, p. 67, para. 37.

[2] *Barbados v. Trinidad Tobago*, 2006, para. 228, 241.

[3] *Continental Shelf Case* (*Tunisia v. Libyan Arab Jamahiriya*), Judgment, *I.C.J. Reports* 1982, paras. 18, 71, 80 and 80-6.

3.1. Relevant coasts

The Court departed in its analysis from its well established jurisprudence in cases such as: the *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark* and *Federal Republic of Germany v. the Netherlands*)[1] and the *Continental Shelf Case* (*Tunisia v. Libyan Arab Jamahiriya*)[2]. According with that established jurisprudence, the title of a State to continental shelf and to exclusive economic zone is based on the **two principles** namely: **1. the land dominates the sea in such a way that costal projections in the seaward direction generate maritime claims** and **2. the coast in order to be considered relevant for the purpose of the delimitation must generate projections which overlap with projections from the coast of the other Party**.

These principles were stated, in different manners, in the abovementioned cases, namely: "the land is the legal source of the power which a state may exercise over territorial extension of the seaward"[3], "the coast of the territory of the State is decisive factor for title to submarine areas adjacent to it"[4] or "the submarine extension of any part of the coast of one Party, which because of its geographical situation cannot overlap with the extension of the coast of the other, is to be excluded from further consideration of the Court"[5].

The Court considered that the role of the relevant coasts can have two different through closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes, in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratio of the costal length of each State and the maritime areas falling either side of the delimitation line (para. 78).

Consequently, by applying these principles to the case, the Court was of the opinion that the length of the relevant Romanian coast is approximately 248 km (para. 88), the length of the Ukrainian relevant coast is approximately

[1] *North Sea Continental Shelf Cases*, 1969, p. 51.
[2] *Continental Shelf Case* (*Tunisia v. Libyan Arab Jamahiriya*), 1982, p. 61.
[3] *North Sea Continental Shelf Cases*, 1969, p. 51, para. 96.
[4] *Continental Shelf Case* (*Tunisia v. Libyan Arab Jamahiriya*), 1982, p. 61, para. 73.
[5] *Continental Shelf Case* (*Tunisia v. Libyan Arab Jamahiriya*), 1982, p. 61, para. 75.

705 km (para. 103) and that the ratio of the costal length between Romania and Ukraine is approximately 1:2.8 (para. 104).

3.2. Relevant maritime area

The Court further proceeded with the establishment of the relevant maritime area and observed that **the legal concept of "relevant area" has to be taken into account as part of the methodology of maritime delimitation**. In the first place, the Court stated that "the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand" and secondly, that "**the relevant area is pertinent to checking disproportionality** (…) the test of disproportionality is not a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustments because of significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived by other means, and lengths of their respective coasts.

At this point in time the Court recalled its previous jurisprudence in cases such as the *North Sea Continental Shelf Cases*[1] and the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[2] and emphasized that "(…) the **calculation of the relevant area** does not purport to be precise and **is approximate**. The object of the delimitation is to achieve a **delimitation that is equitable**, not an equal apportionment of maritime areas".

Consequently, in the case, the Court noted that the delimitation will occur within the enclosed Black Sea, with Romania being both adjacent and opposite Ukraine, and with Bulgaria and Turkey lying to the south and thus, it will stay north of any of the area where third party interests could become involved (para. 112) and, without prejudice to the position of any third State regarding its entitlements in this area, it included in the calculation of the relevant area both the south-western and south-eastern triangles (para. 114).

3.3. Delimitation methodology

When the Court is called to delimit the continental shelf or the exclusive economic zones, or to draw a single delimitation line, from a

[1] *North Sea Continental Shelf Cases*, 1969, p. 22, para. 18

[2] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, 1993, p. 67, para. 64.

methodological point of view, it proceeds in **three separate stages.** These stages, which were previously explained, in a board manner, in the case concerning *Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*)[1], have been specified, in recent decades, with more precision. But, what the Court did in this specific case, was to explain this methodology in a very coherent manner and it gathered all together the principles and rules that have been established in its previous jurisprudence.

Going back to the three separate stages methodology, in the **first stage**, what the Court does is to **establish a provisional delimitation line** using methods that were geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. When the delimitation refers to adjacent coasts, an **equidistance line** is drawn and this will consist of a **median line between the two coasts**. Equidistance and median lines are to be constructed from the most appropriate points on the coast of the two States concerned, with particular attention being paid to those protuberant costal points situated nearest to the area to be delimited. At this initial stage the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

But, as the course of the final line should result in an equitable solution – as articles 74 and 83 of the UNCLOS provide for – in the **second stage**, the Court will consider **whether there are factors claiming for the adjustment or shifting of the provisional equidistance line** in order to achieve and **equitable result**[2]. The Court has also made it clear that when the line to be drawn covers several lines of coincident jurisdictions "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result"[3].

Finally, in the **third stage**, the Court will verify that the line – the provisional equidistance line which may or may not have been adjusted taking into account the relevant circumstances – does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective costal lengths and the ratio between the relevant

[1] *Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*), 1985, p. 46, para. 60.

[2] *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea intervening*), Judgment, Judgment, *ICJ Reports* 2002, p. 441, para. 288.

[3] See for details, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), Judgment, *ICJ Reports* 2007 (II), p. 741, para. 271.

maritime area of each state by reference to the delimitation line. A **final check** for an equitable outcome entails **confirmation that no great disproportionality of maritime areas is evident by comparison to the costal lengths**. But, the Court stressed that this is not to suggest that respective areas should be proportionate to the costal lengths as "the sharing out of the area is therefore the consequence of the delimitation and not vice versa"[1].

3.4. Application of the delimitation methodology to the case

After the Court stated in a comprehensive manner the methodology it uses in cases of maritime delimitations it applied this methodology to the concrete case before it.

In the **first stage**, in order to **establish the equidistance line**, the Court proceeded by selecting the ***base points*** on the Romanian and Ukrainian coasts. In doing so, the Court recalled that the geometrical nature of the first stage of delimitation exercise leads it to use as base points those which the geography of the coast identifies as a physical reality at the time of the delimitation and that geographical reality covers not only the physical elements produced by the geodynamics and the movements of the sea, but also any other material factors that are present.

There were *two issues* that the Court considered of importance and thus clarified in this respect, namely *whether the Sulina dyke*, whose seaward end Romania argued that it should be considered as a base point[2], *could be regarded as a "permanent harbor works which form an integral part of the harbor system" within the meaning of article 11 of the UNCLOS, and thus be selected as a base point*[3] and *whether the Serpents' Island*, which

[1] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, 1993, p. 67, para. 64.

[2] Under article 16 of the UNCLOS, Romania made a notification to the United Nations in which it stated that Romania used the seaward end of Sulina Dyke as a base point for drawing the baseline for its territorial sea. Romania reiterated this position in front of the Court in respect of the base point for the delimitation of the continental shelf and exclusive economic zone. This approach was not contested by Ukraine.

[3] Article 11 of the UNCLOS states: "For the purpose of delimiting the territorial sea, the outermost permanent harbor works which our form an integral part of the harbor system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbor works".

Ukraine claimed is part of its coast, *it is or it is not one of a cluster of fringe islands constituting "the coast" of Ukraine, and thus appropriate to be selected as a base point*.

The *first issue*, namely whether the Sulina dyke could be regarded as a "permanent harbor works which form an integral part of the harbor system" within the meaning of article 11 of the UNCLOS. As these expressions are not defined by the Convention, the Court had the opportunity to recall the *travaux préparatoires* of article 8 of the *Geneva Convention on the Territorial Sea and Contiguous Zone* and on the work of the ILC special rapporteur (1954). Thus, the permanent nature of the Sulina dyke, although not having been questioned by the Parties, was approached by the Court. In doing so the Court wondered whether the structure of the Sulina dyke can be described as "harbor works" which form "an integral part of the harbor system", especially because these expressions are not defined in the *UNCLOS*. The Court stated that "harbor works (…) are generally installations which allow ships to be harboured maintained or repaired and which permit or facilitate the embarkation and disembarkation of passengers and the loading and unloading of goods" (para. 133).

Continuing this idea, the Court noted that the functions of a dyke are different from those of a port; in this case the Sulina dyke may be of use in protecting the ships destined for the mouth of the Danube and for the ports situated there. For example, during the *travaux préparatoires* of article 8 of the *Geneva Convention on the Territorial Sea and Contiguous Zone*, this distinction was made in the sense that "dykes used for the protection of the coast constituted a separate problem and did not come either under article 9 (ports) or article 10 (road-steads). Subsequently, the concept of a "dyke" was no longer used, and reference was made to "jetties" serving to protect coasts from the sea. The Court took into account the comment made by the International Law Commission (ILC)[1] on its Report to the General Assembly, namely: "when such structures are of excessive length (for example a jetty extending several kilometers into the sea) it may be asked whether this article [article 8] could still be applied (…) As such cases are very rare, the Commission, while wishing to draw the attention to the matter, did not deem necessary to state an opinion"[2]. In the light of the above, the Court mentioned that the ILC did not at that time, intended to define precisely the limit beyond which a dyke, a jetty or works would no

[1] Hereinafter referred to as ILC.
[2] *ILC Yearbook*, 1956, vol. II, p. 270.

longer form "an integral part of the harbour system" and thus, concluded that "there are grounds for proceeding on a case-by-case basis, and that the text of Article 11 of the *UNCLOS* and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length identified by the ILC"[1].

In the case before it, the Court pointed out that "irrespective of its length, no convincing evidence has been presented that this dyke serves any direct purpose in port activities. For these reasons, the Court is not satisfied that the seaward end of Sulina dyke is a proper base point for the purposes of construction of a provisional equidistance line delimiting the continental shelf and the exclusive economic zones (…) on the other hand, the Court noted that while the landward end of the dyke may not be an integral part of the Romanian mainland, it is a fixed point on it. (…) for these reasons the Court was of the opinion that the landward of the Sulina dyke where it joins the Romanian mainland should be used as a base point for the establishment of the provisional equidistance line" (para. 138).

The *second issue*, namely whether the Serpents' Island it is or it is not one of a cluster of fringe islands constituting "the coast" of Ukraine and thus appropriate to be selected as a base point, was dealt by the Court in a very broad manner, the Court leaving the extensive discussion on this issue for a later stage. The Court resumed its position, at this point in time, by recalling an arbitral judgment[2] in which fringe islands were considered to be part of the very coast line of one of the Parties in the dispute but concluded that, "the Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of the fringe islands constituting "the coast" of Ukraine"[3] and thus it considered to be inappropriate to select any base points on Serpents' Island, for the construction of a provisional equidistance line between the coasts of Romania and Ukraine.

In conclusion, the Court established as base points on the Romanian coast Sacalin Peninsula and the landward end of the Sulina dyke and as base points on the Ukrainian coast Tsyganka Island, Cape Tarkhankut and Cape

[1] *Maritime Delimitation in the Black Sea*, 2009, p. 107, para. 134.

[2] *Award of the Arbitral Tribunal in the Second stage of the Proceedings between Eritrea and Yemen* (*Maritime Delimitation*), 17th of December 1999, *RIAA*, vol. XXII, pp. 367-368, para. 139-146.

[3] *Maritime Delimitation in the Black Sea*, 2009, p.110, para. 149.

Khersones. Then, using these base points, the Court ***constructed the provisional equidistance line***, ***the median line*** between the Romanian and Ukrainian coasts.

Once the provisional equidistance line has been drawn, in the **second stage**, as it was already established in its previous jurisprudence, the Court "considered whether there are **factors calling for the adjustment or shifting of that line in order to achieve an equitable result**". The function of identifying these factors is to verify that the provisional equidistance line, drawn by geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable. If such will be the case the Court should adjust the line in order to achieve and equitable solution as required by articles 74 (1) and 83 (1) of the *UNCLOS*.

This part of the judgment is the most consistent and substantive one. On one side, Romania argued that the provisional equidistance line achieves and equitable result and thus does not require any adjustment. On the other side, Ukraine argued that there are relevant circumstances which call for the adjustment of the provisional equidistance line "by moving the provisional line closer to the Romanian coast".

Thus, the Court checked no less than **six possible factors/relevant circumstances**, invoked by Ukraine and Romania, and explained in a detailed manner why none of these possible factors/relevant circumstances is in the position to influence the standing of the provisional equidistance line.

These possible factors/relevant circumstances were: a. the disproportion between the lengths of the coasts; b. the enclosed nature of the Black Sea and the delimitations already effected in the region; c. the presence of Serpents' Island in the area of delimitation; d. the conduct of the parties in respect of oil and gas concessions, fishing activities and naval patrols; e. any cutting off effect and f. the security considerations of the parties.

In the case of each of the six the Court developed a line of argumentation and explained why that particular factor/circumstance is not relevant and thus not of such nature as to influence the final line of delimitation. In brief:

a. The disproportion between the lengths of the coasts was invoked as a relevant circumstance by Ukraine which submitted that respective length of coasts and the disproportion between them should result in the shifting of the provisional equidistance line, by moving it closer to Romania's coast, in order to produce an equitable result.

The Court was of the opinion that the respective length of the coasts and the ratio of 1:2.8 can play no role in modifying the equidistance line which has been provisionally established. When stating this the Court recalled its judgment in the *North Sea Continental Shelf Cases* and put emphasis on the fact that "delimitation is a function which is different from the apportionment of resources or areas" (…) and "there is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line"[1]. Moreover, the Court recalled that even when it decided to shift the equidistance line because of disparity in the length of coasts[2] (so when it took into consideration the length of the coast as relevant circumstance) it made clear that "taking into account the disparity of costal lengths does not mean a direct and mathematical application of the relationship between the length of the costal front of Eastern Greenland and that of Jan Mayen"[3] and that "if such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation"[4].

b. The enclosed nature of the Black Sea and the delimitations already effected in the region were invoked by Romania as relevant circumstances. In this respect, Romania argued that in the that the enclosed nature and the rather small size of the Black Sea is part of the wider requirement to take account of all geographical context of the area to be delimited and that all delimitation agreements in the Black Sea use

[1] *North Sea Continental Shelf Cases*, 1969, p. 22, para. 18.

[2] In the case *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court found that the disparity between the length of the coasts between Jan Mayen and Greenland, approximately 1:9, constituted a "special circumstance" requiring the modification of the provisional median line by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zones.

[3] *Maritime Delimitation between Greenland and Jan Mayen Case*, 1993, p. 69, para. 69.

[4] *Continental Shelf Case* (*Libyan Arab Jamahiriya v. Malta*), 1985, p. 45, para. 58.

equidistance as methods for the delimitation of the continental shelf and the exclusive economic zones.

The Court recalled that, according to its own methodology, it has previously established a provisional equidistance line. This choice was not dictated by the fact that in all delimitation agreements in the Black Sea this method was used. Moreover, although the Court bared in mind the agreed delimitations between Turkey and Bulgaria, as well as between Turkey and Ukraine when considering the endpoint of the single maritime boundary, nevertheless considered that, "in the light of the abovementioned delimitation agreements and the enclosed nature of the Black Sea, no adjustment to the equidistance line as provisionally drawn is called for"(para. 178).

c. The presence of Serpents' Island in the area of delimitation was also discussed by the Court because Romania and Ukraine disagreed as to the proper characterization of Serpents' Island and to the role this maritime feature should play in the delimitation of the continental shelf and of exclusive economic zone of the Parties, in the Black Sea. In brief, Romania claimed that the Serpents' Island is a rock, incapable of sustaining human habitation or economic life of its own and therefore has no exclusive economic zone or continental shelf and that it does not form part of the costal configuration and thus of the relevant coasts of Ukraine. Romania also argued that although the Serpents' Island may qualify as a "special circumstance" it should not be given any effect beyond 12 nautical miles, which is its, already agreed, territorial sea belt. On the other hand, Ukraine argued that Serpents' Island constitutes part of Ukraine's relevant coasts and thus it cannot be reduced to just a relevant circumstance and that it is, indisputably, an island rather than a rock because it has vegetation, sufficient supply of fresh water, buildings and accommodation for an active population.

The Court recalled that it has already determined, in the first stage of its methodology when it has determined the base points, that this island does not form part of the general configuration of the coast and further proceeded in determining if the presence of Serpents' Island in the maritime delimitation area constitutes a relevant circumstance calling for an adjustment of the provisional equidistance line. The Court concluded in the sense that the presence of the Serpents' Island cannot be considered as a "special circumstance" in this case and consequently that the equidistance

line calls for no adjustment. In stating this position the Court observed that "the Serpents' Island is situated approximately 20 nautical miles to the East of Ukraine's mainland coast in the area of the Danube Delta (…). Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast because of the southern limit of the delimitation area as identified by the Court" (para. 187).

d. The conduct of the parties in respect of oil and gas concessions, fishing activities and naval patrols was suggested, by Ukraine, to be a relevant circumstance which operates in favour of the continental shelf and exclusive economic zone claim line proposed by it. Ukraine argued that in 1993, 2001 and 2003 licensed activities relating to the exploration of oil and gas deposits within the area claimed before the Court, that its boundary claim corresponds generally to the limits of Parties exclusive fishing zones and that it has been active, contrary to Romania, in policing in the north-west part of the Black Sea. On the other side, Romania does not consider that State activities in the relevant area, namely licenses for the exploration and exploitation of oil and gas and fishing practices, constitute relevant circumstances and that, as a matter of principle, effectiveness or State activities cannot constitute an element to be taken into account for the purpose of maritime delimitation. Moreover, with regards to fishing activities Romania contested that the practice of the Parties has any bearing on the maritime delimitation in the present case since neither Party economically depends on fishing activities in an area in which pelagic fish stocks are limited. With regard to naval patrols, even if they could be considered as relevant circumstance all naval incidents reported are subsequent to the critical date.

The Court considered that none of the above mentioned constitute relevant circumstance calling for the adjustment of the provisional equidistance line. In order to reach this conclusion, the Court recalled that there is no agreement in force between the Parties delimiting the continental shelf and the exclusive economic zone and that it does not see, in the present case, any particular role for the state activities invoked above, in this maritime delimitation. Moreover, it recalled the award of the Arbitral Tribunal in the case between Barbados and Trinidad Tobago where it was observed that: "resource related criteria have been treated more cautiously by the decisions of the international courts and tribunals, which have not generally applied

this factor as a relevant circumstance"[1] and with respect to fisheries recalled its previous jurisprudence[2] and stated that "no evidence was submitted to it by Ukraine that any delimitation line other than that claimed it would be likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" (para. 198).

e. The **existence of any cutting off effect**, of the proposals of the two parties in dispute, was also touched upon by the Court as both, Romania and Ukraine contended that their respective proposed maritime boundary does not cut off entitlements to continental shelf and to exclusive economic zone of the other Party.

Again, the Court found no reasons to adjust the provisional equidistance line as this provisional equidistance line, contrary to the delimitation lines proposed by the Parties[3], "allows the adjacent coasts of the parties to produce their effects in terms of maritime entitlements, in a reasonable and mutually balanced way" (para. 201).

f. As both Romania and Ukraine claimed that the delimitation line proposed by the other, adversary affect theirs **security interests**, the last check done by the Court was whether the security considerations of the parties were or were not legitimate.

The Court concluded that the provisional equidistance line, as it was determined, fully respects the legitimate security interests of either Party. Before reaching this conclusion the Court made two observations: first, that "the legitimate security considerations of the Parties may play a role in determining the final delimitation line"[4] and secondly, that the provisional equidistance line it has drawn substantially differs from the lines drawn either by Romania and Ukraine (para. 204).

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[1] *Barbados v. Trinidad Tobago*, 2006, p. 214, para. 241.

[2] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 1984, p. 342, para. 237.

[3] In the view of the Court, the delimitation line proposed by Romania obstructed the entitlement of Ukraine generated by its coast adjacent to that of Romania, the entitlement further strengthened by the northern coast of Ukraine; at the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular in the first sector between Sulina dyke and Sacalin Peninsula (para. 201).

[4] *Continental Shelf Case* (*Libyan Arab Jamahiriya v. Malta*), 1985, p. 42, para. 51.

In the **third stage** the Court **checked that the result thus far arrived at does not lead to any significant disproportionality** by reference to the respective costal lengths and the apportionment of areas that ensure. In this respect, the Court recalled an arbitral award which stated that: "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor (…) there can never be a question of completely refashioning nature (…) it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features"[1].

The Court underlined in this respect that the main idea is that the continental shelf and the exclusive economic zones allocations are not to be assigned in proportion to length of respective coastlines. Rather the Court will check the equitableness of the delimitation line it has constructed. However, this checking is approximate and the Court and the other tribunals have drawn different conclusions over the years as to what disparity in costal lengths would constitute a significant disproportionality which suggested that the delimitation line is inequitable and still requires adjustment. This remains in each case a matter for the Court's appreciation, which will exercise by reference to the overall geography of the area.

In the case before it, the Court followed the Romanian arguments and was of the view that the provisional equidistance line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires no alteration (para. 216).

3.5. Judgment of Court

The Court issued its judgment in this case on the 3rd of February 2009 and by way of it Romania was awarded sovereign rights over 79.34% of the disputed area, more precisely over 9.700 square km, from the 12.200 square km which were under dispute. And, as Court observed: "the maritime boundaries delimiting the continental shelf and the exclusive economic zone are not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law costal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty." (para. 217).

[1] *Anglo-French Continental Shelf Case*, *RRIA*, vol. XVIII, p. 58, para. 101.

This judgment, which is the 100th judgment of the ICJ, was adopted unanimously.

4. How was the above mentioned judgment reflected in the subsequent case-law of the Court?

This year, on the 3rd of February 2019, there will be 10 years since the ICJ adopted the judgment in the *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) and, thus, the right moment to look back, ten years ago, and see if and how this judgment was later reflected in the Court's jurisprudence.

After the 3rd of February 2009, the ICJ delivered **three judgments on maritime delimitations** cases respectively: a. *Territorial and Maritime Dispute* (*Nicaragua v. Columbia*), ICJ's Judgment of 19th of November 2012; *b. Maritime Dispute* (*Peru v. Chile*), ICJ's Judgment of 27th of January 2014 and c. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos Cases* (*Costa Rica v. Nicaragua*), ICJ's Judgment of the 2nd of February 2018.

These three cases will be the ones to be presented and assessed in this section in order to grasp, if there is the case, the impact of the judgment in the *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*).

4.1. *Territorial and Maritime Dispute* (*Nicaragua v. Columbia)*, ICJ's Judgment of 19th of November 2012

Without any doubt, this case is the one in which the judgment adopted in the *Maritime Delimitation in the Black Sea* was not only the most quoted by also very extensively quoted, namely **twenty two times** but with, many times, **integral paragraphs**. Thus, the Court quoted the before mentioned judgment in paragraphs 140, 141, 150 (with regard to the establishment of the relevant coasts); in paragraphs 157, 158 – 2 times (with regard to the establishment of relevant area); paragraph 161 – 2 times (with regard to entitlements of third States in the relevant area); paragraph 179 (with regard to the status of small islands); paragraphs 190, 191, 192, 193, 196 (with regard to the three stages methodology used in maritime delimitations); paragraphs 200, 202 (with regard to selection of base points); 205 (with

regard to general aspects and functions of the relevant circumstances); paragraph 209 (with regard to the disparity in the lengths of the relevant coasts); paragraph 215 (with regard to the overall geographical context); paragraph 220 (with regard to the conduct of the parties); paragraph 223 (with regard to equitable access to natural resources) and paragraph 240 (with regard to the disproportionality test).

In **paragraph 140** when the Court was called to establish the relevant coasts it stated the principle applicable, namely that "the land dominates the sea" and it also quoted, alongside other decisions, paragraph 77 of *Romania v. Ukraine Case*, respectively: *"the title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the costal fronts"*.

Immediately after that, in **paragraph 141**, when the Court explained the reasons for which the establishment of relevant coasts is of importance from the perspective of any delimitation process, the Court continued by, integrally, quoting paragraph 78 of the 2009 judgment, namely: *"The role of the relevant coasts can have two different through closely related legal aspects in relation with the delimitation of the continental shelf and the exclusive economic zones. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of the case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the final third and final stage of the delimitation process, whether any disproportionality exists in the ratio of the costal length of each State and the maritime area falling either side of the delimitation line".*

In **paragraph 150**, the Court clarified when a coast is to be regarded as relevant, for the purpose of the delimitation and stated that, in order to have this role, it *"must generate projections which overlap with projections from the coast of the other Party"*, as established in paragraph 99 of *Romania v. Ukraine Case*.

After recalling, in **paragraph 157**, and by quoting para.110 of *Romania v. Ukraine Case*, that *"the legal concept of the `relevant area` has to be taken as part of the methodology of maritime delimitation"*, **in paragraph 158** the Court has quoted the whole text of paragraph 110 while emphasizing that: *"The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the*

delimitation line arrived at by any other means needs adjustment because of significant disproportionality in the ratio between the maritime areas which will fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts" and concluded by quoting, in the same paragraph 158, a line of paragraph 111, namely: *"the objective of the delimitation is to achieve a delimitation that it is equitable, not an equal apportionment of maritime areas"*.

The *Maritime Delimitation in the Black Sea* was recalled again, in **paragraph 161**, in which the Court dealt with the entitlements of third States in the area and noted that this fact did not preclude the inclusion of those parts in the relevant area *"without prejudice to the position of any third State regarding its entitlements in this area" but that "where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage test for disproportionality), third parties entitlements would only be relevant if the delimitation between Romania and Ukraine were to affect them"* (para. 114 of the Judgment in *Maritime Delimitation in the Black Sea*).

The discussion and the later approach which was taken by the Court in respect of the legal relevance of the Serpents' Island was recalled in **paragraph 179** when the Court decided that, similarly to the *Maritime Delimitation in the Black Sea*, it is not necessary to determine the precise status of the smaller islands, since any entitlement to maritime space which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental shelf and exclusive economic zone generated by the Islands of San Andrés, Providencia and Santa Catalina.

Paragraphs 190, 191, 192, 193 and 196 of this new judgment contain the most extensive quotes of the 2009 judgment and refer to several aspect related to the three steps methodology, which is employed when the Court it is called upon to effect delimitation between overlapping continental shelf and exclusive economic zone entitlements.

After the Court described the contents of the first stage of the methodology – consisting of the construction of a provisional equidistance line, where the coasts are adjacent or a median line, where the coasts are opposite – it recalled paragraphs 116 and 117 of its judgment in the *Maritime*

Delimitation in the Black Sea case, and to drew the attention to the fact that *"no legal consequences flow from the use of terms 'median line' and 'equidistance line' since the method of delimitation in each case involves constructing a line each point on which there is an equal distance from the nearest points on the two relevant coasts (...). The line is constructed using the most appropriate base points on the coasts of the Parties"*.

In the second stage – when the Court considered whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line as to achieve an equitable result – paragraphs 102 and 103 of the 2009 judgment were also quoted, alongside with other relevant cases of the Court.

In the third stage of the methodology – when the Court conducted the final disproportionality test – it added, in this new judgment, a consistent quote from the *Maritime Delimitation in the Black Sea*: *"Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or which may not have been adjusted taking into account relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective costal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line (...). A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of costal lengths. This is not to suggest that these respective areas should be proportionate to costal lengths" (...). The sharing out of the area is therefore the consequence of the delimitation, not vice versa"* (para. 122)

In paragraph 196 the Court explains how it proceeds, in terms of methodological approach, when there are overlapping potential entitlements, disparity in the costal lengths or islands in the area and underlined that all these do not justify discarding the entire methodology. The main reason is that the construction of a provisional median line in the method normally employed by the Court is nothing more than a first step and that all these factors can be later considered by the Court, if so is the case, as relevant circumstances. Citing the judgment in *Romania v. Ukraine*, the Court pointed out that *"at this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data"* (para. 118).

Paragraphs 200 and **202** of the judgment in this case clarified the approach taken by the Court when it proceeds to the selection of the base points. Thus, in the construction of the provisional median line it is the task of the Court to establish the base points which are going to be used. The Court is not bound by what the Parties indicate as base points. In restating this position, the Court quoted paragraph 137 of the 2009 judgment: *"In (…) the delimitation of maritime areas involving two or more States, the Court should not base itself solely on the choice of the base points made by one of those Parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts"*.

When establishing the base points, the Court also had to consider whether it can or cannot place a base point on Quitasueño, a tiny feature 38 nautical miles from Santa Catalina. The Court found this situation to be similar to the one of the Serpents' Island and recalled its approach in paragraph 149 of the 2009 judgment where it held that it was inappropriate to select any base point on Serpents' Island because it lay alone and at distance of some 20 nautical miles from the mainland coast of Ukraine and its use as part of the relevant coast *"would amount to grafting an extraneous element onto Ukraine's coastline; the consequence will be a judicial refashioning of geography, which neither law nor practice of maritime delimitations authorizes"*. In conclusion, when placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of the provisional line.

In **paragraph 205** of the judgment the Court generally clarified the notion of relevant circumstances and explained the functions of these factors/relevant circumstances, by quoting a part of paragraph 155 of its judgment in the *Maritime Delimitation in the Black Sea*: *"their function is to verify that the provisional median line, drawn by geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable"*.

In **paragraph 209** of the judgment the Court discussed the issue of length of coasts and whether this length is or is not a factor/relevant circumstance. As the Court previously stated, the length of relevant coasts may be a factor/relevant circumstance when there is substantial disparity and that requires an adjustment of the provisional line. This was the case in the present delimitation but was not the case in the *Maritime Delimitation in the Black Sea*. As stated in paragraph 163, in *Romania v. Ukraine Case*, in 2009 – where the Court found that the ratio between the Romanian and Ukrainian

coast was of 1:2.8 – *"the respective length of coasts (as such – author comment) can play no role in identifying the equidistance line which has been provisionally established"*.

In **paragraph 215** the Court analyzed the overall geographical context in order to establish if there is any cut-off effect and quoted *Romania v. Ukraine case*, paragraph 201: *"(...) the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way"*.

Conduct of Parties as relevant circumstance was not considered as such in **paragraph 220** of this case. The Court recalled its previous jurisprudence, including paragraph 198 of the Maritime *Delimitation in the Black Sea* judgment, and the jurisprudence of arbitral tribunals and stated that even though it cannot be ruled out that conduct might need to be taken into account as a relevant circumstance in an appropriate case, its jurisprudence and that of the arbitral tribunals shows that conduct will not normally have such an effect.

The last potential relevant circumstance/factor which was discussed by the Court was the matter of equitable access to resources in respect of which the Court decided, in **paragraph 223**, that in the present case the issue of access to natural resources was not so exceptional as to be treated as relevant. In doing so, the Court recalled the arbitral award in *Barbados v. Trinidad Tobago* of 2006, and reminded that this award was quoted with approval in the *Maritime Delimitation in the Black Sea Case*, paragraph 198.

Finally, the last reference to the *Maritime Delimitation in the Black Sea Case* was in **paragraph 240**, where the Court carried out the disproportionality test and recalled what it has stated in 2009, in paragraph 2013, namely: *"that various tribunals and the Court itself, have drawn different conclusions over the years as to what disparity in costal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable and still require adjustment"*.

4.2. *Maritime Dispute* (*Peru v. Chile*), ICJ's Judgment of 27th of January 2014

This dispute concerned on one hand, the delimitation of the boundary between the maritime zones of Peru and Chile in the Pacific Ocean, beginning at a point on the coast called Concordia, the terminal point of the

land boundary established pursuant to the *Treaty of 3rd of June 1929* and on the other hand, the recognition, in favour of Peru, of a maritime zone lying within 200 nautical miles of Peru's coast, which according with the submission should appertain to it, but which Chile considered to be part of the high seas.

In the *Maritime Dispute* (*Peru v. Chile*) the Court adopted its judgment on the 27th of January 2014. The ICJ's judgment in the *Maritime Delimitation in the Black Sea*, further called the ICJ judgment of 2009, was recalled **five times**, in paragraph 116 (with respect to the exclusive economic zone); paragraphs 180, 183, 185 (with respect to the three steps methodology) and in paragraph 193 (with respect to the disproportionality test).

Paragraph 70 of the judgment of 2009, was first recalled in **paragraph 116**, which is included in section B *Contemporaneous development of the law of the sea*, in relation with the clarification of the concept of exclusive economic zone of 200 nautical miles. In this context the Court observed "that during the period under consideration (after 1929 and before 1982 – *our note*) the proposal in respect of the rights of a State over its waters which came nearest to general international acceptance was of 6 nautical miles territorial sea with a further of fishing zone of 6 nautical miles and some reservation of established fishing rights. As the Court noted previously, in this period the concept of an exclusive economic zone of 200 nautical miles *"was still some long years away"* (…) while its general acceptance in practice and in the 1982 UNCLOS was about 30 years into the future".

Then, in **paragraphs 180**, **183** and **185**, the Court recalled its judgment of 2009, when it made reference to the three steeps methodology which the Court usually employs in seeking an equitable solution, when it made reference to the starting point of delimitations in the situation of a pre-existing agreement between the parties and when it established the base points. In paragraph 180 the Court made reference to the three steeps methodology which was clarified in the *Maritime Delimitation in the Black Sea* case (para. 115-122) and was restated, three years later, in the *Territorial and Maritime Dispute* (*Nicaragua v. Columbia*) (para. 190-193).

In the present case, the Court recalled and described the stages as follows: "in the first stage, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are any relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court conducts disproportionality test in which it assesses whether the effect of the line, as adjusted, in such that the Parties respective shares of the

relevant area are markedly disproportionate to the lengths of their relevant coasts".

With respect to the starting point of delimitation the Court referred to its practice and stated that "a number of delimitations begin not at the low-water line but at a point further seaward, as a result of pre-existing agreement between parties" (para. 218 of the Judgment of 2009).

The selection of the base points, the Court also recalled paragraph 117 of its 2009 Judgment when saying that: "(…) base points for the construction of the provisional equidistance line have been selected as the most seaward costal points *"situated nearest to the area to be delimited"* (…)".

Finally, in **paragraph 193**, the Court quoted its judgment from 2009 while observing that, in this final phase of the delimitation process, the calculation does not purport to be precise and is approximate, thus engaging in a broad assessment of disproportionality. I quote: *"the object of the delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas"* (para. 111).

4.3. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos Cases* (*Costa Rica v. Nicaragua*), ICJ's Judgment of the 2nd of February 2018

This dispute concerned the establishment of single maritime boundaries between Costa Rica and Nicaragua in the Caribbean Sea and the Pacific Ocean, respectively delimiting all the maritime areas appertaining to each of them, in accordance with the applicable rules and principles of international law.

In view of the claims made by Costa Rica in the case concerning the *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* and the close link between those claims and certain aspects of the dispute in the case concerning *Maritime Delimitation in the Caribbean*

Sea and the Pacific Ocean (Costa Rica v. Nicaragua), by an Order of 2nd of February 2017, the Court joined the two proceedings.

In the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* and the *Land Boundary in the Northern Part of Isla Portillos Cases* (*Costa Rica v. Nicaragua*) the Court adopted its judgment on the 2nd of February 2018. The ICJ's judgment in the *Maritime Delimitation in the Black Sea*, further called the ICJ judgment of 2009, was recalled **thirteen times**, in paragraphs 95 (was made by Costa Rica and referred to the base points); paragraph 108 (establishment of the relevant coasts); paragraphs 116, 121 (the legal concept of relevant area and rights of third states in the area); paragraphs 135 – two times, 136, 142 (on the establishment of the provisional equidistance line); paragraph 146 (on the adjustment to the provisional equidistance line); paragraphs 159,160,161 and 162 (on the disproportionality test).

The first reference to the 2009 judgment in this case was in **paragraph 95** and was made not by the Court as such but by Costa Rica and referred to the base points. According to Costa Rica, which quoted a line from paragraph 131 of the judgment in *Maritime Delimitation in the Black Sea* case, the base points must be selected on costal features that represent the *"physical reality at the time of the delimitation"* and thus these points should not be placed on ephemeral, sandy, unstable features. Without recalling the before mentioned judgment, the Court established in this case that it will construct the provisional median line for delimiting the territorial sea only on the basis of points situated on the natural coasts which may include points placed on islands or rocks.

The second reference to the 2009 judgment in this case was made thirteen paragraphs later, in **paragraph 108**, and referred to the establishment of the relevant coasts which, as established by the Court in paragraph 97 of its judgment in *Romania v. Ukraine case*, is an essential step in maritime delimitations, the relevant coasts being those that generate projections which overlap with projections from the coast of the other Party.

In **paragraph 116** the Court recalled its observation that *"the legal concept of the 'relevant area' has to be taken into account as part of the methodology of maritime delimitation"* as it did in the *Maritime Delimitation in the Black Sea*, paragraph 110. The Court later continued by discussing the issue of the impact of the rights of third States in the areas that may be attributed to one of the Parties and quoted paragraph 114 of its 2009 judgment, where it observed that: *"where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area*

(and which in due course will play a part in the final stage testing for disproportionality) third party entitlements cannot be affected".

The Court made reference to and quoted extensively the 2009 judgment in **paragraphs 135, 136** and **142** in respect of the establishment of the provisional equidistance line.

May be one of the most interesting and valuable reference is the one that the Court made in the last part of paragraph 135. After the Court underlined the importance of the three stages methodology and explain why a third stage it is necessary, namely because it allows the Court to *"asses the overall equitableness of the boundary resulting from the first two stages by checking whether there exists a marked disproportionality between the length of the Parties' relevant coasts and maritime areas found to appertain to them"* – as the Court did established in the *Maritime Delimitation in the Black Sea* case (paras. 115-122) – the Court went further and noted that: "the methodology in three stages set out in its Judgment in *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) has also been adopted by other international tribunals requested to delimit maritime boundaries". It was the case of the Hamburg International Tribunal for the Law of the Sea[1] and the one of the arbitral tribunal[2].

Then, in **paragraph 136**, the 2009 judgment was recalled in respect of the first stage of the delimitation, in which the Court uses scientific, geometric and objective criteria to establish the provisional equidistance line. In the respective judgment, as quoted here, the Court stated that: *"First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as the delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in a particular case"* (para. 116) and that *"the line thus adopted is heavily dependent on the physical geography and the most seaward points on the two coasts"* (para. 117).

The legal situation of "a cluster of fringe island" as referred to in the *Maritime Delimitation in the Black Sea* or "islands fringing the Nicaraguan coast" as it was referred to in the present case, was and opportunity for the

[1] Further called ITLOS. *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh v. Myanmar*), Judgment, *ITLOS Reports* 2012, p. 64-68, para. 225-240).

[2] *Bay of Bengal Maritime Boundary Arbitration* (*Bangladesh v. India*), Award of 7th of July 2014, *International Law Reports*, vol. 167, p. 111-114, para. 336-346.

Court, in **paragraph 142** of the present judgment, to reiterate the same conclusion it arrived to in the first case namely that such formations may be assimilated to the coast. The difference was that, in the present case, the Court arrived to the conclusion that Paxaro Bovo, which is a rock situated 3 nautical miles off the coast south of Punta del Mono, was appropriate to place base points for the construction of the provisional equidistance line.

In **paragraph 146** the second stage of the three steps methodology, in which the Court verifies if there is need to adjust the provisional equidistance line, was described by a quote, of paragraph 120, of the judgment in *Romania v. Ukraine* case: *"After constructing the provisional equidistance line, the Court will at the next, second stage consider whether there are factors calling for the adjustment of shifting of the provisional equidistance line in order to achieve and equitable result"*.

The last four references to the 2009 ICJ judgment were made in **paragraphs 159, 160, 161** and **162,** where the ones in which the Court conducted the final disproportionality test. Each of these four paragraphs is predominantly composed of quotes. The quotes from the judgment in the *Maritime Delimitation in the Black Sea* are of an extensive length. Firstly, the Court explained, by using a long quote from its 2009 Judgment, the contents of the third stage of the methodology employed by the Court in maritime delimitations, respectively: "*Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective costal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line"* (para. 122). Then, the Court referred to the need for *"a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of costal lengths".* It continued by saying that whether there is significant disproportionality "remains in each case a matter for the Court's appreciation, which will exercise by reference the overall geography of the area" (para. 213). Finally the Court explained that: *"the calculation of the relevant area does not purport to be precise but is only approximate and that the object of the delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas"* (para. 111).

5. Conclusions

The ICJ's judgment from the 3rd of February 2009, in the *Maritime Delimitation in the Black Sea* is, without doubt, a leading judgment[1] and also an authoritative one as it has been adopted by unanimous vote. There are many arguments which can support this opinion.

Apart from the impressive number of quotes which were extracted from this judgment and used in the other three cases on maritime delimitations that followed, the judgment has also brought significant contributions in respect of substance and was an opportunity for the Court to refine its methodology in maritime delimitations. I will only refer to some of these aspects.

For instance, the methodology in three stages, which was set out by the Court it its judgment on the *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) was not only quoted and restated in all the three ICJ judgments that followed but it has also been adopted, and the judgment quoted accordingly, by other international tribunals requested to delimit maritime boundaries, for example, as previously mentioned in the section above, by ITLOS[2] and the arbitration tribunal[3]. This fact was acknowledged by the Court itself in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos Cases* (*Costa Rica v. Nicaragua*), p. 53, para. 135.

Moreover, in respect of the final result of the delimitation process, it was in *Romania v. Ukraine* case that the Court established that the application of the three stages methodology, aims "to produce an equitable delimitation and not an equal apportionment of maritime areas" (para.100) and the Court placed immense importance on the conduction of the final disproportionality test.

To conclude, after 10 years since its adoption, the judgment of the ICJ in the Maritime Delimitation in the Black Sea was very well reflected in the work undertaken at a later stage by the Court on issues pertaining to maritime delimitations and it has been a very rich source of inspiration not only for the Court itself but also for other international tribunals.

[1] See for the same opinion, Alain Pellet, *Roumanie c. Ukraine – un arrêt refondateur* in Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Hamangiu Publishing House, Bucharest, 2014, p. 44.

[2] See footnote 50 of this paper.

[3] See footnote 51 of this paper.

The Development of Maritime Delimitation by the International Court of Justice

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Abstract: *This article aims to address the manner in which the International Court of Justice developed certain relevant aspects of the law of maritime delimitation.*

Key-words: *Maritime Delimitation, International Court of Justice.*

1. Introduction

The jurisprudence of the International Court of Justice has constantly influenced the development of international law, as '*ninety years of international jurisprudence have left traces on almost the entire spectre of contemporary international law'.*[2] As such, the case law of the International Court of Justice is a strong structure that reinforces the foundation of the progressive development of international law. Certain authors consider that the judgments of the Court could prove even stronger than the primary sources of international law, because they often provide accurate answers to questions of certain specificity, that are mistreated, at times, by treaties or custom. As such, Jan Paulsson concludes that the in built limitations of the jurisprudence of the International Court of Justice are a tribute to its potential potency as treaties do not affect non signatories while customs and

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[2] Christian J. Tams, *"The ICJ as a 'Law Formative Agency': Summary and Synthesis"*, in Christian .J. Tams, J. Sloan (Eds,), The Development of International Law by the International Court of Justice, 378.

general principles evolve with glacial speed, and, in most cases at a level of considerable generality[1].

Maritime delimitation is among the most important concepts of international law, as its interpretation influences a variety of contemporary issues related to the application of international law. Authors have concluded in this respect that *"maritime delimitation remains an important topic: in boundary-making, sensitive questions of state sovereignty, sovereign rights, jurisdiction and title to valuable natural resources are all put into question."* [2] The importance of maritime delimitation issues is also highlighted by the risks involved with this process. As such, it has been further concluded that *"nowadays, the potential political and security risks of boundary disputes are high, and unresolved maritime boundaries between States may easily affect bilateral relations or even international peace and security.* [3]

It did not take a very large number of cases for the Court to establish general rules applicable with respect to the law of maritime delimitation. In fact, *"the Court has been seized of a total of 14 cases in this field involving maritime areas off Western and Eastern Europe, North and South America (including the Caribbean), the Middle East and Africa. At present, there are only two of these cases still remaining on the Court's General List, one between Nicaragua and Colombia, the other between Peru and Chile"*[4]. In the same manner in which the Court has contributed to the law of state responsibility, the International Court of Justice shaped the law of maritime delimitation.

This article shall address three main issues with respect to maritime delimitation, clarified and developed by the International Court of Justice: the interaction between national and international law with respect to maritime delimitation; the relevance of delimitation by agreement and the equitable and practical methods of delimitation.

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[1] Jan Paulsson, *"International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law¨,* in ICCA Congress no. 13, *International Arbitration 2006: Back to Basics?* 883.

[2] David H. Anderson, "Foreword" in Atunes, Nuno Marques (2003), Toward The Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process, Martinus Nijhoff Publishers, Leiden/Boston.

[3] David H. Anderson, "Foreword" in Atunes, Nuno Marques (2003), Toward The Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process, Martinus Nijhoff Publishers, Leiden/Boston.

[4] Shi Jiuyong, *"Maritime Delimitation in the Jurisprudence of the International Court of Justice",* Chinese Journal of International Law (2010), 271–291, 272.

2. The interaction between national and international law with respect to maritime delimitation

The relationship between national law and international law is not controversial. Ian Brownlie concludes in this respect that *"here, the position is not in doubt. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it or for a breach of its obligations under international law"*[1]. Even so, the International Court of Justice was seized with a wide range of topics[2] that involved, *inter alia*, maritime delimitation and the relationship between national and international law from this perspective.

2.1.The Fisheries Case

The Fisheries Case is a classic example in which the Court issued a judgment clarifying whether national or international law governs maritime delimitation. The Fisheries Case is among the first disputes in which the International Court of Justice had to decide regarding the question of the law governing maritime delimitation. The facts of the case referred to the differences that existed between Great Britain and Norway with respect to the limits at sea which the Norwegian Government was entitled to reserve fishing exclusively to Norwegian vessels. The dispute originated with the issuance of the Norwegian Royal Decree of 12th of July 1935, slightly amended in 1937, delimiting the Norwegian Fisheries zone.

Great Britain contested this unilateral delimitation and requested, through its Application, that the International Court of Justice issues a judgement, declaring that international law governs maritime delimitation, as such:

> *"the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals,*
>
> *and to define the said base-lines in so far as it appears necessary, in the light of the arguments of the Parties, in order to avoid further legal differences between them"*[3]

[1] Ian Browlie, James Crawford, Browlie's Principle of International Law (Oxford University Press 2012), 51.

[2] *Ibid*. 54

[3] *Fisheries Case* (United Kingdon v. Norway), Application Instituting Proceedings, 11-12.

The memorial of Great Britain further contextualized the request and contained the following argument, with respect to the interaction between national law and international law, regarding maritime delimitation:

> *"A. International law does not give to each State the right arbitrarily to choose its own base-lines and a State, in prescribing base-lines for any particular area, can therefore da so only within the limits imposed by international law (paras, 62-67)."*[1]

It seems that the International Court of Justice partially accepted the conclusions of Great Britain, and issued its judgment through which it delivered its decision with respect to the interaction between national and international law regarding maritime delimitation issues:

> *"The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law. '*[2]

As such, maritime delimitation is a complex activity performed through national law, but verified by international law. The unilateral acts of state are mechanisms that are governed by national law, as it is national law that delimits these maritime areas. However, this does not imply that international law has no impact on maritime delimitation, but the contrary: it verifies whether these unilateral mechanisms can manifest themselves outward, towards the international community. The Court concluded that states indeed have a sovereign right to delimit their maritime zones, in accordance with their needs, as such:

> *'It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast."*[3]

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[1] *Fisheries case* (United Kingdon v. Norway), Memorial of Great Britain, 55.

[2] *Fisheries case* (United Kingdon v. Norway), Judgment of December 18th, I95I: I.C. J. Reports 1951, p 116, 20.

[3] *Fisheries case* (United Kingdon v. Norway), Judgment of December 18th, I95I: I.C. J. Reports 1951, p 116, 133.

The conclusion of the Court was rather flexible because it did not fix precise limits[1]. However, the findings of the International Court of Justice with respect to the interaction between national and international law regarding maritime delimitation proved instrumental to the development of the other general rules of maritime delimitation.

3. General rules of maritime delimitation

3.1. The relevance of delimitation by agreement

It is clear that delimitation by agreement remains the primary rule of international law[2]. Authors have concluded that maritime delimitation by agreement as being a veritable principle of international law, the United Nations Convention on the Law of the sea emphasizing the *"fundamental importance of agreement in delimitation"*[3].

3.2.The Case Concerning the Territorial Dispute

A relevant case in which the International Court of Justice confirmed that the agreement of the parties is essential when deciding issues of maritime delimitation was the *Case Concerning the Territorial Dispute* between Libyan Arab Jamahiriya and Chad. The dispute originated in the disagreement of the parties to the dispute with respect to the existence of a prior determination of delimitation. As such, Libya argued that there was no existing boundary, and asked the Court to determine it. Chad considered that a boundary existed, and requested the Court to declare what that boundary was.

The International Court of Justice issued its judgment in which it concluded that nothing prevents the states to determine a boundary through agreement:

> *"The fixing of a frontier depends on the will of the sovereign States direct1y concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. If it was already a territorial boundary, it is confirmed purely and*

[1] Tullio Scovazzi, *¨The Baseline of the Territorial Sea: The Practice of Arctic States¨* in A.G. Oude Elferink, D.R. Rothwell, The Law of the Sea and Polar Maritime Delimitation and Jurisdiction (Martinus Nijhoff 2001), 74.

[2] Nugzar Dundua, *"Delimitation of maritime boundaries between adjacent States",* http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf, 3.

[3] Stephen Fietta, Robin Cleverly, A Practitioner's Guide to Maritime Boundary Delimitation (Oxford University Press 2016) 24.

> *simply. If it was not previously a territorial boundary, the agreement of the parties to "recognize" it as such invests it with legal force, which it had previously lacked. International conventions and case-law evidence a variety of ways in which such recognition can be expressed."*[1]

The International Court of Justice further concluded that the establishment of a boundary by treaty, is of great impact towards the *status quo*, as it *"achieves a permanence which the treaty itself does not necessarily enjoy."*[2] The International Court of Justice has analyzed agreements between states in a variety of cases, and constantly decided that where there is agreement, the Court can merely declare its effects. As such, one application of the principle of consent is the *Temple of Preah Vihear Case*, in which the Court concluded that *"both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line"*[3].

However, where there is no agreement, the International Court of Justice applies certain rules of international law in order to determine the manner in which it interprets and applies maritime delimitation.

4. General rules of boundary maritime delimitation

The International Court of Justice has contributed not only to the manner in which it interprets the notion of maritime delimitation, and its general characteristics, but also regarding the principles that apply with respect to the delimitation of maritime zones, and border delimitation. In a variety of cases the Court was requested to determine the rules and principles applicable to maritime delimitation.

4.1.The determination of the relevant coasts

The determination of the relevant coast is the starting point of the complex process of maritime delimitation. These areas of land have been described as being *"in effect, the distance from the land boundary to the most distant controlling points in each direction"*[4].

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[1] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 Feb. 1994, [1994] ICJ Rep 6, 23.

[2] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 Feb. 1994, [1994] ICJ Rep 6, 37.

[3] *Temple of Preulz Vihear (Cambodia v. Thailand), Merits. I.C.J. Reports 1962, 33.*

[4] Malcom D. Evans, "*Maritime Boundary Delimitation: Where do we go from here*?" in D. Freestone, R. Barnes, D. Ong, The Law of the Sea: Progress and Prospects (Oxford University Press 2006), 127.

a) Maritime Delimitation in the Black Sea

A relevant case in which the Court determined the role of relevant coasts, and its implications, is the case concerning Maritime Delimitation in the Black Sea, between Romania and Ukraine. In this case, the dispute concerned *"the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them."*[1] As such, Romania requested the International Court of Justice the following:

> *"to draw in accordance with the international law, and specifically the criteria laid down in Article 4 of the Additional Agreement, a single maritime boundary between the continental shelf and the exclusive economic zones of the two States in the Black Sea."*[2]

One distinctive feature of this case was that the parties did not request the International Court of Justice to determine the principles of maritime delimitation, but to issue a declaratory judgment through which it *decides* the boundary. However, the Applicant requested the Court to consider the following principles of maritime delimitation:

> *"(a) the principle stated in Article 121 of the United Nations Convention on the Law of the Sea of 10 December 1982, as applied in State practice and in international case law;*
>
> *(b) the principle of the equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of the median line in areas where the coasts are opposite;*
>
> *(c) the principle of equity and the method of proportionality, as applied in State practice and the decisions of international courts regarding the delimitation of continental shelf and exclusive economic zones;*
>
> *(d) the principle according to which neither of the Contracting Parties shall contest the other Contracting Party's sovereignty over any part of its territory neighbouring the area submitted to delimitation;*

[1] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Application instituting proceedings, 2.

[2] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Application instituting proceedings 6.

(e) the principle of taking into account the special circumstances of the area submitted to delimitation."[1]

The international Court of Justice analyzed the requests of the parties with respect to its task of determining the boundary between the two states, and concluded as follows, regarding the role of the relevant coast:

> *"The role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line."*[2]

As such, it is presently established that the role of the relevant coasts is complex and that its relevance cannot be understated. First, the relevant coast is the element that it contributes to the identification of the overlapping claims and second, of the potential disproportionalities related to the delimitation line.

4.2.The Determination of Borders – Equitable Criteria and Relevant Circumstances

a) Defining maritime delimitation - The North Sea Continental Shelf Case

The disputes that were instrumental in determining the general applicability, of lack thereof, of the principle of equidistance were the North Sea Continental Shelf Cases. In these instances, the parties requested the Court, through the special agreement, to decide the following question:

> *"What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of*

[1] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Application instituting proceedings 4.

[2] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, 32. (emphasis added)

them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965?"[1]

The International Court of Justice established the notion of maritime delimitation, as such:

> *"Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical"*[2]

As such, the Court does not necessarily determine the boundaries when it decides regarding maritime delimitation, because these boundaries exist. The Court rather adjusts them, and it defined this complex mechanism was *"delimitation"*.

b) Special circumstances –Maritime Delimitation in the Area between Greenland and Jan Mayen

The manner in which the International Court of Justice decides issues related to maritime delimitation usually revolve around these two concepts, i.e. equitable considerations and relevant circumstances. The International Court of Justice, throughout its case law, also observed the manner in which the two concepts influence one another and interact.

The method of using equitable considerations and relevant circumstances emerged before the International Court of Justice with the Greenland/Jan Mayen Case. In this case, Denmark seized the International Court of Justice, with respect to dispute concerning the delimitation of Denmark's and Norway's fishing zones and continental shelf areas in the waters between the east coast of Greenland and the Norwegian island of Jan Mayen.

The Court determined as follows, with respect to the application of the principle of equidistance:

> *"In respect of the continental Shelf boundary in the present case, even if it were appropriate to apply, not article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accordance with*

[1] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Special Agreement, 8.

[2] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, I.C.J. Reports 1969, p. 3, 22.

> *precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' require any adjustment or shifting of the line"*[1]

The Court decided that indeed relevant circumstances are indeed applicable in this case and that the medial line should be adjusted, as such:

> *" In the light of this case-law [Gulf of Maine case], the Court has to consider whether any shifting or adjustment of the median-line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned."*[2]

c) Equitable criteria - Delimitation of the Maritime Boundary in the Gulf of Maine Area

The Delimitation of the Maritime Boundary in the Gulf of Maine Area is another case in which the Court issued an judgment through which it interpreted the manner in which a single maritime boundary should be determined. Authors have concluded that this is *"the first decision of the court on the delimitation of a single maritime boundary for both the continental shelf and superadjacent water column"* [3] and that *"the decision will have major significance for the future"*[4].

In this case, the International Court of Justice concluded the following:

> *"The function of the foregoing discussion has been to define, in the light of the sources examined, the principles and rules of international law or, more precisely, the fundamental norm of customary international law governing maritime delimitation. As has been shown, that norm is ultimately that delimitation, whether effected by direct agreement or by the decision of a third Party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result. The Chamber must now proceed to consider*

[1] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 38, 27. (emphasis added)

[2] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 38, 36.

[3] Edward Collins, Jr., Martin A. Rogoff, *"The Gulf Of Maine Case And The Future Of Ocean Boundary Delimitation",* Maine Law Review, Vol. 38, https://mainelaw.maine.edu/faculty/wp-content/uploads/sites/4/rogoff-mlr-38.pdf, p. 8.

[4] Edward Collins, Jr., Martin A. Rogoff, *"The Gulf Of Maine Case And The Future Of Ocean Boundary Delimitation",* Maine Law Review, Vol. 38, https://mainelaw.maine.edu/faculty/wp-content/uploads/sites/4/rogoff-mlr-38.pdf, p. 8.

> *these equitable criteria and the practical methods which are in principle applicable in the actual delimitation process."*[1]

The Court then turned to its analysis regarding the criteria to be used and whether such general equitable criteria exist in international law, and, it replied in the negative, by concluding as follows:

> *"At any rate there is no single method which intrinsically brings greater justice or is of greater practical usefulness.*
>
> *The Chamber considers, therefore, that there are not two kinds of methods, those which are intrinsically appropriate, on the one hand, and those which are inappropriate or less appropriate, on the other. The greater or lesser appropriateness of one method or another can only be assessed with reference to the actual situations in which they are used, and the assessment made in one situation may be entirely reversed in another. Nor is there any method of which it can be said that it must receive priority, a method with whose application every delimitation operation could begin, albeit subject to its effects being subsequently corrected or it being even discarded in favour of another, if those effects turned out to be clearly unsatisfactory in relation to the case. In each specific instance the circumstances may make a particular method seem the most appropriate at the outset, but there must always be a possibility of abandoning it in favour of another if subsequently this proved justified. Above al1 there must be willingness to adopt a combination of different methods whenever that seems to be called for by differences in the circumstances that may be relevant in the different phases of the operation and with reference to different segments of the line."*[2]

As such, the International Court of Justice established that the notion of equity cannot be applied *mutandis mutatis* in any give dispute. The manner in which the Court will apply equitable considerations in order to decide issues related to maritime delimitation will depend on the intrinsic characteristics of each case. Even so, this circumstance should not lead to the conclusion that there is no predictability regarding the manner in which the Court applies equitable criteria. The Court confirmed this conclusion in the Continental Shelf Case, where it decided as follows:

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[1] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), Judgment, I.C.J. Reports 1984, p. 246, 58.

[2] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), Judgment, I.C.J. Reports 1984, p. 246, 73. (emphasis added)

> *"Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision ex aequo et bono"*[1]

As such, the Court determined that there is a distinction to be drawn between the notion of *"equitable consideration"*, which is a mechanism used by the Court with the constant observance of the law, for which the agreement of the states involved in the dispute is not necessary, and the notion of "equity", i.e. *ex aequo et bono,* which is the notion provided by article 38 of the Statute of the International Court of Justice, for the exercise of which the express agreement of the parties is necessary.

5. Conclusion

This article shows that the impact of the judgments of the International Court of Justice manifests itself in the field of maritime delimitation, contributing to its progressive codification. In the words of Professor Alain Pellet, *"[t]he law of the delimitation of maritime spaces is a fascinating example of the use by the Court of this de facto legislative power"*[2]. Authors that conclude that *'one important issue, maritime delimitation, has been effectively ICJ shaped'*[3] support the conclusion that the International Court

[1] *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, 46.

[2] Alain Pellet, *"Competence of the Court: Art. 38"* in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C. J. Tams. The Statute of the International Court: A Commentary (Oxford University Press 2012), p. 865.

[3] Christian J. Tams, "The Development of International Law by the International Court of Justice", https://www.scienzegiuridiche.uniroma1.it/sites/default/files/varie/GML/2015/GML_2015-Tams.pdf, p. 17.

of Justice has contributed towards the development of maritime delimitation. Other authors confirm that *"the clarification of the rules of maritime delimitation has been mostly achieved through the case law of the International Court of Justice."*[1]

Indeed, the International Court of Justice has proven to be instrumental with respect to the manner in which the three main concepts described, i.e. the law governing maritime delimitation, the agreement of the parties involved in maritime delimitation and the notions of *"equitable criteria"* and *"relevant circumstances",* are presently understood.

[1] Alex G. Elferink, Tore Henriksen, Signe V. Busch, "The Judiciary and the Law of Maritime Delimitation: Setting the Stage", in A. G. Elferink, T. Henriksen, S. V. Busch (Eds.) Maritime Boundary Delimitation: The Case Law: Is it Consistent and Predictable (Cambridge University Press 2018), p.2.

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

Brief Observations on the Protection of Underwater Cultural Heritage in International Law

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Abstract: *The present article seeks to briefly present the existing applicable regulations concerning the protection of underwater cultural heritage, a still-developing and somewhat controversial field of the law of the sea. The article analyses the applicable relevant International Law provisions, mainly the 1982 Convention on the Law of the Sea and the 2001 Underwater Heritage Convention, by discussing the practical aspects of their provisions, as well as their validity and issues presented. This research is also valuable for a maritime country such as Romania, particularly since over three dozen shipwrecks reportedly lie in the Black Sea alone.*

Keywords: *underwater cultural heritage; law of the sea; UNCLOS; Underwater Heritage Convention.*

1. Introduction

The last hundred years or so have opened up a new chapter of interest within the law of the sea, namely the protection and possible exploitation of underwater cultural heritage. This is particularly due to the development of science and technology in underwater exploration and exploitation, especially the deep seabed, as well as the discovery of multiple historical

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shipwrecks, the most notable and somewhat notorious of which being the wreck of the *RMS Titanic*, discovered in 1985 in the North Atlantic.

The four 1958 Conventions on the Law of the Sea (UNCLOS I) do not address underwater heritage at all. At the time, the negotiating States did not consider the issue to be important enough to address it in the final text of the Conventions, although the status of historical shipwrecks was raised during the drafting of the 1958 Convention on the Continental Shelf[1]. Though sometimes discussed whether heritage lying on the seabed may be qualified as a 'natural resource' within the meaning of the mentioned Convention, this contention has mostly been rejected[2].

With the growing technology, States started turning their attention towards the resources of the deep seabed, including the heritage discovered there. The legal aspects of these activities started being explored by the 1982 United Nations Convention on the Law of the Sea (UNCLOS III, hereinafter referred to as *'UNCLOS'*), which has however certain provisions that are more or less controversial or even applicable.

The issue of the underwater heritage was embraced more fully under the auspices of UNESCO in the 2001 Convention on the Protection of the Underwater Cultural Heritage, which has taken several steps forward in this matter.

The present article will start by examining the applicable legal regime under the UNCLOS, followed by the more recent Underwater Heritage Convention. The article analyses and evaluates the applicable rules and provisions, seeking to underline their relevance and practical issues.

2. The UNCLOS Regime

The 1982 Convention on the Law of the Sea[3], now with 168 States Parties[4], has only two provisions regulating the regime of the underwater cultural heritage, those being Articles 149 and 303. Furthermore, several States that might have an interest in discovering or protecting their underwater

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

[2] Markus Rau, "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea", *Max Planck Yearbook of United Nations Law*, vol. 6, 2002, p. 396 (hereinafter cited as "Rau").

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

[4] As of December 2018.

heritage, such as Turkey, Peru or the United States of America, are not yet Parties to it.

The two mentioned provisions of the UNCLOS, Articles 149 and 303, have often been called 'ambiguous at best'[1]. In fact, delegates to a 1995 Conference between the UNCLOS Parties tried to agree upon and formulate an understanding of these Articles, failing however to reach a valid and agreed-upon interpretation of their meaning and applicability[2].

2.1. UNCLOS Article 303

Article 303 UNCLOS, entitled *'Archaeological and historical objects found at sea'*, provides four rules. Its applicability to all maritime zones instead of only the contiguous zone has been questioned in doctrine[3], as will be discussed below.

The first paragraph sets the States' duty of protection and cooperation regarding all objects of archaeological and historical nature found at sea[4], providing both a positive (*i.e.* taking all measures to ensure protection of the heritage) and a negative obligation (*i.e.* refraining themselves from destroying, damaging or otherwise bringing harm to the heritage) upon States in relation with the underwater heritage.

Consequently, a State's failure of either protecting *or* cooperating towards the protection of underwater heritage may give rise to that State's responsibility under the general rules of Public International Law[5], but no further details are specified regarding the actual measures that may be taken by States. This might be left for each State to decide from case to case, based on its own possibilities and abilities, but the provision seems as least vague in this regard. Multiple possibilities have been embraced by writers[6], but no further explanation is provided from a legal point of view by the Convention.

The use of the general phrase 'found at sea' may signify no distinction is made between the different areas of sea where heritage is found. However,

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[1] Dinah Shelton, "Recent Developments in International Law Relating to Marine Archaeology", *Hague Yearbook of International Law* 10 (1997), p. 61.

[2] Craig Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London and New York, 2010, p. 329 ("Forrest").

[3] *Ibid*. p. 324.

[4] UNCLOS, Article 303(1).

[5] Tullio Scovazzi, "Underwater Cultural Heritage", *Max Planck Encyclopedia of Public International Law*, para. 8, last visited on 5 December 2018 ("Scovazzi").

[6] See *e.g.* Forrest, pp. 325-326.

paragraph (2) of Article 303 UNCLOS points to a specific regime concerning heritage found within a State's contiguous zone[1]. The relevant text provides that 'in order to control traffic' the coastal State may presume that the unauthorised removal of heritage from its contiguous zone would result in an infringement of that zone's special legal regime (that is customs, fiscal, immigration or sanitary laws and regulations).

Despite having been recognised by some as 'the main innovation' of UNCLOS with regard to underwater cultural heritage[2], this regulation may raise several concerns. Firstly, it conditions the regulation of underwater heritage in the contiguous zone upon the State's extension of its jurisdiction over the customs, fiscal, immigration and sanitary regimes, thereby making it impossible for a State to protect underwater heritage *per se*, without reference to any of the mentioned domains[3]. Secondly, Article 303(2) UNCLOS only covers the situation of *removal* of objects from the contiguous zone, which means that heritage may simply be destroyed or damaged where it is found, filmed or otherwise affected *in situ*, and no legal measures would be taken in this regard.

Therefore, the provision of Article 303(2) extends the applicability of Article 33 with regard to a State's jurisdiction over removal of cultural heritage from its contiguous zone as a 'trigger' for its control powers, without providing any jurisdiction over such objects as such[4]. We share the view of other writers that the relationship between the first and the second paragraphs of Article 303 is still somewhat unclear and abstract[5].

State practice is also far from uniform in the matter, as only a handful of States have extended their cultural heritage laws to be applicable over the contiguous zone, and moreover they have done so in various degrees and for various reasons[6]. This blocks the formation of a distinct rule of customary

[1] The contiguous zone of a State is defined by Article 33 UNCLOS as 'a zone contiguous to its territorial sea [which] may not extend beyond 24 nautical miles from the baselines'.

[2] Anastasia Strati, "The Protection of the Underwater Cultural Heritage in International Legal Perspective", *Archaeological Heritage: Current Trends in Its Legal Protection*, 1995, p. 159.

[3] Scovazzi, para. 8.

[4] Rau, p. 399.

[5] Kaare Bangert, "A New Area of International Law: the Protection of Maritime Cultural Property", in Sienho Yee, Wang Tieya (eds.), *International Law in the Post-Cold War World. Essays in Memory of Li Haopei*, 2001, p. 125.

[6] Forrest, p. 328.

International Law, lacking the necessary requirements of a uniform practice and *opinio juris*[1].

The third paragraph of Article 303 raises several additional questions, as it recognises the previous provisions do not affect 'the rights of identifiable owners, the law of salvage or other rules of admiralty'[2], as well as regulations pertaining to cultural exchanges. What this text appears to do is to place the barely-recognised rules of the first two paragraphs hierarchically below salvage law and admiralty law – terms which are not developed upon by the Convention. Additionally, the 'identifiable owners' are apparently left to be determined in accordance with the domestic rules and legislation of each State.

Furthermore, while 'salvage' refers to the process of rescuing a ship or its cargo from imminent distress (and does not apply to submerged heritage)[3], the rules of admiralty are a body of *private* law regulating the legal relationships between various private entities with regard to seagoing ships[4]. One also has to mention that the salvor 'works' for profit, which might raise several questions as to the efficiency of the protection of underwater heritage in these circumstances[5].

In fact, salvage law and admiralty law are institutions so specific to common law systems that, as noted, it is difficult even to translate them into other languages[6]. The equally-authentic French version of the UNCLOS[7] refers to *'droit de récupérer des épaves'* ('the right of recovering shipwrecks') and *'autres règles du droit maritime'* ('other rules of maritime law'), which seem a different matter than salvage and admiralty law altogether.

Despite these shortcomings and apparent inapplicability of salvage law to underwater cultural heritage, certain domestic courts have relied on it in

[1] See the cases before International Court of Justice, *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p. 3.

[2] UNCLOS, Article 303(3).

[3] Roberta Garabello, "Salvage", *Max Planck Encyclopedia of Public International Law*, para. 1, last visited on 5 December 2018.

[4] Robert Force, *Admiralty and Maritime Law*, Federal Judicial Center, Washington DC, 2004, p. 20.

[5] Ole Varmer, "The Case Against the 'Salvage' of the Cultural Heritage", *Journal of Maritime Law and Commerce*, vol. 30 (1999), p. 279.

[6] Scovazzi, para. 17.

[7] According to UNCLOS, Article 320.

various cases involving shipwrecks[1], although this has more recently been 'corrected' by internal statute[2].

Finally, the fourth and last provision of Article 303 UNCLOS states that the above-mentioned rules do not prejudice other international agreements and rules of International Law concerning the protection of heritage, which leaves the door open for the adoption of particular, specific agreements and norms meant to ensure the protection of underwater heritage.

2.2. UNCLOS Article 149

The second provision of relevance within the UNCLOS is found in Article 149, referring specifically to archaeological and historical objects found in the 'Area', which is a term introduced by the 1982 Convention and defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'[3] (*i.e.* beyond the outer limits of the continental shelf).

Despite attempts of further developing upon these rules during the negotiation process, the final text does not recognise such objects as the common heritage of all mankind and does not institute any regulating body or authority[4].

As such, objects found in the Area must be 'preserved or disposed of for the benefit of mankind as a whole'[5], observing however the preferential rights of the State of origin, the State of cultural origin or the State of historical and archaeological origin.

The terms 'preservation' and 'disposal' may have various substantive meanings and the UNCLOS does not specify what meaning is to be given to them. As such, 'preservation' may mean preserving the heritage *in situ* (where it is situated) or removing and placing it in a museum or a similar institution[6], but it may also simply mean a general protection from the different maritime perils, both natural and human[7].

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[1] For example, the US District Court for the Western District of Texas ruling in *Plataro Ltd. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816 (W. D. Tex. 1981).

[2] Rau, p. 406.

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

[4] Rau, p. 398.

[5] UNCLOS, Article 149.

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

[7] Cynthia Furrer Newton, "Finders Keepers? The Titanic and the 1982 Law of the Sea Convention", *Hastings International and Comparative Law Review*, vol. 10, 1986, p. 178.

In a similar way, 'disposal' has been interpreted in a variety of ways, ranging from removing the heritage in order to gain access to natural resources[1], somehow dividing the artefacts between the interested museums worldwide[2], or even selling the heritage and using the proceeds for the 'benefit of mankind as a whole'[3].

One might question how is this 'benefit of mankind' to be reconciled with the rules of salvage law recognised by Article 303. The answer might be provided by the *specialia generalibus derogant* rule of interpretation, which would make Article 149 a special provision in relation to Article 303, with application only to the Area.

Not only are the categories of interested States not explained, but also the content of these 'preferential rights' is not developed upon by the Convention. In fact, the entire range of alternative States that may hold preferential rights (*i.e.* the State of origin, of cultural origin, or of historical and archaeological origin) was never intended to be left as 'alternatives' in the final text of the Convention, which happened nevertheless[4].

All these observations make the provision seem vague and void of any actual content, leading some commentators to wonder whether the inclusion of Article 149 and its wording was nothing more than a political strategy[5].

3. The Underwater Heritage Convention

The Convention on the Protection of the Underwater Cultural Heritage (hereinafter referred to as the *'Underwater Heritage Convention'* or *'UHC'*)[6] was adopted in 2001, under the auspices of UNESCO, in order to help States to better protect their submerged heritage. This instrument falls within the scope of Article 303(4) UNCLOS, which, as mentioned above, refers to 'other international agreements'.

[1] Ibid. p. 180.

[2] Forrest, p. 323.

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

[4] Forrest, p. 323.

[5] Bernard H. Oxman, "Marine Archaeology and the International Law of the Sea", *Columbia-VLA Journal of Law and the Arts*, vol. 12, 1988, p. 362.

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

3.1. Application of the Convention

The Convention, now having 60 States Parties[1], applies to heritage that has been 'partially or totally under water, periodically or continuously, for at least 100 years'[2]. The alternative wording may give rise to four distinct possibilities: heritage partially underwater periodically (such as the sometimes-exposed wreck of the Dutch East India Company *Amsterdam* near the East Sussex coast), heritage partially underwater continuously (such as the wreck of the *USS Arizona* in shallow waters at Pearl Harbor), heritage totally submerged periodically and heritage totally submerged continuously[3] (the latter being the most widespread situation). The definition explicitly excludes from its application pipelines, cables and other installations placed on the sea bed[4].

Since the Convention uses the phrase 'all traces of human existence', it may be deduced that it offers protection to entire heritage sites, not just for isolated objects. Moreover, the definition seems to exclude non-human resources or natural resources that might be of certain cultural significance to a human population[5]. The introduction of the 100-year limitation was also controversial during the negotiation and drafting of the Convention[6].

Besides the States' general obligation to cooperate towards ensuring the most effective protection of underwater heritage, as provided in Article 2(2), the Convention states the principle according to which priority is given to the *in situ* preservation of underwater heritage above any other activities[7], *i.e.* maintaining and protecting the heritage where it is found.

The Convention brings an absolute prohibition on the commercial exploitation of the underwater heritage[8]. However, since not all of the negotiating States wanted a complete rejection of the rules of salvage and admiralty law[9], Article 4 of the Convention tries to strike a balance between those rules and the protection of underwater heritage, seeking (but possibly not succeeding) to clear the muddy waters of Article 303 UNCLOS.

As such, an activity related to underwater heritage will fall within the scope of the law of salvage only if it is authorised by the competent authorities,

[1] As of December 2018.
[2] UCH, Article 1(1) (a).
[3] Forrest, p. 334.
[4] UCH, Articles 1(1) (b) and 1(1)(c).
[5] Forrest, p. 334.
[6] Rau, p. 404.
[7] UCH, Article 2(5).
[8] UCH, Article 2(7).
[9] Scovazzi, para. 22.

being in full conformity with the Convention and ensuring the 'maximum protection' of any heritage recovery[1]. It might be affirmed that, while not absolutely rejecting the law of salvage and the rules of admiralty (although, according to some writers, salvage law is completely excluded from the Convention's scope of applicability[2], especially since it would be difficult to imagine a situation where salvage law is reconciled with the principle of *in situ* preservation of heritage), the Convention's provisions prevent the negative effects of forcing a uniform application amongst States Parties.

Other writers draw a distinction between salvage law (which might indeed appear as opposed to the archaeological preservation of underwater heritage), on the one hand, and the economic use of heritage, on the other hand, the latter not being necessarily opposed to the Convention's fundamental principles, scope and purpose[3].

In any event, a controversial issue that the Convention could (and should) have clarified, and apparently failed to do so, is the reconciliation between the commercial uses of the underwater heritage and its preservation and archaeological protection.

3.2. Jurisdictional Issues

Article 7 of the Convention reiterates the complete and exclusive sovereignty of the coastal State over heritage found in its internal and archipelagic waters, as well as in its territorial sea. There are no duties of consulting with or reporting to other States and even the phrase 'exclusive *right*'[4] should be interpreted in close connection to the general duty to protect and safeguard underwater heritage, turning this more into an obligation than a discretionary right.

Regarding the contiguous zone, Article 8 of the Convention stipulates that States may regulate and authorise activities directed towards heritage found in that area, while making specific reference to Article 303(2) UNCLOS. This might be interpreted as somewhat limiting the coastal State's jurisdiction over heritage found in its contiguous zone to its four areas of competence already discussed in that Article, by reference to Article 33 UNCLOS. In our view, this does not bring any added value to the already-existing regulations under the UNCLOS.

[1] UCH, Article 4.
[2] Rau, p. 406.
[3] Forrest, p. 346.
[4] UCH, Article 7(1).

The most controversial jurisdictional aspect was the treatment of heritage found within the EEZ, on the continental shelf and on the deep seabed[1]. In order not to upset the balance of rights achieved by the UNCLOS[2], the Underwater Heritage Convention creates a mechanism involving the participation of all the States linked to the heritage in question. This mechanism is comprised of three parts – reporting, consultations and urgent measures, as will be discussed below.

3.3. Measures Provided by the Convention

States must require their nationals and vessels bearing their flag to report any discovery of or any activity directed towards underwater heritage[3]. The State or States involved should notify the UNESCO Director-General, who in turn should inform all States Parties of the discovery or of the activity in question.

A coastal State must consult all interested States ('interested' being defined based on a 'verifiable link' especially of a cultural, historical or archaeological nature) in order to ensure the most effective and efficient protection of the underwater heritage[4].

As noted, this cooperation mechanism reflects the requirements of Article 303 UNCLOS concerning the States' duty to protect underwater heritage and *cooperate* for this purpose[5].

The Convention also allows for urgent measures to be taken by a State in order to prevent the damaging of underwater heritage from human or natural causes, even before consultations take place[6]. These causes include looting, unauthorised excavations or other works, as well as imminent (and predictable) natural disasters.

The protection of underwater heritage found within 'the Area' (*i.e.* the deep seabed) is regulated by Articles 11 and 12 of the Convention, in a manner similar to the heritage found within the EEZ and the continental shelf, as discussed above. The main differences reflect the fact that coastal States have a smaller role to play regarding heritage from the Area and that they have to appoint a 'Coordinating State', which shall organise the

[1] Rau, p. 407.
[2] Scovazzi, para. 23.
[3] UCH, Article 9(1).
[4] *Ibid*. Article 9(5).
[5] Patrick J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Institute of Art and Law, 2002, p. 81.
[6] UCH, Article 10(4).

consultations and issue all required authorisations, acting however 'for the benefit of humanity as a whole'[1].

The Underwater Heritage Convention requires States to take measures in order to seize cultural heritage recovered in a manner contrary to its provisions[2]. Writers have already noted, in an opinion we fully embrace, that this duty was drafted in such a way as to avoid an obligation of result (the obligation of States *seizing* the heritage, an obligation which might be unachievable anyway), rather States having to *take measures providing for the seizure* instead[3].

States must record, protect and take all reasonable measures in order to stabilise (implying a less onerous duty than the more onerous term which was initially envisioned, 'to conserve'[4]) the heritage seized according to the mentioned provision[5], as well as to notify the other interested States[6] and, ultimately, ensure the disposition of the seized heritage for the public benefit[7].

Sanctions are also regulated within the Convention's purview. As is the case in International Cultural Heritage Law generally, most sanctioning measures are non-criminal in nature, based mainly on the return, restitution and forfeiture of the stolen goods[8].

However, criminal (penal) sanctions also have their part to play, as the Convention requires States Parties to impose sanctions for violations of the measures taken by them, which should be 'adequate in severity' in order to secure compliance with the relevant provisions and to discourage further violations, sanctions which are to be implemented through inter-State cooperation[9]. Despite an early draft of the Convention exemplifying this cooperation by measures such as producing and transmitting documents, providing witnesses and extradition agreements[10], no such listing exists in

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[1] *Ibid*. Article 12.

[2] *Ibid*. Article 18(1).

[3] Forrest, p. 352.

[4] Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage, Paris, 3-7 July 2000, Document no. CLT-2000/CONF.201/7.

[5] UCH, Article 18(2).

[6] *Ibid*. Article 18(3).

[7] *Ibid*. Article 18(4).

[8] James A. R. Nafziger, "International Penal Aspects of Protecting Cultural Property", *The International Lawyer*, vol. 19, no. 3 (summer 1985), p. 836.

[9] UCH, Article 17.

[10] Draft Convention on the Protection of the Underwater Cultural Heritage, Paris, July 1999, Document no. CLT-96/CONF.202/5 Rev.2.

the final text, as many of the exemplified duties proved (or would have proved) problematic[1].

In a natural and welcomed way, the Convention also paves the way for the possibility of bilateral, regional or multilateral agreements being entered into by the States Parties, which should be in full conformity with its provisions[2]. Several such agreements have been concluded, especially for the protection of specific wrecks, being in accordance with the Underwater Heritage Convention and regulating different forms of cooperation between the coastal State(s) and the flag State. Some examples include the 1972 Agreement concerning Old Dutch Shipwrecks (between Australia and the Netherlands), the 1982 Agreement concerning the Wreck of the *CSS Alabama* (between France and the United States), the 1995 Agreement regarding the *MS Estonia* (between Estonia, Finland and Sweden), the 1997 Memorandum of Understanding Pertaining to the Shipwrecks *HMS Erebus* and *HMS Terror* (between the United Kingdom and Canada), or the 2003 Agreement concerning the Shipwrecked Vessel *RMS Titanic* (a multilateral treaty between Canada, France, the United Kingdom and the United States). As it can easily be observed, given the fame of several wrecks covered by these agreements, their importance cannot be understated.

It has been suggested that the provision allowing for the conclusion of these agreements is proof of the Convention's lack of efficiency and would only lead to a fragmented application[3]. However, specifically because of the difference in legal regimes, training and awareness levels between the various States, such a provision might actually be seen as a form of international cooperation, leaving Parties to regulate these issues more efficiently at a bilateral or regional level, where they can better engage in dialogue and negotiation.

In fact, cooperation is heavily underlined as an important landmark of the Convention, reflecting the provisions of Article 303 UNCLOS. It requires States to cooperate in their protection of the underwater heritage, including in the investigation, excavation, documentation, conservation, study and presentation of such heritage, as well as by sharing information methodologies and technologies[4]. In cases of risk, all information must be kept, as far as possible, confidential.

[1] Forrest, p. 354.
[2] UCH, Article 6.
[3] Forrest, p. 357.
[4] UCH, Article 19.

International Cultural Heritage Law in general requires States to establish competent national authorities or services for the preservation, safeguarding and maintenance of their heritage, as well as relevant inventories thereof[1]. The Underwater Heritage Convention, for its part, also requires Parties to do so[2]. The 'competent authorities' suggest bodies which should provide the States with the necessary infrastructure in order to allow for the best implementation of the Convention's provisions[3].

Due to the natural and explicable differences between States, no uniform standard for the national authorities may be required or even achieved. In order to help States do their best to this purpose, the Convention requires Parties to cooperate by providing training in underwater archaeology and heritage conservation techniques[4].

This is supplemented by a heavily-negotiated and often overlooked provision of the Convention, which requires Parties to take all measures in order to 'raise public awareness' concerning underwater cultural heritage, its importance and value[5].

Another very interesting provision is found in Article 25 of the Underwater Heritage Convention, related to the peaceful settlement of disputes. According to this, and in order to reconcile the various negotiating delegations, States Parties have available to them the four means of dispute settlement provided by Article 287 UNCLOS[6], those being:

(i) the International Tribunal for the Law of the Sea;

(ii) the International Court of Justice;

(iii) an arbitral tribunal constituted pursuant to Annex VII UNCLOS;

(iv) a special arbitral tribunal constituted pursuant to Annex VIII.

The provisions on the settlement of disputes are applicable between the Parties to the Underwater Heritage Convention regardless of whether they are also Parties to the UNCLOS or not[7]. In fact, the entire Convention does not prejudice and applies consistently with the 1982 instrument[8].

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[1] See, *e.g.*, the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict, the 1970 Illicit Traffic Convention or the 1972 World Heritage Convention.

[2] UCH, Article 22.

[3] Forrest, p. 354.

[4] UCH, Article 21.

[5] *Ibid*. Article 20.

[6] UCH, Article 25(4).

[7] *Ibid*. Article 25(3).

[8] *Ibid*. Article 3.

4. Conclusion

As it seems, not even the somewhat pioneering 1982 Convention on the Law of the Sea managed to clarify the controversies and vague regulations concerning the protection, excavation and exploitation of the underwater cultural heritage, particularly taking into account the new scientific and technological developments in the field of underwater exploration, as well as the growing interest of the various States either to protect their underwater heritage, to exploit it commercially or, why not, both.

The Underwater Cultural Heritage Convention, adopted under the auspices of UNESCO, brings forth new regulations, striving to reconcile the interests of the various States. Some of these regulations answer certain questions, while also raising new ones.

All in all, the Underwater Heritage Convention seeks to enhance and encourage cooperation between its Parties, by leaving them to choose by themselves the measures taken in order to achieve the results provided by the Convention. Instruments have been adopted, particularly at a bilateral or regional level, and the protection of the underwater heritage is becoming more and more achievable through the growing involvement of all interested Parties.

The European Union's Role as an Actor in International Law of the Sea Issues: History and Adjudication

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Abstract: *This research follows the historical evolution of the EU's role as an actor in International Law of the Sea issues, culminating with its signature of UNCLOS. It then analyses the ECJ's most recent judgments on its competence to adjudicate on Law of the Sea issues between its Member States and the consequences of the Court's point of view, namely that the ECJ is poised to become a reference Court on such issues if future cases are to arise before it.*

Keywords: *European Union; International Law of the Sea; UNCLOS; Adjudication.*

1. Introduction

The International Law of the Sea is one of the most dynamic and interesting areas of international law. Given its prevalence, it does not come as a surprise that the European Union now has an important role in this area of international law as well, since its role as an international actor is ever expanding.

This article is structured in two parts. The first part will analyze the European Union's gradual evolution into an important actor of the International Law of the Sea, culminating with its signing of the United Nations Convention on the Law of the Sea[2]. The second part will analyze, beyond the general scope of the UNCLOS for the EU, the important matter of adjudication under the current EU legal regime and the UNCLOS,

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[2] Hereinafter, "UNCLOS". See http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, last visited on 10/01/2019.

especially when EU Member States are in dispute with a matter that falls under the ambit of the Convention. Short conclusions will follow.

2. A Short History of the European Union's Role in International Law of the Sea Issues

The European Union's role as an actor in the International Law of the Sea is the result of a gradual evolution, and it was hard to envisage its current role given the original configuration of the treaties that founded it. The EEC Treaty only contained two references to the marine issues: *illo tempore* articles 84 and 38 (1). Article 84 simply mentioned that sea transport was excluded from the common transport policy unless the Council adopted "*appropriate provisions*" for such issues.

Article 38 (1), read in conjunction with the fourth paragraph of the same Article, specifically included products of fisheries under the common agricultural policy, by deeming them to be "*agricultural products*" as well. This inclusion turned out to be more important than at first glance, since in 1968, the Commission proposed a Common Fisheries Policy (CFP)[1]. Given that first accession wave was due to happen, the Council ended up adopting a compromised version of the CPF, in order to include it in the *acquis* – a fact which was important in Norway's decision to reject accession via referendum.

The Act of Accession, along the Treaty of Accession of 1972, provided, in Article 102, that the Council shall "*determine conditions for fishing with a view to ensuring the protection of fishing grounds and conservation of the biological resources of the sea*". At first glance, this provision does not seem to carry much weight, but its practical implications were major. However, a jurisprudential evolution laid the groundwork for Article 102's extension, namely the Court's seminal decision in C-22/70, *Commission v. Council*[2]. Here, the Court held[3] that if the Communities had the internal competence to adopt common rules, there has to be a necessary external competence for the Communities to negotiate and enter treaties on an international level. This inferred competence[4] is a natural extension of the

[1] Robin Churchill, "The European Union as an Actor in the Law of the Sea, with Particular Reference to the Arctic", *The International Journal of Marine and Coastal Law 33 (2018) 1 – 34*, p. 2

[2] C-22/70 - *Commission v Council*.

[3] *Ibid.* par. *75 - 78*

[4] For more on the issue of conferral, see Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law. Cases and Materials.*, second edition, Cambridge University Press, Cambridge, 2010, pp. 211 - 214

internal competence, in order to better protect those internal measures, which would be put under peril if Member States were forced to choose between respecting international law obligations and community law obligations.

This perspective was then applied to fisheries, in the 1976 Case of *Officier van Justitie v. Kramer*, where the Court held that "*[i]n these circumstances it follows from the very duties and powers which Community Law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea."*[1]. This was nothing more than a concrete application of the principle determined above, but it was extremely relevant for the issue at hand, which finally moved the entire problem of conservation of marine resources in the common fisheries policy to the European Communities.

Namely, in *Commission v. United Kingdom,* the Court held that *"[m]ember States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community Law. As the Commission has rightly pointed out, the resources to which the fishermen of the Member States have an equal right of access must henceforth be subject to the rules of Community Law"*[2]. Since the EEC had already joined a regional fisheries organization in 1978 (the Northwest Atlantic Fisheries Organization)[3], coupled with the above judgments, the EEC was already underway to become a powerhouse, at least as international fisheries were concerned.

Concurrently with the above, the UN held its Third Conference on the Law of the Sea, between 1973 and 1982, with 160 States participating[4]. The EEC Member States considered that the EEC itself, and not merely its Member States, should become a party to the Conference and any documents it adopts. This wish of the EEC Member States did not fall on deaf ears, and Article 305 (1) (f) and Annex IX of the UN Convention on the Law of the Sea took shape. Article 305 (1) (f) states, when read in conjunction with Article 1 of Annex IX, that international organizations defined as *"an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this*

[1] Joint cases no. C-3/76, C-4/76 and C-6/76, par. 30 – 33.
[2] C-804/79, *Commission v United Kingdom,* par.18
[3] See Robin Churchill, *op cit,* p. 5.
[4] See http://legal.un.org/diplomaticconferences/1973_los/, last checked on 10/01/2019.

Convention, including the competence to enter into treaties in respect of those matters"[1] can sign the UNCLOS, for it to become binding for the international organization as well.

As one can see, the text seems tailor-made for the current EU, and no other international organizations have signed the UNCLOS to this date. The EEC became a party itself to the UNCLOS in 1998, when the majority of its Member States became a party to the Convention. The Communities then continued to expand their role as far as the international law of the sea is concerned[2].

3. The EU and the International Law of the Sea. General Aspects. Adjudication

One must not assume that the EU's competence in such matters is absolute, since it is the Treaties that define this competence and how it is to be used by the European Union. Internal competence is not limitless, of course, since the EU has no competence of its own that had not been a competence of its Member States at a point – *ex nihilo nihil,* respecting the principle of conferral[3].

Consequently, the EU has exclusive competence in relation to the conservation of marine biological resources under the common fisheries policy, pursuant to Article 3 (1) (d) of the TFEU and shared in relation with the remaining issues of fisheries, transport, energy, research and the environment, pursuant to Article 4 of the TFEU. Naturally, Member States cannot intervene in the areas of exclusive internal competence but can still act in areas of shared competence (which, as we can see, are more extended than the area that exclusive competence covers), so long as the Union has not acted, pursuant to the subsidiarity principle[4].

However, it's notable that the EU's exclusive external competence can radiate to areas of shared internal competence if the conditions set forth by the treaties are met, which means that, as a broad rule of thumb, if the EU has exercised its powers internally in any matters (law of the sea, *lato sensu,* included), it will have exclusive external competence to negotiate and sign any international agreements, pursuant to Article 3 (2) TFEU. Moreover, some EU competence on matters of the sea was exercised under the

[1] UNCLOS Article 1 of Annex IX.
[2] See Robin Churchill, *op. cit.*, p. 7.
[3] A principle now codified in Article 5 TEU.
[4] See Damian Chalmers, Gareth Davies, Giorgio Monti, *op. cit*, pp. 129 – 132.

Common Foreign and Security Policy, such as the issue of the European response to Somali pirates[1].

However, one should note that important areas, such as the drawing of baselines, delimitation of maritime boundaries, establishment of coastal State maritime zones and jurisdictional rights and duties of flag States still are still a matter of Member State competence[2]. Another important limit of the EU's external competence in this area is that many international agreements precede the above events in the 1970s, and therefore have no provisions for organizations participating in them[3].

Once understood the history of the EU's involvement in International Law of the Sea issues, there are several aspects which are important to underline, namely some general remarks on the EU and its participation to the UNCLOS, and a special analysis of the issue of Law of the Sea Dispute Settlements and the EU.

As mentioned, the EU has signed and become a part of the UNCLOS, a fact which entails that it has both rights and obligations stemming from the Convention, and the EU has put forth a declaration of competence upon joining it. This document has left the door open for the EU's competences to evolve pursuant to its own provisions. While evolutions have existed, no amendment to this declaration was adopted.

Article 216 (2) TFEU specifically states that international obligations concluded by the European Union are binding, for both the Union itself and its institutions, but also for Member States, but this does not mean that Eu must bow to the rules of International law[4]. Since obligations arising from international agreements are fully situated in the hierarchy of European norms, it is for the Commission to ensure that Member States comply with these obligations and give credence to the principle of sincere cooperation[5].

The issue arises whether individuals may, for example, rely on provisions in international agreements against secondary EU legislation (since in the hierarchy of EU norms international agreements occupy a superior place to this legislation), and the main focus of the ECJ's has been the nature of the

[1] See Maria Luisa Sanchez Barrueco, "Reflections on the EU Foreign Policy Objectives Behind the Integrated Approach in the Response to Piracy off Somalia", *CYELP, Vol 5,* pp. 215 – 258.

[2] See Robin Churchill, *op. cit.*, p. 9

[3] *Ibid.* p. 11 – 12.

[4] Elena Lazăr, "The Role Played by the Kadi Judgements to Articulating the UN Legal System with the EU Legal System", *RRDI, no. 6*, June-December 2016, p. 119

[5] See Esa Paasivirta, "The European Union and the United Nations Convention on the Law of the Sea", *Fordham International Law Journal,* Volume 38, Issue 4, p. 1066

agreement. In other words, if the agreement confers rights to individuals, nothing prohibits that certain norms of this agreement have direct effect[1].

Case C-308/06[2] settled this issue in regard to the UNCLOS, as the Court held that this agreement had the "broad logic" of codifying international law as regards International Law of the Sea issues[3], and does not grant individuals rights directly[4].

Another important issue of convergence between the UNCLOS and EU law is whether and how the territorial scope of the EU treaties extends to the areas that are governed by the UNCLOS, such as contiguous zones, the continental shelf, the exclusive economic zone and so on[5]. Article 52 TEU does not have any definition of an "EU area". Given that the Member States themselves have founded the Union and have transferred their own sovereign competences to the Union, it follows that EU law in those areas shall be applied in the same manner as if it was created and applied by the Member State at hand.

This conception has also been supported by the Court's constant case law. For example, in Case C-6/04[6], the issue was whether a Directive on the conservation of natural habitats and of wild fauna and flora[7] was applicable to Member States' EEZ and the continental shelf. The Court held so, just as it confirmed in C-347/10[8], where it held that installations on Member States' continental shelves are to be areas in which work is carried out on that Member State's territory for the purpose of EU Law.

As far as dispute settlement under the UNCLOS is concerned, without assuming to analyze the system in its entirety, it suffices to point out that Part XV of the Convention has two dedicated sections on dispute settlement, namely general provisions on dispute settlement, and some compulsory procedures on binding settlement. Parties are not bound to use these procedures if a previous agreement exists for other procedures, pursuant to

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[1] See Damian Chalmers, Gareth Davies, Giorgio Monti, *op. cit*, p. 268 *et seq.*

[2] C-308/06, *Intertanko and Others v Secretary of State for Transport.*

[3] Moreover, the ECJ was one of the first international judicial bodies to note that many of the UNCLOS' provisions were already provisions of customary international law. See, for example, C-405/92, *Armand Mondiet v. Armement Islais, par. 13*

[4] *Intertanko and Others*, par. 59

[5] See, for further details on these notions, Donald R Rothwell, Tim Stephens, *The International Law of the Sea*, Hart Publishing, Oxford, 2010, p. 30 *et seq*.

[6] C-6/04 - *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*

[7] Directive 92/43/EEC.

[8] C-347/10 - *A. Salemink v. Raad van bestuur van het Uitvoeringsinstitut werknemersverzekeringen*

article 208 of UNCLOS, which entails that disagreements between EU Member States must be resolved by the ECJ alone if those disagreements fall into an area of the EU's competence, such as the CFP.

Article 7 of Annex IX UNCLOS provides for the EU the possibility of choosing from the methods of settling provided by Article 287 of UNCLOS, others than the ICJ, where it has no *locus standi*. Part XV of the Convention will also apply where disputes between the EU and State Parties to the Convention are concerned, except for situations in which the states at hand are also EU members, where the ECJ will be the international court competent. Finally, if the EU and a State Party to the Convention are joint parties to a dispute, the Union is considered to have accepted the same arbitration as the State, so long as that state has only selected the ICJ as a dispute settlement venue, case in which arbitration will be automatically considered to have been selected, unless the EU and that State have decided otherwise.

The EU has declined to yet choose a certain a specific dispute settlement mechanism, which means it will adopt whatever means are necessary from a case to case basis, with arbitration being the default avenue to be chosen under the Convention, pursuant to Article 287 (3) UNCLOS. It's undeniable that the peaceful settlement of any disputes with third states is a principle for the Union in any international issue, given that one of its principle objectives is to "promote peace, its values and the well-being of its peoples", pursuant to article 3(1) TEU, while strictly respecting international law, especially the UN Charter[1].

Regardless, the EU has generally used its diplomatic strength to settle such issues consensually. For example, the then-EC took a consensual approach vis-à-vis Canada where the detention of the Spanish vessel *Estai* took place in international waters in the year 1995[2]. Negotiations took place between the EC and Canada, and a bilateral agreement was signed. Now both the Union and Canada are parties to both UNCLOS (which came into force in the meantime) and the Fish Stocks Agreement, so such an issue could be solved using the procedures set forth by Article 30 of the UN Fish Stocks Agreement.

Another important issue diplomatically settled by the EU is the dispute between the Union and Chile, which took place after Chile decided to

[1] Article 3(5) TEU.

[2] For an analysis of this case, see Derrick M. Kedziora, "Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", *17 Nw. J. Int'l L. & Bus. 1132 (1996-1997),* p. 1132 *et seq.*

prohibit vessels from EU Member States from unloading swordfish caught in the south-eastern Pacific in any Chilean ports. Notably, procedures were started before both the WTO Dispute Settlement Body and the ITLOS, but were suspended, since a Provisional Arrangement was agreed between Chile and the EU in 2001. After long negotiations, the parties reached an agreement, and the dispute was settled in 2009[1]. These two cases highlight the complex nature of activity pertaining to the International Law of the Sea, and the myriad adjudication methods (and legal regimes that can be incident) are surely to lead to complex cases in which the courts must decide the extent of their competence.

As was shown above, issues may arise between the EU and third-party countries, but one should not exclude International Law of the Sea issues between EU Member States. As mentioned, the Convention fully allows for such disputes to be amicably settled outside the UNCLOS system, as is the case for issues settled in front of the ECJ. In the *Mox Plant* Case[2], for example, Ireland had an issue with the movement of radioactive materials in the Irish Sea, coming from the Mox Plant facility. Therefore, it started dispute settlement procedures under the UNCLOS, for the issue to be decided by the ITLOS. The Arbitral Tribunal, instituted under Annex VII UNCLOS, eventually suspended its proceedings in order to ensure that the exact EU competence on this matter was clear.

Consequently, the ECJ, in case C-459/03, which followed the suspension of the proceedings in front of the Arbitral Tribunal, held several important issues which pertain to the object of this article. Firstly, it held that, on the areas in which the Community became a party to the Convention, the respective rules are part of the Community legal order, and that, thereby, the ECJ has the exclusive power (for Member States) to interpret and apply those provisions in the European legal order[3].

Moreover, it held that Ireland was in breach of its general obligation of loyalty, by refusing to elect the Community judicial system in order to resolve the dispute, since there exists an obligation of cooperation and "[t]he act of submitting a dispute of this nature to a judicial forum such as an arbitral tribunal established pursuant to Annex VII to the United Nations

[1] See, for an analysis of this case, Marcos A. Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", *Nordic Journal of International Law.* 71(1), p. 55 *et seq.*

[2] For a lengthy analysis of this case, see Barbara Kwiatkowska, "The Ireland V. United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism", *The International Journal of Marine and Coastal Law,* Vol 18, Issue 1, pp. 1 - 58

[3] Case C-459/03, *Commission of the European Communities v Ireland*, par. 121

Convention on the Law of the Sea involves the risk that a judicial forum other than the Court of Justice will rule on the scope of obligations imposed on the Member States pursuant to Community law."[1]

One can see that the ECJ has plainly stated that, from its perspective, the appropriate provisions of the UNCLOS are an integral part of the EU's legal order, and that, consequently, the Court of Justice will be the ultimate arbiter of such issues between Member States.

As was noted in the literature[2], there is an important corollary to the ECJ's decision in the *Mox Plant* Case, namely that, if a Member State fails to comply to its obligations under the UNCLOS and a Third Party State holds the EU liable, the Member State can be subject to enforcement proceedings, pursuant to Article 259 of the TFEU. Significantly, the Treaties allow for enforcement proceedings to be started by a Member State as well, but it's highly unlikely that this will be done, given the political and cooperative nature of the EU. This might be one of the reasons Ireland preferred to try to resolve that issue through arbitration, rather than address the Court immediately. Notably, one of the few cases that actually reached judicial proceedings in a case of enforcement brought up by a Member State actually concerned a fisheries dispute, which underlines the sensible nature of International Law of the Sea matters[3].

4. Conclusion

The EU's role as an actor in the International Law of the Sea has steadily grown in recent decades. Given the ECJ's recent judgments, especially in the *Mox Plant* case, it has fully adopted the UNCLOS into its legal order, and the Court is poised to become one of the leading authorities in the area, if further issues are to come before it. It is this author's hope that the Court will do so in a manner respectful to both the International and European legal regimes.

[1] *Ibid.* par. 177

[2] See Ronan Joseph Long, "Law of The Sea Dispute Settlement and the European Union", found at https://www.researchgate.net/publication/305441661, p. 443, last checked by the author on 10/01/2019.

[3] See C-141/78, *French Republic v United Kingdom of Great Britain and Northern Ireland.*

An Introduction to the Phenomenon of Piracy

Ioana-Roxana OLTEAN[1]

Abstract: *The law of the sea is ever-changing and complex. An aspect that has been constant throughout the evolution of law is one of its contenders: piracy. In today's context it takes various forms and States have taken different national and international stances against it. However, current affairs show that piracy remains a constant risk to commerce itself. With modern warfare means becoming accessible to private persons has come a need to internationally and uniformly regulate this phenomenon. This article aims to offer an overview of the international instruments governing piracy, address the current state of areas that have been affected, propose how risks in this matter should be viewed and present some solutions that have been beneficial in the practice of sea farers.*

Keywords: *piracy, risk assessment, proposals.*

1. Introduction

The piracy phenomen threatens maritime security by endangering, in particular, the security of the freedom of navigation and commerce. These acts of piracy can result in the loss of life, physical harm or even hostage-taking, significant disruptions to commerce and navigation, financial losses to shipmasters and lastly great damages to the marine environment.[2] Taking account the huge implications that this issue brings to the table, there have been attempts to tackle piracy through international law, but they are being hampered by the lack of a consistent or clear definitions. Thus the spectacle of the international community wringing its hands, trying to look for a legal solution to the piracy problem, can be regarded as a necessity for the international legal tools due to the costs involved. In addition, in order to have the bigger picture of this phenomen, we will first address the legal background of it.

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[2] http://www.un.org/depts/los/piracy/piracy.htm

2. The legal background of piracy

Ever since the beginning of mankind, the furtherance and development of the human species has relied heavily on commerce. The growth and diversification of needs were the catalysts of opportunity for those wishing to exploit them in the pursuit of profit. However, alongside commercial relations carried out in good faith came factors trying to deter commerce from its original purpose. Seeing as the maritime route is still one of the most preferred means of carriage of commercial goods, it is natural for it to be a bountiful field for unlawful acts. In the field of maritime law, one of the forms of unlawful acts is piracy. According to the results indicated by the Lloyd's List Security Survey and Lloyd's Risk Index[1], piracy is considered still one of the main threats to the conduct of commerce.

Piracy is a notion that has evolved around the course of time. As most aspects related to the law of the sea, the definition of piracy has been established through custom. The reason behind this practical approach to law relating to the sea is caused by a series of factors. One of the most important is the fact that at the early stages of law development, it was difficult to outline a conventional body of law that would regulate a domain which is essentially international, meaning that involves a wide number of participants from the international community, both private and public. A written body of regulation implies the consent of a vast majority of participants, which would hinder the process of commerce through its lengthy unravelling. Another factor involved is the rapid development of technology, the practices between parties, the needs and offers that can meet them. These fluctuate constantly and with the perpetual modification of the processes comes a need to know how to adjust conduct for the relations between merchants to go about undisrupted.

Piracy was initially addressed by the British jurist C.S. Kenny as being any type of armed violence at sea, which is not a lawful act of war[2]. Other definitions carried the same characteristics, thus placing piracy outside of regular war activities. In this aspect, J.L. Anderson was the one who stated

[1] Lloyd's Risk Index, https://ehtrust.org/wp-content/uploads/Lloyds-Risk-Index-2013report100713.pdf, last visited on 29.01.2019.

[2] Malvina Halberstam,"Terrorism on the High Seas: The Anchille Lauro, Piracy and the IMO Convention on Maritime Safety" *American Journal of International Law*, Vol. 82, nr.2, 1988, p. 273.

that piracy is a subset of violent maritime predation in that it is not part of a declared or widely recognised war.[1]

Attempting to unify all the existent customary law at that moment in time, the International Law Committee was requested by the United Nations General Assembly to conceive a draft of a convention that would govern the high seas and other parts of the ocean. Following the report rendered by the ILC, the United Nations adopted the Resolution 1105 (XI) of 21 February 1957, through which it convened the first conference on the law of the sea. This conference took place in Geneva and it rendered the entry into force of four conventions and an optional protocol: the Convention on Fishing and Conservation of the Living Resources of the High Seas, the Convention of the Continental Shelf, the Convention on the High Seas, the Convention on the Territorial Sea and the Contiguous Zone and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

A written definition said to highlight custom in the matter of piracy can be derived from the Convention on the High Seas of 1958. The article reads:

"*Piracy consists of any of the following acts:*

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or subparagraph 2 of this article."[2]

This definition was later amended through the text of the United Nations Convention on the Law of the Sea, which states in article 101 that:

"*Piracy consists of any of the following acts:*

[1] John L. Anderson, "Piracy and World History: An Economic Perspective on Maritime Predation", *Journal of World History*, Vol. 6, No. 2, 1995, pp. 175-199.

[2] United Nations, 1958 Convention on The High Seas, Adopted at Geneva, Switzerland on 29 April 1958 http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf, last visited on 30.12.2018.

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).” [1]

It is important to note that the text carries an intentional lack of precision in order to be able to cover all the acts of piracy that might occur, bearing in mind that the means of committing piracy acts evolve rapidly.

Other definitions of the phenomenon can be found in a myriad of national or international instruments. There are also organizations that have produced similar definitions, such as the International Maritime Bureau, which defines piracy as

“*An act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act*”[2]

In what concerns application *ratione loci* the norm requires that the acts of piracy be attempted in either in *the high seas* or *outside de jurisdiction of any State*. If we examine different national laws, we can observe that generally, acts carried out in the territorial or internal waters of states are subject to the corresponding state jurisdiction. For example, art. 8 paragraphs 1 and 2 of the Romanian Criminal Code establishes that the Romanian law is applicable to criminal offences committed on Romanian territory and outlines that its lands include the territorial sea and internal waters that are within borders. Correspondingly, the German Criminal Code

[1] United Nations Convention on the Law of the Sea, 1982, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, last visited on 30.12.2018

[2] ICC International Maritime Bureau,”Piracy and Armed Robbery Against Ships: Annual Report”, *Barking: ICC Publishing*, 2006, p. 3.

states in Section 3 that German criminal law shall apply to acts committed on German territory.[1] In other national laws, different terminology is used.

For example, in the Swedish Criminal Code in Section 1 of Chapter 2, regarding the applicability of Swedish Law it is stated that "*Crimes committed in this Realm shall be adjudged in accordance with Swedish law and by a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm"*.[2] The term of realm refers to all of the territories belonging to the State, being a specific term that is used throughout Nordic history[3].

Regarding these spatial criteria, we must mention the fact that the regime applicable to the high seas is also applicable for the exclusive economic zone (art. 58 UNCLOS). In consequence, should an act of piracy be committed in the waters that constitute the exclusive economic zone of a State, the acts shall be available for prosecution by any state (as it would be if it had been committed in the high seas).

Another element provided by the definitions previously mentioned regards the fact that the illegal acts of piracy must be committed with the intent of satisfying a private interest. Private interest can take different forms, whether it be the intent to commit a robbery, a murder, acts of violence in general. However, it is not necessary that the acts of piracy be accompanied by illegal acts concerning the assets of a person, or their life, if the *mens rea* pursues a private interest[4]. However, if the private interest is a political one as well, then this condition shall not be met, political aspects falling outside of the purpose of the incrimination of piracy.

As what concerns the source of the attack, the UNCLOS definition provides that the attack which constitutes an act of piracy must come from another private ship. Therefore, when analysing the act of piracy, one must establish that there are at least two vessels in conflict. If the acts relating to piracy are ones of internal origin, meaning that they come from the crew on board a vessel, the passengers or any other actors acting from within, then the acts

[1] German Criminal Code, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/criminal_code_germany_en_1.pdf , last visited on 23.10.2018

[2]Swedish Criminal Code, https://www.government.se/49cd60/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf, last visited on 01.11.2018

[3] Helle Krunke, Björg Thorarensen, *The Nordic Constitutions: A Comparative and Contextual Study*, First Edition, Hart Publishing, 2018.

[4] United Nations, International Law Commission,"Articles concerning the Law of the Sea with commentaries", (1956), *Yearbook of the International Law Commission*, 1956, pg. 282.

shall not fall in the definition of piracy. This remains true even if the perpetuators are posing as passengers or crew members.

Another essential element of the definition on piracy is the concept of "pirate ship or pirate aircraft". These terms are defined by art. 103 from UNCLOS which states as follows:

"*A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act*."

Therefore, in order to establish the pirate character of a vessel, one must evaluate the subjective attitude by those in dominant command of the ship. The latter is evaluated based on acts that embody the criminal intent of the author. In this sense, the second thesis of the article above attributes a piracy character to the vessel, if the persons committing the acts of piracy still have control over it. Therefore, the illicit character of the means used to commit the act is in direct relation to the author and his purpose, it being essential for the vessel to be used to perform the will of the author and to be under his or her control. Furthermore, the material object of piracy can be in the form of any vessel, whether private or public and of any nationality as long as the conditions of control and subjective attitude are met. However, if a ship is highjacked by a group of pirates, that does not imply the automatic loss of the ship's nationality. The loss or retention of nationality is directly dependent on maintaining control over the vessel by the perpetuators.

In this sense, art. 104 of the UNCLOS:

"*A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.*"

The last letter of art. 101 of the UNCLOS incriminates any act of inciting or of intentionally facilitating the acts described at the previous letters. This text covers the situation when the acts of piracy are committed with the participation of more authors. At a national level the text would refer to the act of complicity to a crime or the instigation of the author to commit a crime. In the international scheme, the participants to the crime are responsible for their acts.

Finally, art. 105 of the UNCLOS gives the right of any State to seize the pirate ship or vessel that was highjacked. Once seized, the jurisdiction regarding the acts shall belong to the courts of that State.

Despite the codification of piracy in the UNCLOS, the form of the text has some deficiency. One of the disadvantages of the fact that the UNCLOS incriminates acts of piracy which take place in the high seas is the fact that outside this territorial boundary, the judicial possibility to apprehend of any State ceases. Therefore, many pirates have resorted to performing attacks in the high seas situated in the immediate vicinity of territorial seas of jurisdictions that are not equipped to handle crimes on the seas, the aim being to escape the reach of international and domestic law. Moreover, a practice that has grown in intensity is the passage through several territorial waters until the pirates escape their pursuers.

Another aspect is that restricting the definition of piracy to include just private acts has the effect of excluding terrorists and insurgents, due to their primarily political focus. Already mentioned, the definition has the effect of limiting the area of action just to the high seas and has no infrastructure developed for pursuing the perpetuators in the territorial or internal waters of States, where pirates might seek refuge. Even more, because under this convention piracy requires two vessels, it places under a questionable regime the situations where the acts of piracy come from internal sources, such as an internal seizure of the ship.

In most cases of documented piracy[1] the source often cited for the illegal acts is poverty, or other forms of economic necessity. However, it appears that although economic necessity could be an underlining cause, it is not the primary reason for committing piracy. In actuality, there are a few key factors that enable piracy[2]: Legal and jurisdictional weakness; Favourable geography; Pre-existing state of conflict and disorder; Poor law enforcement/inadequate security; Favourable political environments; Cultural acceptability; Potential reward.

There are some jurisdictions in the world where piracy is not considered a crime, for example in India or Japan. This lack of uniformity among the incrimination of such illegal acts creates a barrier behind which some can hide and eventually escape prosecution.

De lege ferenda future propositions for codification in the domain of piracy should aim to institute the requirement for all states to enact national piracy laws concerning crimes at sea. Moreover, giving the current rapid evolution of technology and with cooperation between criminal organizations extending beyond borders, it is crucial for the combating of these tendencies

[1] Douglas Stewart,"*Terror at Sea"*, MP Publishing Ltd, 2017, pg. 50-200.

[2] Martin N. Murphy,"*Contemporary Piracy and Maritime Terrorism"*, 1st Edition, Routledge, 2007, pg.13.

that a mechanism of cooperation be instituted among States. A model of this could be the international cooperation in criminal matters mechanisms instituted in the European Union. By simplifying procedures and setting aside unnecessary bureaucracy, measures taken to prevent, and fight piracy would be more effective.

Furthermore, despite providing for universal jurisdiction in article 105, the UNCLOS does not oblige the States to criminalize piracy in their national legislation and to outline corresponding penalties for those convicted for acts of piracy. However, these measures can only be taken, keeping in mind the obligations on behalf of all States to cooperate to the fullest extent possible, in the repression of piracy. In this context, the rule encapsulated in art. 105 acts as an exception to the principle of exclusive flag-State jurisdiction over ships on the high seas.

Even more, while enforcing the said penalties, States must bear in mind to not violate the applicable humanitarian law, which include, but are not limited to: the interdiction of arbitrary detention, the right to a fair trial, the right to an independent and impartial court, the right to a speedy trial and avoidance of transfer to a country that still applies the death penalty. These aspects, which are left unregulated by the UNCLOS, result in a general unpredictability and uncertainty in situation where action is needed. These types of dissensions among regulation only favours the authors of illicit acts.

As mentioned before, the law of the sea is a vastly regulated and yet unregulated domain, at a fast-moving pace. In this sense, a number of other international conventions may be incident when attempting the repression and efficient prosecution of piracy. For example, the International Convention Against the Taking of Hostages is applicable to the matter of piracy, despite the convention not being specifically designed for this illicit act. There is also the Convention for the Suppression of Unlawful Acts Against the Safety of Marine Navigation and the UN Convention on Transnational Organized Crime. This excessive fragmentation throughout the law of the sea tends to create confusion regarding which instrument is applicable, due to their constant overlapping. For the future, a better uniformity is required in order to more efficiently combat the phenomenon.

3. Evolution of piracy-affected areas

Piracy in Somalia was initially construed as a response to the illegal fishing of tuna in its waters, done by several other States.[1] This phenomenon took the form of locals arming themselves and confronting those illegally fishing and requesting them to pay a sum of money for the right to fish in those waters. However, the effect of this practice was encouraging the locals to become more demanding, eventually leading to highly organised crime. Probably the greatest conquest of these pirates is the capturing of the Sirius Star, a Saudi Arabian owned tanker, that was transporting two million barrels of petrol[2], approximately 330 m long and run by a mixed crew.

The modus operandi of these perpetuators is to capture the ships and then lead them into isolated coves or isolated fishing villages (frequently used as hide-outs), in order to avoid detection. They get onto the ship by means of grapples, which enable them to access the hull of the ship. [3]

Afterwards, they begin transporting the cargo and crew to the shore, through whatever means they have at their disposal, where they make arrangements for ransom to be delivered. In the case where a Ukrainian vessel was captured and later taken to Xarardheere and Hobyo[4], where a request for a 3.2 million dollars ransom was made, through the application of their method, the authorities where prohibited by the pirates to create a confrontation, seeing as they were keeping 147 crew-members captive.

Several methods have been deployed to combat the phenomenon in this region. Despite all the trials, the hunting grounds of these pirates extend to more than a million square miles. Also, deploying heavy security on the vessels is near to impossible due to the size of the ships, the lack of human resources and the increase in the overall costs, which would eventually impact the product value on the market. An example would be how more

[1] Malkhadir M. Muhumed,"Somali pirates make off with $3.2 million ransom", https://www.heraldbanner.com/news/somali-pirates-make-off-with-million-ransom/article_a3f77e33-6c49-5e73-89c6-207b2d246624.html, last visited on 3.11.2018.

[2] Robert F. Worth,"Pirates Seize Saudi Tanker off Kenya; Ship Called the Largest Ever Hyacked", https://www.nytimes.com/2008/11/18/world/africa/18pirates.html, last visited on 30.10.2018.

[3] Barbara Surk & Tarek el-Tablawy,"Daring pirates pull off coup: Seizing giant oil tanker", https://www.tribpub.com/gdpr/orlandosentinel.com/, last visited on 12.12.2018.

[4] Jeffrey Gettleman, "Pirates Seek $35 Million For Ship with Costly Cargo", https://www.nytimes.com/2008/09/28/world/africa/28pirates.html , lastg visited on 23.10.2018, and Jeffrey Gettleman, "Tensions Rise Over Ship Hyacked Off Somalia", https://www.nytimes.com/2008/09/29/world/africa/29pirates.html, last visited on 23.10.2018

than half of the imported oil in China comes from the Middle East and all the vessels transporting the oil require to pass through the Gulf of Aden.[1]

Many shipping companies have chosen to avoid the course through the Suez Canal and go around the Cape of Good Hope, in attempt to be safe from pirates. However, this route presents clear deficiency, in the sense that it can delay shipment up to 20 days and as an effect, requires a costly amount of extra fuel. Therefore, the Somali pirates are still a source of danger even in the present.

Throughout time, Nigeria has also been a consistent zone where piracy is a great risk.[2] There are a few differences that make the Nigeria area stand out from other piracy targets. Firstly, if the attacks carried out in Somalia mainly pursue profit, the attacks in Nigeria are often politically driven. Moreover, the attacks in this case take place in territorial waters, rather than the high-seas, as it happens in Somalia. The forms of piracy that take place in this territory are usually related to the oil industry and how it affects the political environment of the country. The situation in Nigeria is even more alarming, given the fact that because of the political context, many acts of piracy go unreported in order to prevent insurers or brokers from increasing the price of insurance policies.

Other areas have seen progress in the last years, with the number of piracy-related incidents having decreased.[3] For example, piracy in Indonesia has lessened, as well as incidents in the Malacca Strait. The reason takes the form of regional ship controls, increasing security measures, increased vigilance and patrol of the coastal States, doubled by the extra safety means taken on board the passing vessels.[4]

A general conclusion for the tendency of piracy can be contoured. In this sense, we are witnessing areas that are a rising threat for the security of maritime transport. At the same time, the efficiency of the security measures proposed by the leading authorities in the domain have proved fruitful,

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[1] Leticia M. Diaz and Barry Hart Dubner "On the Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and the Sovereign Rights of States in the Areas of the Creation and Enforcement of Jurisdiction," https://lawpublications.barry.edu/barrylrev/vol13/iss1/6/?utm_source=lawpublications.barry.edu%2Fbarrylrev%2Fvol13%2Fiss1%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages, last visited on 29.01.2019

[2] International Maritime Bureau, Annual Report 2008, https://www.icc-ccs.org/reports/2018_Q3_IMB_Piracy_Report.pdf, last visited on 29.01.2019

[3] International Maritime Bureau, Annual Report 2018, https://www.icc-ccs.org/reports/2018_Q3_IMB_Piracy_Report.pdf and https://www.icc-ccs.org/reports/2017-Annual-IMB-Piracy-Report.pdf

[4] *Idem*.

aspects which are confirmed by the statistics carried out.[1] As a proposal, practitioners, those enacting legislation, commercial actors should collaborate in order to better coordinate their efforts. Since it appears that some measures are providing for a much more secure maritime commerce, a steady increase in the funds allocated to security could ensure a higher profitability in the longer run. Allowing piracy to continue in the manner that it has will inevitably result in higher costs with insurance and other damage control related costs, which will undoubtedly impact the market stronger as time progresses.

4. Risk assessment and proposals for practices aimed at reducing piracy

Piracy is an organised criminal activity that exists in many parts of the world. Those conducting the attacks are aggressive and use acts of physical violence to aid them in their purpose. Violence can be manifested at the time of boarding the ship or can take the form of prolonged ill treatment of crew members or persons on board lasting for years. The hijacking of ships or capturing of seafarers have also been used in order to obtain different sums as ransom.

The component elements of a threat are the capacity, the subjective element, the existence of a prerequisite permitting the party to act and finally a material act.

Capacity refers to the capability of the perpetuator of conducting the illicit act. In other words, it refers to the physical capability of him or her being able to initiate and carry out an attack. The subjective element refers to the type of culpability that lies behind the attack. In continental law systems, the distinction between direct and indirect intentions often appears.[2] The first describes the situation in which the person committing the act of piracy foresees the consequences of his actions, while the later merely accepts the possibility of them unravelling.

The prerequisite permitting the party to act refers to an existence of a breach in the security of the vessel targeted. In the sense, perpetuators will often observe the target of their attacks searching for the opportune moment to conduct their offensive.

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[1] *Idem*.

[2] Greg Taylor,"Concepts of Intention in German Criminal Law", *Oxford Journal of Legal Studies*, 2004, pp. 99-127.

The material act refers to the conduct of the perpetrators, aimed to secure their objectives. This element varies and can take form in very dangerous acts. A factor that must be taken into consideration is the technological advancements made in the field of war. In this sense, a constant risk in some parts of the world is represented by anti-ship missiles, sea mines or water-borne improvised explosive devices. Anti-ship missiles are long-range, accurate and powerful weapons, whose usage has also been associated with regional conflict. Sea mines have been used to deter and deny access to key ports and are usually tethered or anchored. However, due to normal sea currents or abnormal activities these mines can be dislocated and break free from moorings and drift into shipping lanes. Although the placement of the mines can be intended to harm military vessels, transiting merchant ships that are not a target can be hit. To prevent this situation it is advised that ships deploy the use of the Maritime Security Transit Corridor.[1]

Attacks with Water-Borne Improvised Explosive Devices can involve a large or reduced number of smaller vessels, capable of traversing large areas of water in limited amounts of time. The reasoning behind this can be explained through the purpose of such an attack. The perpetuator in this case is pursuing to cause damage to the ship (usually the hull), which can be accompanied by the boarding of the ship, although the latter is not a requirement. In order to prevent any injury, it is necessary to limit the contact of the speed boats with the hull of the ships.[2]

When attempting to combat the phenomenon of piracy, one can rely on the aid of empirical evidence. In this sense, it is noticeable how some geographical areas are more susceptible to attack than others. Places like the Bab el Mandeb Straits and the Strait of Hromuz to the Somali basin are deemed in practice as being high risk areas. A High-Risk Area (HRA) is a defined area within the VRA where it is considered that a higher risk of attack exists, and additional security requirements might be necessary.[3]

Measures to actively protect the ship mostly involve the tightening of security, especially while passing high risk areas. In this sense, it is preferred that the watches on the ship are increased and special attention be paid to the blind spots of the vessel.[4] These areas are the most vulnerable

[1] BMP 5, https://eunavfor.eu/wp-content/uploads/2018/06/BMP5-PP.pdf, last visited on 27.10.2018.

[2] *Ibid.*

[3] *Ibid.*

[4] Global Counter Piracy Guidance for Companies, Masters and Seafarers, https://www.ocimf.org/media/91171/Global-Counter-Piracy-Guidance-For-Companies-Masters-and-Seafarers.pdf, last visited on 23.12.2018.

and often the most targeted. Although preventive measures are preferred, sometimes they are not possible and the implicated are advised to report to the corresponding reporting centre and cooperate with the counter piracy services available.

As a general note the BMP offers a set of factors that could influence risk assessment for seafarers, which can include: Requirements of the Flag State, company, charterers and insurers; the threat assessment and geographical areas of increased risk; Background factors shaping the situation, e.g. traffic patterns and local patterns of life, including fishing vessel activity; Cooperation with military. An understanding of presence should be obtained from UKMTO; the embarkation of Privately Contracted Armed Security Personnel (PCASP); the ship's characteristics, vulnerabilities and inherent capabilities, including citadel and/or safe muster points to withstand the threat (freeboard, speed, general arrangement, etc.); the ship's and company's procedures (drills, watch rosters, chain of command, decision making processes, etc.).[1]

As mentioned before, the geographical component can serve as an aid in determining the level of measures needed to protect the vessel. The most frequent, but not exclusive areas in which ships are faced with the threat of piracy are: The Western Indian Ocean, South-East Asia and The Gulf of Guinea[2]. Therefore, when passing these zones, special care must be taken in order not to not fall under the siege of those aiming to commit acts of piracy.

Another aid lies in the form of collaboration. Frequently, guidance is provided through the means of sharing and voluntary reporting of other seafarers. For example, one system of such sharing takes the forms of charts, mapping out the different seas of the globe, which are regularly updated, to include the risks, authorities that a vessel in distress can contact and further means of handling and reporting issues regarding safety at sea.[3]

One more source for information is represented by the International Maritime Bureau Piracy Reporting Centre (IBM PRC). This NGO specializes in providing all types of aid for vessels confronted with piracy and robbery at sea.

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[1] BMP 5, https://eunavfor.eu/wp-content/uploads/2018/06/BMP5-PP.pdf, last visited on 27.10.2018.

[2] www.maritimeglobalsecurity.org, last visited on 29.01.2019.

[3] Regional Guide, http://www.recaap.org/resources/ck/files/guide/Regional%20Guide%20to%20Counter%20Piracy%20and%20Armed%20Robbery%20Against%20Ships%20in%20Asia%20(high-res).pdf, last visited on 4.11.2018.

Even more, insurers of ships, cargo and generally all aspects of maritime transport are also working closely to diminish the risk associated with the industry. Thus, areas with perceived enhanced risk are factored in when calculating the amount that is due to cover the policies which would be emitted. The Joint War Committee brings together underwriting representatives from two major actors on the insurer's market: Lloyd's and the International Underwriting Association. They often update the geographical regions which will affect potential insurance claims and these present relevance in combating piracy from the perspective of costs required to handle the phenomenon.[1]

5. **Conclusions**

Although the phenomenon of piracy is not frequently addressed in discussions about current world affairs, it remains one of the most pressing issues in what regards the law of the sea.

The abject failure of the international community response to piracy acts, represent a cautionary tale about the limits of international law and the common lack of interest states have in enforcing international law norms when proceeding so proves to be costly for them, even though most nations have commercial and security interests that could be adversely affected by this phenomen.

The issues highlighted above could be remedied through a more uniform approach to the codifying of the law in this regard and through practical measures taken by all those involved. The losses incurred so far are evident testimony that change is needed for safer seas.

[1] Joint War Committee Listed Areas, http://www.lmalloyds.com/lma/jointwar, last visied on 25.11.2018.

Cuvânt final / Closing Word

2009 – 2019
A Decade Marked by the Benefits of an ICJ Ruling

Irina MUNTEANU[1]

10 years since Romania's Hague Trial. This represents the time passed since the ruling issued by the International Court of Justice (ICJ) on February 3rd, 2009, in the case of the maritime delimitation in the Black Sea between Romania and Ukraine. A historic moment for Romania, considering the extension of Romania's sovereign jurisdiction over an area of 9,700 km^2 of the disputed 12,200 km^2 area (the area of the continental shelf and the exclusive economic zone) and the benefits of the corresponding natural resources.

Our attention today will not focus on the content of the judgment or over the elements of the merits of the case, but, first of all, on its importance to Romania and to the team members involved in this effort and, subsequently, on the relevance of the ruling to the international community.

The Romanian State has not only benefited from a territorial and economic point of view of this success of Romanian diplomacy, but has also gained appreciation, especially at the regional level. By submitting this dispute to the International Court of Justice, Romania has demonstrated confidence in the international justice, in its ability to resolve a situation that lasted approximately 40 years (since the dispute arose), shaping its status as a promoter of international law enforcement and of the principles enshrined in this branch of law. This status has been confirmed and reaffirmed at the highest level on various occasions.

Naturally, the fact that the ruling of February 3rd 2009 proved Romania's gain also brought to these arguments the awareness of a well-done job, of an accomplished duty and of rewarded effort. It managed to show to the most skeptical within both internal and international levels that justice is on the side of those who have solid arguments and incontestable evidence. It has definitely increased Romania's own confidence in its capacity as a State to

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support its viewpoint independently of its territorial size or its economic power.

As a follow-up to this judgment, on 23 June 2015, following a public consultation process at the national level, Romania submitted to the UN Secretary-General the Declaration of Acceptance of the Mandatory Jurisdiction of the International Court of Justice. Through this formal act,[1] Romania recognizes, along with 72 other States, the Court's jurisdiction of judging a particular case, without a special agreement, with any other State which accepts the same obligation.

The document bears the signature of Bogdan Aurescu. As a sign of fate, the internal process of drafting and approving the declaration's submission – in its current wording – ended at a time when the Romanian agent in the case of the maritime delimitation with Ukraine took over the role of head of Romanian diplomacy as minister of foreign affairs.

Participating in this international trial represented an important point not only for Bogdan Aurescu's career, but also for the entire team that ensured the mentioned result. Supporting this far-reaching project, which has been carried out over four years – from the time the Court was notified to the completion of the hearings – would not have been possible without the involvement and dedication of a group of experts (representing a mix of personalities).

Without forgetting the tremendous support of foreign consultants (Professors Alain Pellet, James Crawford and Vaughan Lowe and the assistants of the former two, Daniel Muller and Simon Olleson), we will focus on the Romanian members of this team, diplomats and specialists that have dedicated a great effort during this period of time, out of respect and passion for their profession.

Bogdan Aurescu – Romania's agent – took over other important files shortly after the ruling was passed. During 2010-2011, he was the chief negotiator for Romania of the Romanian-US Agreement on Missile Defense and the Joint Statement on the Strategic Partnership for the 21st Century between Romania and the USA, as State Secretary for Strategic Affairs. Between November 2014 and November 2015 he was Minister of Foreign Affairs. He is currently a Presidential adviser on foreign policy (since 2016), a member of the UN International Law Commission, of the Hague Permanent Court of Arbitration, alternate member of the European Commission for Democracy through Law (the Venice Commission) of the Council of

[1] Romania's Declaration contains certain exceptions. Its integral text may be read online, at https://www.icj-cij.org/en/declarations/ro

Europe, the arbitrator designated by Romania in accordance with Article 2 of Annex VII to the UN Convention on the Law of the Sea (together with other scientific roles). Bogdan shares the same passion for international law, which he passes along to his students, generation after generation, in his capacity of professor at the Faculty of Law of the University of Bucharest.

The 10th anniversary of the ICJ ruling finds Cosmin Dinescu – Romania's co-agent during this trial – as Secretary-General of the Ministry of Foreign Affairs. Following a position as Romania's Ambassador to Croatia during 2010-2016, he returned to the MFA headquarters to face the multiple challenges of this position, coordinating the entire consular, financial and administrative activity of the institution.

The role of Romania's second co-agent – according to custom, Romania's ambassador to The Hague – was fulfilled in the written phase of the trial (2004-2008) by Iulian Buga, then in the oral phase by Călin Fabian. They represent today our national interests as Romania's Ambassador to Sweden (Iulian Buga), respectively the Director of the Protocol Department within the Ministry of Foreign Affairs (Călin Fabian).

Ioana Preda – the team veteran, as Bogdan Aurescu called her, continued her 'journey' in the field of international relations, both in Bucharest – at the headquarters of the Ministry of Foreign Affairs – and within a EU mission in Georgia, gathering experience that she is currently using at Romania's Permanent Mission in Brussels. Her expertise is all the more valuable in this position given Romania's exercise of the Council of the European Union Presidency in this first semester of 2019.

Liviu Dumitru remained honest to his commitment, working all these 10 years within the MFA Legal Affairs Department. He was initially Head of the Office for Maritime Borders and Delimitations, then deputy director and, starting with 2016, the director of the International Law and EU Law Directorate. The name of the directorate has suffered certain changes, but Liviu's involvement has remained unchanged, showing the same dedication for using International Law as a 'tool' of his diplomatic career.

Mirela Pascaru has undertaken various activities within the MFA headquarters and the external service. She continued working with Bogdan Aurescu as adviser to the Secretary of State, she then was the deputy mission head at Romania's Embassy to Hungary, and subsequently adviser of the minister for foreign affairs. She is currently working with Liviu Dumitru as deputy director of the International Law and EU Law Directorate. The two continue to be a successful team in this context as well.

After completing her diplomatic posting at The Hague, Irina Niță initially returned to the Legal Affairs Department, subsequently being an adviser within the minister's cabinet and general director of the Human Resources Department. Starting with September 2016, Irinița – as she is called by her close friends – embraced a new challenge within the external service at Romania's Embassy to Belgrade, where she currently is. Her vast experience over the last 10 years can only confirm Irina's focus and adaptation capacities – essential abilities in her career.

Other experts from the MFA were involved – Catrinel Brumar and Rodica Vasile (during the oral hearings), Elena Paris, Ionuț Gâlea and Alina Orosan (during the negotiations and the written phase) – all these maintaining the same high standard of their professional activity.

Catrinel Brumar initially continued her activity as a diplomat within the Legal Affairs Department, including by coordinating the Office for Implementing International Sanctions. Since 2012, however, Catrinel has been Romania's Agent to the European Court of Human Rights, defending the national interests before this prestigious international court. It is an offering activity – with its benefits and risks – that involves dedication, loyalty and a refined legal sense.

Rodica Vasile – the team's IT expert – who supervised the optimum performance of the technical equipment during the preparation and undertaking of the oral hearings, continues the same commitment within the MFA special department, by offering assistance mostly to Romania's embassies and consular offices abroad.

Elena Paris has shared the same passion for International Law and foreign affairs, both from her position as head of the MFA Office for Implementing International Sanctions, and from within the institution's political departments. She is currently working at the Western and Central Europe Directorate, by managing the specific challenges of the bilateral relations within this area.

The 3rd of February 2019 finds Ionuț Gâlea at Sofia, as Romania's Ambassador to Bulgaria. Prior to this important challenge, he was General Director of the Legal Affairs Department during 2011-2016, combining the many faces of international legal activity. Ionuț is, moreover, a senior lecturer at the Faculty of Law of the University of Bucharest. By undertaking a considerable effort in order to combine his diplomatic and academic activities (both from the perspective of his loaded program and the distance invoved), Ionuț overcomes any obstacles out of respect for his students and passion for the subject he teaches.

Alina Orosan has shown the same perseverance in developing her diplomatic career in International Law, by evolving during these 10 years as deputy director and director of the International Law and Treaties Directorate, and subsequently as general director of the Legal Affairs Department. It is in this quality that the 10th anniversary of the ruling finds her.

The team of the Ministry of Foreign Affairs was supplemented by technical experts, easily assimilated within *Romania's team*, because, in reality, the served interest was the national one, without any institutional or organizational barriers.

Rear admiral Eugen Laurian has been part of the team ever since the negotiations with Ukraine, the first round of which took place in 1998. His valued contribution facilitated a link that has not disappeared after the Court's ruling. Rear admiral Laurian, now a military reserve, happily remembers all the important moments from the more than a decade he invested in this project, kindly and humbly granting interviews on the case when he is asked to.

Captain Ovidiu Neghiu accompanied the team to the September 2008 hearings, offering special assistance and sharing the feeling of a unitary project outlined during these moments.

Lieutenant Commander (now in reserve) Octavian Buzatu – Tavi for the team members – had the essential role of team cartographer. His indisputable graphic skills have offered Tavi the possibilities of offering, during the last 10 years, similar services to other States undertaking procedures of maritime delimitation, being considered one of the first cartographers in the world offering similar expertise in this type of trials.

Regardless of the activities the team members are currently undertaking or the numerous projects they are part of, the maritime delimitation with Ukraine will represent a reference mark for their careers.

And, in a happy coincidence for Romania, the judgment passed by the ICJ in this case will also remain in the Court's institutional memory, as its 100th judgment. Not from coincidence, however, the judgment was adopted unanimously, with no separate or dissenting opinions. The text was assumed in its entirety by the whole panel of judges.

At the same time, the manner in which the Romanian arguments persuaded the Court and the remarkable proportion it gained from the disputed total (almost 80%) by applying these arguments represent a landmark for the relevant caselaw.

It is otherwise well-known that, statistically, the cases of maritime delimitation before the ICJ are not solved by the absolute win of one of the parties. Consequently, the percentage obtained by Romania on February 3rd, 2009, was considered by foreign advisers 'an extremely good result' (Alain Pellet) and 'a strong victory' (James Crawford)[1].

From the perspective of this ruling's impact at the regional level, the submission of the dispute to the International Court of Justice itself and its subsequent judgment represented a model of managing inter-State conflicts. Moreover, if we focus on recent international evolutions, we can note that such conflicts do not avoid Romania's geographical location and would benefit from more positive examples like this.

Including from the perspective of the bilateral relation between Romania and Ukraine, the jurisdictional settlement of this dispute allowed the parties to relax their bilateral agenda and to focus on other elements that had been surpassed within the last years by the subject of the maritime delimitation as far as their importance of temporal priority was concerned.

Finally returning to the team, the 10 years have not been overlooked. Its members came together every year, most times all of them, around the date of February 3rd in order to celebrate this victory they have assimilated to a family anniversary. Besides the joy of being reunited and the beautiful memories, they were also most probably reunited by being aware of the joint effort and teamwork in promoting grand projects.

None of them, however, were aware of the drafting of this article or of its content, prior to publication.

[1] Evaluations taken from the correspondence between Bogdan Aurescu and each of the two advisers, immediately after the Court's ruling. More details in Bogdan Aurescu, *Avanscena și Culisele Procesului de la Haga. Memoriile unui tânăr diplomat*, Ed. Monitorul Oficial R.A, Bucharest 2009, p. 248.