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

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

*Professor dr. Bogdan Aurescu*
*Member of the UN International Law Commission*

# Abrevieri / Abbreviations

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

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

CAHDI – Comitetul ad-hoc al experţilor în drept internaţional public / Committee of Legal Advisers on Public International Law

CDI / ILC – Comisia de Drept Internaţional / International Law Commission

CEDO / ECHR – Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights

CIJ / ICJ – Curtea Internaţională de Justiţie / International Court of Justice

CJUE / CJEU – Curtea de Justiţie a Uniunii Europene / Court of Justice of the European Union

COJUR – Grupul de lucru Drept Internaţional Public al Consiului UE / EU Council Working Group on Public International Law

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

CPJI / PCIJ – Curtea Permanentă de Justiţie Internaţională / Permanent Court of International Justice

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

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

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

UE / EU – Uniunea Europeană / European Union

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

# Articole
# Articles

## Preliminary Objections in the Bosnia and Herzegovina v Yugoslavia Case

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***Abstract:*** *The present paper seeks to address the issue of the preliminary objections raised in the Bosnia and Herzegovina v. Yugoslavia case. The paper engages in a presentation of the procedural issues raised by the respondent State and the manner in which the ICJ has dealt which each of these contentions. Further, the paper provides a critique of some of the aspects which arise from the Court's Judgment, as well as the legal implications of its findings.*

***Key-words: International Court of Justice, preliminary objections, jurisdiction, access***

### 1. Introduction

The first step in the conduct of proceeding before the International Court of Justice (hereinafter, the "Court") is the establishment of jurisdiction of the Court, either at the request of one of the parties to the proceeding, or on the Court's own initiative. To that end, Article 79 of the Rules of Court (hereinafter, the "Rules") permits a respondent to raise objections to either "*the jurisdiction of the Court or to the admissibility of the application, or other objection the decision of which is requested before any further proceedings on the merits…*". Therefore a *sine qua non* for invoking Article 79 is that the nature of the objections must be such that it is imperative for

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the Court to decide on them before looking to the merits.[1] Further, the decision on preliminary objections, if favorable, would avoid not only a decision on, but also a discussion on the merits.[2]

The decision of the Court on preliminary objections in the *Bosnia and Herzegovina v. Yugoslavia Case*[3] (the "1996 decision") is one of particular interest in that it raises questions with respect to both the procedural and substantive aspects of raising preliminary objections.

On 20 March 1993 the Republic of Bosnia and Herzegovina ("Bosnia and Herzegovina") filed an Application against the Republic of Yugoslavia ("Yugoslavia") claiming alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). The primary basis of jurisdiction relied on by Bosnia and Herzegovina was Article IX of the Genocide Convention, however during the period between March 31, 1993 and August 10, 1993 it invoked several additional bases of jurisdiction and requested provisional measures. Yugoslavia filed its responses to these requests on August 10 and August 23, 1993.

On April 15, 1994 Bosnia and Herzegovina filed its Memorial. On June 26, 1995 Yugoslavia filed its Preliminary Objections to the Court's jurisdiction and the admissibility of the Application. In accordance with Article 79(3) of the Rules the Court suspended the proceeding on merits until the Preliminary Objections were disposed of by its order of July 14, 1995. Bosnia and Herzegovina filed its response to the Preliminary Objections on November 14, 1995 and the oral proceedings were conducted between April 29 and May 3, 1996.

It is relevant to note that Yugoslavia raised Preliminary Objections on the following grounds:

(a) jurisdiction *rationae personae*;

(b) jurisdiction *rationae materiae*;

(c) jurisdiction *rationae temporis*;

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[1] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie *(Libyan Arab Jamahiriya v. United States of America)*, ICJ Reports 1998, 26; *Rights of minorities in Upper Silesia (Germany v. Poland)*, PCIJ Series A, No. 15

[2] *Barcelona Traction case*, ICJ Reports 1964, p.44; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Reports 2007, p.40

[3] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v. Yugoslavia)*, ICJ Reports 1996, p. 595

(d) admissibility of the claims; and

(e) admissibility of the additional bases of jurisdiction invoked by Bosnia and Herzegovina.

The coming paragraphs will examine the procedural aspects as well as the reasoning of the Court in dismissing Yugoslavia's Preliminary Objections along with the legal consequences of the 1996 Decision.

## 2. Commentary on the 1996 Decision

### 2.1. Procedural Aspects

Before delving into the reasoning of the Court, it is noteworthy to examine the procedural aspects related to preliminary objections, which have been enshrined in Article 79 of the Rules.

Article 79(1)[1] provided for the possibility of preliminary objections (as defined in Section I above) within the time limit fixed for the submission of the Counter-Memorial. Therefore, the Preliminary Objections raised by Yugoslavia were in time and rightly allowed by the Court. This provision has, however, been made more stringent by the amendment of 2001 which requires preliminary objections to be raised "*as soon as possible, and not later than three months after the delivery of the Memorial.*"

Article 79(5) of the Rules also mandates that the proceeding on the merits of the dispute be suspended upon receipt of the preliminary objection by the Registry. As done by the Order of the Court dated July 14, 1995.

Article 79(9) sets out that the Court may either uphold or reject a preliminary objection. The same provision also permits the Court to declare that an objection is not of an exclusively preliminary character and fix a timetable for further proceedings. This is ordinarily the situation where the Court finds that the objection is so intricately connected to the merits of the dispute that it cannot be disposed of in a preliminary manner.[2] Finally, Article 79(10) imposes upon the Court to give effect to an agreement of the parties that the preliminary objections be heard along with the merits. In the 1996 decision, however, neither did the Court defer any of the Preliminary Objections to a later date, nor was there any agreement of the parties to hear the Preliminary Objections along with the merits.

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[1] As adopted on April 14, 1978 which were to be applicable to all cases submitted to the Court prior to February 1, 2001

[2] Appeal Relating to the Jurisdiction of the ICAO Council *(India v. Pakistan)*, ICJ Reports 1972, p.56

## 2.2. Reasoning of the Court

The Court, in the 1996 decision, dismissed all the Preliminary Objections raised by Yugoslavia. The reasoning of the Court in doing so is as follows:

### 2.2.1. Jurisdiction *Rationae Personae*

Yugoslavia had, in its third and sixth Preliminary Objections, challenged the jurisdiction of the Court invoked under Article IX of the Genocide Convention on the ground that it did not bind the parties or even assuming that it did, that it had not entered into force between them. While rejecting this Preliminary Objection the Court considered a number of factual positions.

Firstly, the Court considered that Yugoslavia was a party to the Genocide Convention, thereby bound by it, which had not been contested. The former Socialist Federative Republic of Yugoslavia ("SFRY") had signed and ratified the Genocide Convention without reservation in 1950. Further, Yugoslavia had, by its proclamation of April 27, 1992, expressed that as the continuing state of SFRY it would be bound by the international commitments of SFRY. A note dated April 27, 1992 from the Permanent Mission of Yugoslavia to the Secretary General later confirmed this position.

Secondly, the Court noted that Article IX of the Genocide Convention opened it to any member of the UN from the date of admission thereto. In light of the fact that Bosnia and Herzegovina became a member of the UN on May 22, 1992, it could have been a party to the Genocide Convention as well, through the mechanism of state succession. Further, the Secretary General had communicated Bosnia and Herzegovina's Notice of Succession to all the members of the Genocide Convention on March 18, 1993. Therefore, Bosnia and Herzegovina could become a party to the Genocide Convention through the mechanism of state succession.

Thirdly, the Court looked into Yugoslavia's contention that if the Notice given by Bosnia and Herzegovina could be considered to be an instrument of accession to the Genocide Convention, it would only become effective on March 29, 1993 *i.e.* nine days after the filing of the Application. The Court however placed reliance on the *Mavrommatis principle*[1] and held that since the procedural defects had been cured as on the date of the judgment, there

[1] *Mavrommatis Palestine Concessions Case*, PCIJ, Series A, No. 2, p.34.

was no basis to uphold the third Preliminary Objection. To do so would merely extend the timeframe for resolution of the dispute as Bosnia and Herzegovina could have, on its own initiative, filed a new application during the elapsed time and remedied the procedural defect. Further, the Court explained that even if it were to be assumed that Bosnia and Herzegovina was not recognized by Yugoslavia, therefore there was no consensual basis to found the Court's jurisdiction, that defect had been remedied by the entry into force of the Dayton-Paris Agreement on December 14, 1995 by which Yugoslavia and Bosnia and Herzegovina expressly recognized each other as sovereign independent states.

### 2.2.2. Jurisdiction *Rationae Materiae*

The fifth Preliminary Objection raised by Yugoslavia related to whether the disputes between the parties were covered by Article IX of the Genocide Convention. Yugoslavia contended that the Court lacked *rationae materiae* jurisdiction on the ground that (i) the genocide complained of was of a domestic nature and Yugoslavia did not take part in it or exercise jurisdiction over the territory; and (ii) Article IX excluded State Responsibility as claimed by Bosnia and Herzegovina.

The Court first considered that the Genocide Convention sought to punish the crime of genocide irrespective of the nature of the conflict and that Yugoslavia's involvement in the said genocide was in itself a dispute between the parties.[1] Further, the Court noted that Article I of the Genocide Convention recognized genocide as a "*crime under international law*" in times of both peace and war. The domestic or international nature of the conflict was accordingly irrelevant.

Coming next to the nature and extent of State Responsibility envisaged by the Genocide Convention, the Court held that Article IX referred to "*the responsibility of a State for genocide or for any of the other acts enumerated in Article III*". This in light of the object and purpose of the Genocide Convention it was clear that rights and obligations imposed were *erga omnes* obligations. The Court went further and examined the imputability and application of the Genocide Convention to States for actions within their own territory and found that Article IV did not limit the same at all. In fact, the Court concluded that the language was sufficient to include the responsibility of a State for an act of genocide perpetrated by the State itself.

[1] East Timor *(Portugal v Australia)*, ICJ Reports 1995, p.100, para. 22

Accordingly, the Court rejected the fifth Preliminary Objection raised by Yugoslavia.

### 2.2.3. Jurisdiction *Rationae Temporis*

Yugoslavia contended, in its seventh Preliminary Objection, that even assuming that the Genocide Convention was applicable, it would only be so for a part of the dispute and not the entirety of the dispute between the parties. Yugoslavia forwarded several arguments in support of this contention. However, the Court considered that the Genocide Convention, including Article IX, did not limit the scope or application of its jurisdiction *rationae temporis*, and neither did the parties make any such reservation to the Genocide Convention or when signing the Dayton-Paris Agreement. Accordingly, the Court rejected the sixth and seventh Preliminary Objections and held that it had jurisdiction over all the relevant facts since the beginning of the conflict in Bosnia and Herzegovina.

### 2.2.4. Admissibility

Yugoslavia challenged the admissibility of the Application on the basis that there was no "*international dispute*" as the conflict upon which Bosnia and Herzegovina's case was founded was in the context of a civil war. Referring to its findings on jurisdiction *rationae materiae*, the Court affirmed that there was, in fact, an international dispute between the parties in that their positions with regard to the entirety of the claims raised in the Application were radically different. In any event, the Court found that the Application could not be inadmissible on the sole ground that it would have to look into events that may have occurred in the context of a civil war.

Separately, Yugoslavia also questioned the admissibility of the Application brought by Bosnia and Herzegovina on the premise that Mr. Alija Izetbogović, who had authorized the filing of the Application, was not the President of Bosnia and Herzegovina but only of the Presidency, which was in contravention of domestic law. The Court did not accept this argument on the ground that it was a valid presumption of international law that the head of a State was competent to take decisions with respect to international relations of that State and that it would not go into domestic law to ascertain the validity of such actions. In particular, the Court was guided by the fact that the UN and a number of international bodies recognized Mr. Izetbgović as the Head of State. In fact, the Dayton-Paris agreement too bears his signature.

The Court, therefore, rejected Yugoslavia's Preliminary Objections as to admissibility of the Application.

### 2.2.5. Admissibility of the Additional Bases of Jurisdiction invoked by Bosnia and Herzegovina

As previously mentioned, Bosnia and Herzegovina invoked several additional bases of jurisdiction, all of which being rejected by the Court for the following reasons.

Bosnia and Herzegovina claimed that the Court had jurisdiction under the Treaty between the Allied and Associated Powers and the Kingdom of Serbs, Croats and Slovenes of 10 September 1919, which provided for settlement of disputes by the Permanent Court of International Justice. The Court, however, found that this treaty was not in force and jurisdiction under it could not be invoked.

Bosnia and Herzegovina also invoked the letter of June 8, 1992 from the Presidents of the Republics of Montenegro and Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia, which suggested settlement of disputes before the Court. It was held that this letter could not be considered as a binding declaration to unconditionally submit to the jurisdiction of the Court given the circumstances under which the letter was sent.

As regards Bosnia and Herzegovina's letter of August 10, 1993 by which it expressed its intention to rely on "*the Customary and Conventional International Laws of War and International Humanitarian Law, including but not limited to the Four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles*", the Court found that none of these were applicable to the dispute in question.

Finally, Bosnia and Herzegovina attempted to invoke the principle of *forum prorogatum* on the premise that Yugoslavia had impliedly consented to the jurisdiction of the Court. However, this contention was rejected by the Court on the footing that the request for indication of provisional measures aimed at preservation of rights covered by the Genocide Convention cannot imply consent to jurisdiction and the conditions to invoke the doctrine were not fulfilled.

## 2.3. Legal Implications of the 1996 Decision

The Court first addressed the legal implications of the 1996 decision when it was confronted with an application for revision ("Revision Application") of the same under Article 61 of the Statute, which was filed by Serbia and Montenegro (formerly known as Yugoslavia) on April 24, 2001. The Revision Application was founded on the footing that the admission of Yugoslavia as a new member of the UN revealed that it was not a member of the UN before such time and could not be a member of the Genocide Convention when the Application was filed. The Court rejected the Revision Application by its decision of February 3, 2003[1] on the ground that no new facts were revealed, the circumstances relied upon arose only after the 1996 decision had been rendered and, in any event, could not be called "*facts*". This decision did not touch upon the membership status of Yugoslavia to the UN in 1993.

In the meantime, Serbia and Montenegro filed an "*Initiative to the Court to Reconsider ex officio Jurisdiction over Yugoslavia*" (the "Initiative") on May 4, 2001. By the Initiative, Serbia and Montenegro sought to resile from the position taken in 1992 *i.e.* that it was the continuing state of SFRY, and claimed that it only became a member of the UN on November 1, 2000. It once again contended that Yugoslavia was a member of neither the UN nor the Genocide Convention on the date of the Application and that the Court did not have *rationae personae* jurisdiction over it and requested suspension of the proceedings on merits. The Court however declined to do so, pursuant to which Serbia and Montenegro requested the Court to decide whether Yugoslavia had access to the Court as an "issue of procedure". The Court deferred the question of Yugoslavia's access till the hearing on merits by its letter of June 12, 2003.

The "*issue of procedure*" was accordingly settled by the Court's decision on the merits rendered on February 26, 2007 ("2007 decision"). The Court adumbrated that since jurisdiction was established under the Statute in the 1996 decision, which was binding on the parties, without any recourse to appeal,[2] it had the force of *res judicata*. The Court also considered were it the case that the question of access to the Court was not implicit in the 1996 decision, any decision now taken would necessarily entail reopening an

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[1] *Application for Revision of the Judgment dated 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, (Yugoslavia v. Bosnia and Herzegovina)*, ICJ Reports 2003, p.7

[2] *Corfu Channel case (United Kingdom v. Albania), Preliminary Objections*, ICJ Reports 1948, p.15

issue which was *res judicata*[1] and would likely yield a contradictory result. Accordingly, the Court affirmed its jurisdiction on the strength of the 1996 decision.

The Court also took note of the decision in the *Legality of Use of Force case*[2] ("2004 decision") wherein the Court looked to the 1996 decision and held that the question of whether Yugoslavia had access to the Court was not looked into and confirmed that it did not. As to whether a preliminary objection could be raised after the decision on the preliminary objections had been rendered, the 2004 decision distinguished between jurisdiction relating to consent and that relating to access. It was held that the question of access was one of law and it was incumbent upon the Court to look into this at any stage of the proceeding. With respect to the scope of the 1996 decision the Court nevertheless disagreed with the 2004 decision and held that the fact that Yugoslavia had access to the Court was an implied finding in the 1996 decision. The Court went further to state that since the 2004 decision was in a different case, it did not, indeed could not, have the force of *res judicata*.

## 3. Critique

Upon perusal of the 1996 decision, it appears that the question of access to the Court by Yugoslavia was never, in fact, considered. This is also implicit from the Dissenting Opinion to the 1996 decision of Judge *ad hoc* Kreka. The Court brushed the issue of jurisdiction *rationae personae* vis-à-vis Yugoslavia by citing the proclamation of April 27, 1992 and simpliciter stating that the fact of Yugoslavia being a continuer state of the Socialist Federal Republic of Yugoslavia, consequently party to the Genocide Convention was not contested. However, when confronted with the issue at the merits stage, the Court took the stand that confirmation of Yugoslavia's access was implicit in the 1996 decision. The Court similarly faced problems with decisions on jurisdiction by implication in the *South West Africa case*[3] where the Court resided from the position it had taken in 1962 and stated that there was no *res judicata* as the issue of *locus standi* had not been dealt with and proceeded to decline jurisdiction on the examination of

[1] *Nottebohm case (Liechtenstein v. Guatemala), Preliminary Objections,* ICJ Reports 1953, p.111

[2] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment,* ICJ Reports 2004, pp. 310-311

[3] *South West Africa Case (Ethiopia and Liberia v. South Africa),* ICJ Reports 1962, p.319

*locus standi* in 1966. Pertinently, the Court had, in the 1966 decision, opined against a decision on jurisdiction being made implicitly.

The second question that comes to mind is whether it was incumbent upon the Court to look into the statutory limits of its activities, including issues affecting its own judicial integrity. There have been instances where it was held that the Court is obligated to confirm that it has *rationae personae* and *rationae materiae* jurisdiction over a dispute *proprio motu.* After all, the establishment of jurisdiction (including the right of access of parties) is the first step to initiating proceedings before the Court.

For the present, suffice it to say that the 1996 decision is not free from flaw and the attempt of the Court to address these paucities in the 2007 decision leaves much to be desired.

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*Barcelona Traction case,* ICJ Reports 1964, p.44; *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Preliminary Objections, ICJ Reports 2007, p.40

*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia),* ICJ Reports 1996, p.595

*Corfu Channel case (United Kingdom v. Albania),* Preliminary Objections, ICJ Reports 1948, p.15

*East Timor (Portugal v Australia),* ICJ Reports 1995, p.100, para. 22

*Legality of Use of Force (Serbia and Montenegro v. Belgium),* Preliminary Objections, Judgment, ICJ Reports 2004, pp. 310-311

*Nottebohm case (Liechtenstein v. Guatemala),* Preliminary Objections, ICJ Reports 1953, p.111

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*Rights of minorities in Upper Silesia (Germany v. Poland),* PCIJ Series A, No. 15

*South West Africa Case (Ethiopia and Liberia v. South Africa),* ICJ Reports 1962, p.3

# Admissibility of Claims before the ICJ: "Mootness" and the *Nuclear Tests* Case

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***Abstract*****:** *The present paper aims to provide a case analysis of one instance of inadmissibility before the International Court of Justice, illustrated by the Nuclear Tests Case (New Zealand v. France), namely, the so-called "mootness" of a claim. The paper presents a description of the main aspects of the case and the controversies which arise from this Judgment. On the face of it, the case in question is simply an example of what may be construed as an inadmissible claim before the ICJ. However, upon further study, it becomes apparent that, in reaching its decision in this matter, the Court applied its authority of interpretation to an Applicant's claim quite extensively, essentially determining what the Applicant was effectively seeking, and set the precedent that unilateral public statements made by a State may be considered as legally binding undertakings, based on the principle of good faith. The analysis presented in the present paper seeks to bring to light the implications of the Court's Judgment in the Nuclear Tests Case.*

***Key-words: International Court of Justice, admissibility, mootness, authority of interpretation***

## 1. Introduction

The admissibility of an Application to the International Court of Justice ("ICJ" or the "Court") is a preliminary matter upon which the Court must

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decide before proceedings to the merits of the dispute.[1] As has been pointed out by legal authorities:

> *"Objections to admissibility are less easy to define, except negatively, as contentions that are neither matters of jurisdiction, nor questions of the merits*".[2]

The ICJ has expressed its opinion on the matter of admissibility, stating that:

> "*a preliminary objection to admissibility covers a more disparate range of possibilities. Essentially such an objection consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein.*"[3]

The Nuclear Tests Case is an illustration of one such possibility. It is an example of what constitutes a valid objection to admissibility: the lack of a dispute caused by the effective satisfaction of the Applicant's claims.[4]

On 9 May 1973, New Zealand instituted proceedings against France in respect of a dispute concerning the legality of atmospheric nuclear tests conducted by the French Government in the South Pacific region. New Zealand claimed that these tests gave rise to radioactive fallout and that, as such, were a violation of New Zealand's rights under international law. The latter requested that these tests cease, so as to avoid any further violations of its rights.

New Zealand grounded the jurisdiction of the Court, principally, on Art. 36 para. 1 and Art. 37 of the Statute of the Court, corroborated with Art. 17 of the General Act of 1928 for the Pacific Settlement of International Disputes, and in the alternative, on Art. 36 paras. 2 and 5 of the Statute of the Court.

In consideration of the fact that France had raised objections regarding the jurisdiction of the Court and that the Court was concerned with the

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[1] Hugh Thirlway, 'The International Court of Justice' Chapter 20 in Malcolm D. Evans (ed), *International Law* (Oxford: Oxford University Press, 4th edition, 2014), page 600.

[2] Ibid.

[3] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Croatia v. Serbia),* Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para. 120.

[4] Hugh Thirlway, 'The International Court of Justice' Chapter 20 in Malcolm D. Evans (ed), *International Law* (Oxford: Oxford University Press, 4th edition, 2014, page 598.

admissibility of the Application,[1] any pronouncement on matters of substance, and therefore also on issues such as the request for intervention filed by Fiji, were deferred to a later stage.

In deciding the issue of admissibility of the Application, the Court looked to statements made by the French Government,[2] in particular a statement made by the President of the Republic,[3] as well as to the diplomatic correspondence between the latter and New Zealand.

By way of interpretation, the Court found that, as a result of its statements, France had become legally bound by its promise to end the nuclear testing.

For this reason, the Court held that the claim of New Zealand no longer had any object and that the Court was therefore "*not called upon to give a decision thereon."*[4]

## 2. Brief Outline of the Nuclear Tests Case Judgment of 20 December 1974

### 2.1. Procedural Aspects and Related Issues

Before addressing the reasoning of the Court in more detail, there are certain aspects regarding the case which must be borne in mind.

First, by Order of 22 June 1973, in light of New Zealand's Request for the Indication of Interim Measures of Protection, the International Court of Justice decided that "*the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zeeland, the Cook Islands, Niue or the Tokelau Islands."*[5]

Suffice it to say that the nuclear testing conducted by France did not cease as a result of the above-mentioned Order,[6] and two more series of tests were carried out in the periods of July to August 1973 and June to September

[1] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457, para. 4.

[2] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457, para. 51.

[3] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457, para. 38.

[4] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457, para. 65.

[5] Nuclear Tests *(New Zealand v. France),* Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 135

[6] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 494

1974, which the French Government declared to be the last tests to be conducted in the atmosphere.[1]

Second, due to the fact that the Court decided that the Application was inadmissible, the proceedings were terminated at this preliminary stage. As a result, the Court did not address the issue of jurisdiction, nor did it proceed to the merits.[2]

Lastly, the Australian Government filed, on the same day as New Zealand, an Application regarding the same dispute, which was not joined with the claim filed by the latter. It is interesting to note that the two Applications (*i.e.* that of Australia and New Zeeland, respectively) contain similar, however not identical claims.

The Australian claim stated that "*the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law*", and as such, requested the Court to "*order that the French Republic shall not carry out any further such tests*".[3]

On the other hand, the Application filed by New Zealand claimed that "*the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law (...)*".[4]

A comparison of the two Applications may lead to the conclusion that, while in Australia's case only future tests were considered to be inconsistent with the rules of international law, New Zealand considered that both past and future tests of that sort were a violation of its rights. Indeed, this does seem to be the case, in light of the fact that New Zealand formally reserved "*the right to hold the French Government responsible for any damage or losses incurred as a result of the tests*".[5]

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[1] Jose Juste Ruiz, "Mootness in International Adjudication: The Nuclear Tests Cases", in German Yearbook of International Law; vol. 20, p. 359

[2] *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p.457, para. 62

[3] Application instituting Proceedings, filed in the Registry of the Court on 9 May 1973, Case concerning Nuclear Tests (*Australia v. France*), p. 28

[4] Application instituting Proceedings, filed in the Registry of the Court on 9 May 1973, Case concerning Nuclear Tests (*New Zealand v. France*), p. 9.

[5] Application instituting Proceedings, filed in the Registry of the Court on 9 May 1973, Case concerning Nuclear Tests (*New Zealand v. France*), p. 22.

## 2.2. Reasoning of the International Court of Justice

In the *Nuclear Tests Case* the Court ruled that New Zealand's Application was inadmissible due to the fact that the objective of the claim, interpreted as such by the Court, was essentially accomplished as a result of France's unilateral commitment to hold no further atmospheric tests in the South Pacific.[1] In order to reach this ruling, the Court's reasoning followed three main steps: first, it established the Applicant's claim by way of interpretation (Subsection 2.2.1); second, the Court interpreted statements issued by the French Government (Subsection 2.2.2); and finally, it established the "mootness" of the dispute (Subsection 2.2.3).

### 2.2.1. Interpretation of New Zealand's Claim

New Zealand sought a declaration from the Court that the nuclear atmospheric tests conducted by France were a violation of the former's rights in light of international law.[2]

In the first step of its reasoning, the Court determined that it had an "*inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute.*"[3]

On the basis of its "*inherent jurisdiction*", the Court decided that there was a need to proceed with a detailed analysis of the claim, in order to determine if there was, in fact, a dispute.[4]

The Court analysed the claim in light of the diplomatic correspondence that took place between New Zealand and France over the previous ten years, which revealed "*New Zealand's preoccupation with French nuclear tests in the atmosphere in the South Pacific region, and indicate[d] that its objective was to bring about their termination*".[5]

Among others, the Court looked at a comment made by the Prime Minister of New Zealand, in which he stated that until New Zealand received an assurance from the French Government that the tests would be terminated, the dispute between the two States would persist.[6] In relation to this

[1] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 62.
[2] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 11.
[3] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 23.
[4] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 24.
[5] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 26.
[6] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 28.

comment, the Court considered that "*an assurance that atmospheric testing is 'finished for good' would, in the view of New Zealand, bring the dispute to an end*".[1]

In other words, by looking at diplomatic correspondence between the two Parties to the dispute, the Court considered that New Zealand was effectively seeking the termination of the nuclear tests.

Furthermore, the Court also considered that the New Zealand claim was to be interpreted as applying only to atmospheric tests, since the Applicant's claim had been argued mainly in relation to this kind of testing.[2] However, it must be pointed out that, textually, the Application filed by New Zealand refers generally to nuclear tests that give rise to radioactive fallout, and not solely to atmospheric tests.[3]

### 2.2.2. Interpretation of the French Government's Statements

The next step in the reasoning of the Court entailed the interpretation of the statements made by the French Government in relation to the ceasing of the atmospheric nuclear tests.

These statements,[4] and especially the communique issued by the Office of the President of the French Republic, essentially conveyed the fact that France had reached the point in its nuclear defence program where it was "*in a position to pass on to the stage of underground explosions*".[5]

The Court noted that, before assessing whether the declarations made by the French Government met the object of the Applicant's claim, it first had to determine "*the status and scope on the international plane of these declarations*".[6] To this end, the main consideration was that, when a State makes a statement with the intention of becoming legally bound to it, it has to follow a course of conduct according to the statements made.[7]

The Court continued by noting that the statements made by the French Government and, more importantly, by the President of the Republic, considered as a whole, "*must be held to constitute an engagement of the*

[1] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 29.
[2] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 29.
[3] Application instituting Proceedings, filed with the Registry of the Court on 9 May 1973, Case concerning Nuclear Tests (*New Zealand v. France*), p. 9.
[4] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 35, 36.
[5] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 35.
[6] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 45.
[7] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 46.

*State, having regard to their intention and to the circumstances in which they were made*".[1] Its further reasoning was that "*the objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect*".[2]

Therefore, the Court found that the statements issued by France constituted legally bounding undertakings.

### 2.2.3. "Mootness" of the Claim

The third and final step of the reasoning of the Court was to confront the commitment entered into by France with the claim advanced by New Zealand. The Court stated that "*though the latter* [*i.e.* New Zealand][3] *has formally requested from the Court a finding on the rights and obligations of the Parties, it has throughout the dispute maintained as its final objective the termination of the tests*".[4]

As the Court considered that the final objective of New Zealand's claim was the ceasing of the atmospheric nuclear tests and in light of the statements made by France, by which it declared that it was moving on to underground tests, the Court found that "*the objective of the Applicant has in effect been accomplished*".[5]

As such, the Court ruled that "*the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon".*[6]

## 3. Controversial Issues

The Nuclear Tests case has indeed raised some controversial issues that are worth analysing. In the following Subsections we shall touch upon three of these issues: first, in relation to the Court's interpretation of New Zealand's claim (Subsection 3.1), second, the finding that the statements made by France were legally binding obligations (Subsection 3.2), and finally, the issue of Paragraph 63 of the Judgment and the subsequent Order of 1995 (Subsection 3.3).

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[1] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 51.
[2] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 53.
[3] Author's Note.
[4] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 54.
[5] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 55.
[6] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 65.

### 3.1. The Court's Interpretation of New Zealand's Claim

The Judgment of 20 December 1974 in the case of New Zealand versus France "*is primarily addressed to the determination of the actual object of the litigation submitted to the Court*".[1]

New Zealand's textual claim was the request that the Court "*adjudge and declare: That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests*."[2]

In other words, the Applicant made a request for a judicial declaration that France's conduct represented a violation of the former's rights under international law, the pronouncement of which was discarded by the Court[3] when it concluded that New Zealand was effectively seeking the ceasing of the nuclear testing.

Indeed, the approach taken in this case has been subject to criticism, particularly in the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimgnez de Aréchaga and Sir Humphrey Waldock.

The Dissenting Judges noted that "*the formal submissions of the parties define the subject of the dispute*",[4] and further found that "*while the Court is entitled to interpret the submissions of the parties, it is not authorized to introduce into them radical alterations".* [5]

As such, the Dissenting Judges considered that the objective sought by New Zealand should have been established on the basis of the "*clear and natural meaning of the text of its formal submission*"; in their opinion, the Court's interpretation was, in fact, a complete revision of the text, which eliminated the essence of the Applicant's submission.[6]

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[1] Jose Juste Ruiz, "Mootness in International Adjudication: The Nuclear Tests Cases", in German Yearbook of International Law; vol. 20, p. 364.

[2] Nuclear Tests *(New Zealand v. France),* Joint Dissenting Opinion, I.C.J. Reports 1974, p.494, para. 11.

[3] Jose Juste Ruiz, "Mootness in International Adjudication: The Nuclear Tests Cases", in German Yearbook of International Law; vol. 20, p. 364.

[4] Nuclear Tests *(New Zealand v. France),* Joint Dissenting Opinion, I.C.J. Reports 1974, p.494, para. 10.

[5] Nuclear Tests *(New Zealand v. France),* Joint Dissenting Opinion, I.C.J. Reports 1974, p.494, para. 10.

[6] Nuclear Tests *(New Zealand v. France),* Joint Dissenting Opinion, I.C.J. Reports 1974, p.494, para. 12.

This does appear to be the case, considering the clear and unequivocal manner in which the submission was constructed. As the Court itself points out, a claim may be interpreted when it is not properly formulated, but the Court may not substitute itself for the parties by formulating new submissions.[1]

This, in turn, begs the question of why, then, has the Court opted to apply its authority to interpret in this manner, especially when considering that in the opinion of the Dissenting Judges themselves, the arguments advanced by the Court in support of its decision to interpret the claim so extensively are not sufficient.[2]

Therefore, it is perhaps useful to look for answers in some of the external factors surrounding the Nuclear Tests Case.

In this vein, some legal authorities have been of the opinion that the outcome in this case was related to the political implications of the litigation which "*overwhelmed in fact the fragile position of the Court in the international community*[3]". The same opinion states that France's declarations which affirmed the termination of atmospheric tests gave the Court "*a legal way out*"[4] without "*having to perform the dreaded fate of a direct and open confrontation*.[5]"

On a different note, the fact that the Court refused to take a firm decision on this matter might also be seen as an attempt at judicial discretion that gave time for "*the formation of a certain consensus of the international community on the question of nuclear testing*."[6]

Considering the circumstances of the international arena at that time may provide some insight into the underlying reasoning of the Court's approach to New Zealand's claim.

Nevertheless, the use of the Court's authority to interpret did not end here.

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[1] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 30.

[2] Nuclear Tests *(New Zealand v. France),* Joint Dissenting Opinion, I.C.J. Reports 1974, p.494, para. 6, 7, 8.

[3] Jose Juste Ruiz, "Mootness in International Adjudication: The Nuclear Tests Cases", in German Yearbook of International Law; vol. 20, p. 373.

[4] Ibid.

[5] Ibid.

[6] Jose Juste Ruiz, "Mootness in International Adjudication: The Nuclear Tests Cases", in German Yearbook of International Law; vol. 20, p. 374.

### 3.2. The Binding Nature of Unilateral Statements Based on the Principle of Good Faith

The second issue of controversy brought on by the Nuclear Tests Case is the Court's finding that the unilateral declarations made by France were legally binding commitments.

As the Court points out "*declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations*".[1] However, in order for a unilateral declaration to have such an effect, it has to be made with the intent of becoming legally bound to it, as the Court itself noted.[2]

In truth, it has been pointed out by legal authorities that, in order to conclude that a statement imposes a legally binding obligation, "*it is essential that the person making the statement intended it to do so*",[3] whereas the same legal authority concluded that in this case "*there was not sufficient evidence to prove the requisite intention, and certainly not enough to rebut any presumption against it*."[4]

This last point then begs the question: where there is no sufficient ground to show intent to be bound, but there is also a lack of sufficient evidence to rebut it, can this be enough to consider France's statements binding? The Court considered that it was.

The Court found that France would not have made such declarations "*in implicit reliance on an arbitrary power of reconsideration*".[5] Because these statements were made publicly and *erga omnes*, France was bound to assume that other States, including the Applicant, would rely on the effectiveness of these declarations.[6] However, it would appear that New Zealand did not, in fact, rely on these statements, since the latter did not consider them to be "*unqualified assurances*".[7]

The legal principle invoked by the Court in order to support the finding that the unilateral declarations where binding was the principle of good faith. Indeed, the Court discusses how trust and confidence are essential in

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[1] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 46.

[2] Ibid.

[3] MacDonald, R.St.J.; Hough, B., „The Nuclear Tests case revisited", in: German yearbook of international law; vol. 20, p. 346.

[4] MacDonald, R.St.J.; Hough, B., „The Nuclear Tests case revisited", in: German yearbook of international law; vol. 20, p. 353.

[5] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 53.

[6] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 53.

[7] Nuclear Tests *(New Zealand v. France),* Judgment, I.C.J. Reports 1974, para. 27.

international cooperation and that, therefore, States are entitled to expect that obligations born out of unilateral declarations will be respected.[1]

This, however, might be a dangerous precedent to set. It has been pointed out in legal writings that it appears that the Court was not so much influenced in its decision by France's intent to be bound, than it was by "*the view that when a State makes a public declaration in regard to a matter of international controversy it should be bound by it*."[2] It is unclear whether that was indeed the view of the Court, but the arguments on which the Court relies, when considering the lack of a firm undertaking from France of its intention to be bound by its statements, do seem to make room for a dangerously relaxed approach on determining the binding nature of unilateral declarations made by States.

### 3.3. Paragraph 63 of the 1974 Judgment and the Order of 22 September 1995

The last issue to be addressed in the present paper relates to Paragraph 63 of the Judgment in the Nuclear Tests Case. The paragraph in question reads as follows:

"*Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request*."[3]

The implications of the quoted paragraph became relevant in 1995, when France made a public statement announcing that it would conduct a final series of eight underground nuclear weapons tests in the South Pacific.[4]

As a result of this announcement, New Zealand filed a Request for an Examination of the Situation, relying on the above-cited Paragraph 63,

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[1] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 49.

[2] MacDonald, R.St.J.; Hough, B., „The Nuclear Tests case revisited", in: German yearbook of international law; vol. 20, p. 353.

[3] Nuclear Tests *(New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 63.

[4] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (*New Zealand v. France*) Case, I. C. J. Reports 1995, p. 288, para. 1.

primarily seeking that the Court declare "*that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States*".[1]

The Court limited the proceedings to the question of whether the Request submitted by the Government of New Zealand fell within the scope of Paragraph 63 of the 1974 Nuclear Tests Case Judgment.[2] In its view, the question had two elements[3]:

The first, concerning the courses of procedure envisaged by the Court in Paragraph 63 when it stated that "*the Applicant could request an examination of the situation in accordance with the provisions of the Statute*".

The second, concerning the question of whether the "basis" of the Judgment was "affected" within the meaning of Paragraph 63.

In relation to the first element, the Court found that the intent in Paragraph 63 was not to limit New Zealand's access to legal procedures available to it by virtue of the Statute, but to create a special procedure which was applicable provided that the special circumstances (*i.e.* circumstances which "affected" the "basis" of the Judgment) laid down in Paragraph 63 were met.[4]

As such, the Court moved on to consider the second element, and to determine whether the basis of its Judgment of 20 December 1974 had been affected by the facts to which New Zealand referred.

At this point, the Court looked to the 1974 Judgment, and decided that its basis was France's undertaking not to conduct any further atmospheric nuclear tests, as was the result of the interpretation of the Court in the original Judgment. Therefore, the basis of the Judgment would have been affected only in the event of a resumption of nuclear tests in the atmosphere,

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[1] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (*New Zealand v. France*) Case, I. C. J. Reports 1995, p. 288, para. 6.

[2] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (*New Zealand v. France*) Case, I. C. J. Reports 1995, p. 288, para. 46.

[3] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (*New Zealand v. France*) Case, I. C. J. Reports 1995, p. 288, para. 47.

[4] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports 1995, p. 288, para. 53.

which had not happened, since the future tests to be conducted were underground, and not atmospheric.[1]

As such, the Court ruled that the Request for an Examination of the Situation submitted by New Zealand did not fall within the scope of Paragraph 63 of the 1974 Judgment and was, therefore, dismissed.[2]

## 4. Conclusion

The *Nuclear Tests case* is one that concerns the admissibility of an Application before the ICJ. It is, as previously mentioned, an illustration of "mootness", where the objective of the relief sough has been satisfied, therefore draining the claim of its purpose and rendering the dispute between the Parties moot.

Generally, such an application can have no other fate than that of being dismissed by the Court, as the effective satisfaction of an applicant's claim is, naturally, what is sought to be achieved. If this purpose has been reached outside the confines of the ICJ, there is, then, nothing for the Court to resolve.

However, leaving the general principle aside, the circumstances of this dispute and the process of the Court's analysis in this particular case raise a different concern, particularly in relation to the extent to which the Court may make use of its authority of interpretation.

As we have seen, the Court, by way of interpretation, decided what the Applicant was effectively seeking, despite, perhaps, indications to the contrary of its finding.

Further, the Court established a legally binding undertaking of future conduct attributable to France, stemming from unilateral statements made by this State, grounded on the principle that these statements would not have been made if France had not intended to conduct itself accordingly.

Finally, the Court compared the two results of its own previous interpretations and determined that the dispute, in effect, did not exist.

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[1] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports 1995, p. 288, para. 62.

[2] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports 1995, p. 288, para. 68.

In light of all these aspects, therefore, one must ask the one remaining question: had the Court not made use of its authority of interpretation, would this case still have been one concerning admissibility, or would it have been something else entirely?

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

## The Interpretation of "Military Activities", as an Exception to Jurisdiction: the ITLOS Order of 25 May 2019 in the Case Concerning the Detention of Three Ukrainian Naval Vessels

***Ion GÂLEA*[1]**

***Abstract:*** *The study presents the main elements of the ITLOS Order of 25 May 2019, by which it prescribed provisional measures sought by Ukraine, in relation with the incident that took place in the Kerch Strait on 25 November 2018. The ITLOS ordered Russia to release the three Ukrainian naval vessels and their crewmen, involved in the incident, according to its competence based on article 290 paragraph 5 of UNCLOS, according to which the ITLOS has jurisdiction only for provisional measures, while the principal jurisdiction will belong to an arbitration tribunal formed according to Annex VII of UNCLOS. The main point of interpretation of the Order was represented by the determination of the prima facie jurisdiction, as both Ukraine and the Russian Federation made reservations according to article 298 paragraph 1) b) of UNCLOS, excluding the jurisdiction of the dispute settlement mechanisms with respect to "disputes concerning military activities". ITLOS interpreted this notion narrowly, concluding that the incident comprised use of force in the context of a law enforcement operation. Thus, the study attempts to examine the interpretative approach of ITLOS towards the notion "military activities", including from the perspective of the possibility of the situation to be characterized as an "armed conflict". The general conclusion that the study attempts to propose is that what the ITLOS did was not to increase the "margin" of the "military activities" exception (in order to include what appears to be a "mixed" law enforcement and military activities operation),*

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*but to "increase the margin of the determination of the prima facie jurisdiction".*

***Key-words:*** *International Tribunal for the Law of the Sea, United Nations Convention on the Law of the Sea, provisional measures, military activities, Kerch Strait incident*

## 1. Introduction

On 25 May 2019, the International Tribunal for the Law of the Sea ("ITLOS") rendered its decision on the request for the prescription of provisional measures in the *Case concerning the Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*.[1] The procedure, initiated on 16 April 2019,[2] relied on the specific competence of the ITLOS under article 290 paragraph 5 of the United Nations Convention on the Law of the Sea[3] ("UNCLOS"), which provides that pending the constitution of an arbitral tribunal pursuant to Annex VII of the UNCLOS, the ITLOS "*may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires*".[4] Thus, Ukraine had submitted on 31 March 2019 a notification instituting arbitral proceedings against the Russian Federation under Annex VII of the UNCLOS, by which it requested that the arbitral tribunal would adjudge and declare that by seizing and detaining the Ukrainian naval vessels - the *Berdyansk*, the*Yani Kapu* and the *Nikopol*, and by detaining the 24 crewmen of such vessels and initiating criminal charges against them, Russia violated certain provisions of the UNCLOS. As a consequence, Ukraine requested the Arbitral Tribunal to adjudge that Russia is obliged to release the vessels and the crewmen.

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[1] ITLOS *Case no. 26, Case concerning the Detention of Three Ukrainian Naval Vessels, (Ukraine v. Russian Federation), Order or 25 May 2019* (hereinafter " *Case concerning the Detention of Three Ukrainian Naval Vessels"),* available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf (accessed 15 July 2019).

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels,* p. 2, para. 1.

[3] UNTS, vol. 1833, p. 3.

[4] UNCLOS, article 290 paragraph 5; see also Cameron A. Miles, *Provisional Measures before International Courts and Tribunals,* Cambridge University Press, 2017, pp. 156-158.

As provided by article 290 para. 5 of the UNCLOS, ITLOS had jurisdiction only with respect to the provisional measures sought by Ukraine. In order for the ITLOS to prescribe the provisional measures, the following conditions should be met: the ITLOS must consider, *prima facie*, that the arbitral tribunal has jurisdiction over the main claim, the rights asserted by the Applicant are plausible and there is an imminent and real risk of irreparable prejudice.[1] The purpose of this study is to concentrate on the first condition, the *prima facie* jurisdiction, especially because the Order of ITLOS supposed a difficult interpretation of the notion of "military activities", contained by reservations made by both Ukraine and the Russian Federation, in accordance with article 298 paragraph b) of UNCLOS.

The Order of the ITLOS appeared on the background of a very difficult political context between Ukraine and Russian Federation, which comprises both a larger background dispute, as well as the dispute concerning the particular incident that took place in the Kerch Strait on 25 November 2018.[2] Thus, the procedure before ITLOS was "filled with political pressure". Moreover, the procedures before the Arbitral Tribunal constituted on the basis of Annex VII of UNCLOS (as a "basic" procedure) and before ITLOS (as an "auxiliary" procedure) were only part of the legal and diplomatic steps taken by Ukraine in connection with the Kerch Strait incident of 25 November 2018: i) on 29 November 2018, Ukraine lodged an inter-State application before the European Court of Human Rights (request no. 55855/18) and, on 4 December 2018, the Court indicated interim measures (mainly related to the provision of medical treatment); ii) Ukraine brought the issue of the Kerch Strait incident before the Security Council of the UN[3] and before the Council of the OSCE.[4]

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[1] See also *"ARA Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, ITLOS Reports, 2012, p. 332, 343, para. 60; *"Enrica Lexie"* (*Italy v. India*), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, 197, para. 84, 87; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Cote D'Ivoire),* Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146, 158, para. 58.

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[3] SC/13601, Top Political Official Urges Restraint from Ukraine, Russian Federation in Emergency Security Council Meeting on Seized Ukrainian Vessels, 26 November 2019, https://www.un.org/press/en/2018/sc13601.doc.htm (accessed 15 July 2019).

[4] Statement by the delegation of Ukraine on the latest Russia's act of unprovoked armed aggression against Ukraine, 26 November 2018, https://mfa.gov.ua/en/news-feeds/foreign-offices-news/68971-zajava-delegaciji-ukrajini-shhodo-aktu-nesprovokovanoji-zbrojnoji-agresiji-rosiji-proti-ukrajini (accessed 15 July 2019).

The study proposes to analyze the core issue of the ITLOS Order – namely the determination of the *prima facie* jurisdiction, including the interpretation of the "military activities". It will follow: a presentation of the relevant facts and of the main findings of the ITLOS (I), as well as the analysis of the main "points of debate/criticism" (II), which may be related to i) the question whether UNCLOS itself or the laws of armed conflict apply or ii) the way in which the ITLOS regarded the "military activities" involved.

In the end, the indication of provisional measures appears to serve a "right purpose": nevertheless, the question concerns the larger picture of the relation between the right purpose and the solid legal ground, especially related to "jurisdiction" – including "*prima facie* jurisdiction".

## 2. Factual and legal background of the Order of 25 May 2019

### 2.1. The relevant facts

The factual background on which the case relies is generally known as the "Kerch Strait" incident of 25 November 2018. On this date, three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol* and the *Yani Kapu*) departed from Odessa, having the mission – according to Ukraine – to pass through the Kerch Strait in order to reach the port of Berdyansk, in the Sea of Azov.[1] Also according to Ukraine, the three vessels received a communication from the Russian Coast Guard asserting that the Strait was closed.[2] As the vessels proceeded, they were in practice blocked by the Russian Coast Guard and they were "ordered to wait in the vicinity of an anchorage, subject to restrictions on their movement", being held for about eight hours.[3] Subsequently, the Ukrainian vessels "apparently gave up their mission to pass through the strait and sailed away from it", but the Russian Coast Guard ordered them to stop. As the Ukrainian vessels ignored the order to stop, the Russian Coast Guard started pursuing them and used force, first firing warning shots and then real shots. One vessel was damaged, servicemen were injured.[4]

The Ukrainian vessels were arrested and taken to the port of Kerch. According to the Russian Federation, the 24 Ukrainian servicemen were "formally apprehended" according to the Russian Code of Criminal Procedure as persons suspected to having committed a crime of aggravated

[1] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 9, para. 31.
[2] *Ibid.*
[3] *Ibid.*, p. 19, para. 71.
[4] *Ibid.*, p. 19, para. 73.

illegal crossing of the State border. Furthermore, they were placed in detention following decisions of the "Kerch City Court" and "Kievskiy District Court of Simferopol", the investigation being still pending at the date of the order.[1]

### 2.2. *Prima facie* jurisdiction and the reservations to article 298, para 1 b) of the UNCLOS

According to the Statute of the Tribunal and to the well-established jurisprudence, the establishment of *prima facie* jurisdiction is one of the most important conditions for the prescription of provisional measures.

It is true, the establishment of *prima facie* jurisdiction requires somehow a lower threshold than the mere determination of jurisdiction. In the words of the International Court of Justice, the Court"need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case".[2] Case-law offered cases when the Court found that *prima facie* jurisdiction exists, while in a subsequent decision on preliminary objections determined that it does not have jurisdiction on the respective dispute. In the case concerning *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, the Court indicated provisional measures, being satisfied of the existence of the *prima facie* jurisdiction (after examining that article 22 of the Convention on the Elimination of all Forms of Racial Discrimination provides a legal basis for jurisdiction and with respect to the precondition of negotiations, "it is apparent from the case file that such issues have been raised in bilateral contacts between the Parties")[3]. Nevertheless, in the phase of the decision concerning preliminary objections, the Court found it has no jurisdiction, because the precondition, to hold negotiations on the substantive issue of racial discrimination, has not been fulfilled.[4]

In the case of the specific procedure of article 290 paragraph 5 of UNCLOS, the ITLOS has to decide on the *prima facie* jurisdiction of *another tribunal*:

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[1] *Ibid.*, p. 10, para. 32.

[2] *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, ICJ Reports 2017, p. 236, para. 15; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, ICJ Reports 2018 (II), p. 421, para. 14.

[3] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353, 388, para. 115-117.

[4] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, 140, para. 184.

most frequently an Arbitral Tribunal constituted under the Annex VII of the UNCLOS.[1]

As mentioned above, in its notification instituting arbitral proceedings, Ukraine requested the Arbitral Tribunal constituted under Annex VII of UNCLOS to declare that by seizing and detaining the Ukrainian naval vessels and by detaining their 24 crewmen and initiating criminal charges against them, Russia violated certain provisions of the UNCLOS.[2] Russia decided not to take part in the oral procedure, but communicated to the ITLOS that the tribunal to be constituted under Annex VII of the UNCLOS will not have jurisdiction, "including *prima facie*, in the light of the reservations made by both Russia and Ukraine under article 298 of UNCLOS, stating, *inter alia*, that they do not accept the compulsory procedures […] for the consideration of disputes concerning *military activities*" (emphasis added).[3]

Indeed, article 298 of UNCLOS provides the possibility for States to make specified reservations related to the dispute settlement system created by the Convention:

> "When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:[…]
>
> (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."

The reservation formulated by the Russian Federation reads as follows:

> "The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the

[1] Thomas A. Mensah, *Provisional Measures in the International Tribunal for the Law of the Sea*, Zeitschrift fur auslandisches offentliches Recht und Volkerrecht, Heidelberg Journal of International Law, vol. 62 (2002), p. 43-54, 47.

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*,, p. 6, para. 22.

[3] *Ibid.*, p. 3, para. 8; Memorandum of the Government of the Russian Federation, 7 May 2019, para. 24 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf, consulted 15 July 2019).

> Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations".[1]

On its turn, Ukraine formulated a reservation to the same end, stating that:

> "Ukraine declares, in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of […] disputes concerning military activities."[2]

As a general remark, it may be stated that reservations apply reciprocally.[3] At the same time, the jurisdiction of an international court is limited "only to the extern to which" the reservations or the declarations conferring jurisdiction coincide in creating a basis for jurisdiction.[4]

Therefore, the task of the ITLOS was to interpret both article 298 b) of UNCLOS and the two reservations made by Russia and Ukraine in order to ascertain, on a *prima facie* basis, whether the combined effect of the reservations exclude jurisdiction in the present case.

### 2.3. The reasoning of ITLOS

The ITLOS examined first, whether a dispute related to the interpretation or application of the UNCLOS existed and, secondly, whether the reservations referring to article 298 paragraph (1) b) of the Convention applied.

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[1] Memorandum of the Government of the Russian Federation, 7 May 2019, para. 27 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf, consulted 15 July 2019); see also United Nations Treaty Collection, Chapter XXI, no. 6, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (consulted 15 July 2019).

[2] *Ibid.*

[3] Vienna Convention on the Law of Treaties, article 21 (1) a); International Law Commission, Guide to Practice on Reservation to Treaties (2011), Yearbook of the International Law Commission, vol. II, 2011, p. 34, 4.2.4, (2).

[4] *Anglo-Iranian Oil Co. case (jurisdiction)*, ICJ Reports I952, p. 93, 103.

*a. Existence of a dispute*

With respect to the existence of a dispute related to the Convention, the ITLOS noted that Ukraine argued that by seizing and detaining the three naval vessels and by detaining the 24 crewmen, Russia breached the obligations related to "complete immunity" of foreign naval vessels and its other obligations provided by articles 32, 58, 95 and 96 of the UNCLOS.[1] The ITLOS notes, *inter alia*, that Russia, on one side, inferred that its actions are "lawful under, among other provisions, article 30 of the Convention";[2] on the other side, "did not directly respond to the argument of Ukraine, but it resulted from the Press Statement of the FSB that the Ukrainian naval ships were order to stop, *inter alia*, in accordance with article 30 of UNCLOS.[3]

The lack of direct response from the Russian Federation was not seen as an obstacle to identifying the fact that a dispute exists. According to ITLOS:

> "Although the Russian Federation has not clearly professed any view on the conformity of its actions with the provisions of the Convention invoked by Ukraine, its view on its questions may be inferred from its subsequent conduct".[4]

In our view, it is true that the fact that a party did not respond to the pretention or a claim of another party is not an obstacle to the existence of a dispute. Indeed, the case-law of the International Court of Justice confirmed that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[5] Also, the Court decided in subsequent cases that "*a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed"*

[1] *Case concerning the Detention of Three Ukrainian Naval Vessels*,, p. 11, para. 39.

[2] *Ibid.*, p. 12, para. 40.

[3] *Ibid.*, p. 12, para. 41.

[4] *Ibid.*, p. 13, para. 43. The ITLOS quoted also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, ICJ Reports 1998, p. 275, 315, para. 89; *M/V "Norstar" (Panama v. Italy),* Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, p. 69, para. 100.

[5] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, ICJ Reports 1998, p. 275, at p. 315, para. 89 (quoted by ITLOS), also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, 84, para. 30.

*by the applicant*".[1] Thus, it is undoubted that the fact that Russia did not formally put forward its legal arguments, does not prevent the existence of a dispute, since it appears evident that Russia holds a different position than Ukraine on the sovereign immunity of naval vessels and of their personnel, which results from the mere seizure of naval vessels and servicemen.[2]

An important element related to the issue of the existence of a dispute related to the UNCLOS was the mere application of UNCLOS to a situation which might have revealed of the application of a "different set of norms" – meaning the law of the international armed conflicts (international humanitarian law). The ITLOS dealt very briefly with this issue: "*The Tribunal also notes that the Russian Federation denies the "categorization of the situation as an armed conflict for the purposes of international humanitarian law*".[3]

Thus, the ITLOS considered that a dispute concerning the interpretation and application of the Convention *prima facie* appeared to exist at the date of instituting arbitral proceedings.[4]

*b. Applicability of the reservations referred to in article 298 paragraph 1 b) of UNCLOS*

The positions of the parties diverged substantially on this matter.

Russia considered that the dispute concerned military activities. On one side, Russia, maintained that, based on a document found on board of one of the vessels, the mission of the Ukrainian ships was "a non-permitted 'secret' incursion" into Russian territorial waters, which was resisted by Russian military personnel of the Coast Guard.[5] Russia invoked the *Philippines v. China Arbitration*, arguing that "a quintessentially military situation" is defined as a situation "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another", and argued that this was the situation on 25

[1] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* Preliminary Objections, Judgment, ICJ Reports 2016 (I), p. 26, para. 73; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom),* Preliminary Objections, Judgment, ICJ Reports 2016, p. 850, para. 41.

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 13, para. 44.

[3] *Ibid.*, p. 13, para. 44.

[4] *Ibid.*, p. 13, para. 45.

[5] *Ibid.*, p. 14-15, para. 51; Memorandum of the Government of the Russian Federation, 7 May 2019, para. 28 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf, consulted 15 July 2019).

November 2018.[1] Russia also argued that Ukraine characterized the matter in various instances as of a military nature.[2]

Ukraine, on its turn, argued that there is a clear distinction between military activities and law enforcement activities.[3] It argued that the exception provided by the reservation does not apply when a party whose actions are at issue has characterized them as non-military in nature.[4] Furthermore, Ukraine argued that what matters it is not the type of vessel, but the type of activity the vessel is engaged in.[5] Ukraine stated that its claims "*do not allege a violation of the Convention based on activities that are military in type, but, rather, Ukraine's claims are based on Russia's unlawful exercise of jurisdiction in a law enforcement context*".[6] Thus, it argues that "it is undisputed that [Ukrainian] warships were trying to leave the area and that the Russian Coast Guard was chasing them in order to arrest them for violating *Russian domestic laws"* and further argues that this was a "typical law enforcement encounter".[7]

In order to formulate its position, ITLOS made several general considerations. First, it drew a general approach about the distinction between military and law enforcement activities:

> "the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question. This may be a relevant factor but the traditional distinction between naval vessels and law enforcement vessels in terms of their roles *has become considerably blurred*. The Tribunal notes that it is not uncommon today for States to employ the two types of vessels collaboratively for diverse maritime tasks" (emphasis added).
>
> Nor can the distinction between military and law enforcement activities be based solely on the characterization of the activities in question by the parties to a dispute. This may be a relevant factor,

[1] Memorandum of the Government of the Russian Federation, 7 May 2019, para. 30 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf, consulted 15 July 2019), quoting *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award, 12 July 2016, PCA Case Nº 2013-19, para. 1161; *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 15, para. 52.

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 15, para. 53.

[3] *Ibid.*, p. 15, para. 55.

[4] *Ibid.*, p. 16, para. 56.

[5] *Ibid.* p. 16, para. 58.

[6] *Ibid.*, p. 16, para. 57.

[7] *Ibid.*, p. 16, para. 59.

> especially in case of the party invoking the military activities exception. However, such characterization may be subjective and at variance with the actual conduct.
>
> In the view of the Tribunal, the distinction between military and law enforcement activities must be based primarily on *an objective evaluation of the nature of the activities in question*, taking into account the relevant circumstances in each case."[1]

As it can be noticed, the main criterion identified by ITLOS is the "nature of the activities in question". The Tribunal acknowledged that the dispute arose from the facts related to the arrest and detention of three naval vessels and their servicemen, and the subsequent exercise of criminal jurisdiction, but noted that in order to determine whether the arrest and detention took place either in the context of a military operation or a law enforcement operation, the entire series of events leading to such arrest has to be examined.[2] In order to qualify in an objective manner the activities outlined in the relevant facts, the ITLOS referred to three "particularly relevant circumstances":[3]

i) the ITLOS noted that the dispute leading to the arrest of the vessels "concerned passage through the Kerch Strait" and remarked that "it is difficult to state in general that passage of naval ships *per se* amounts to a military activity".[4] The ITLOS did not entirely ignore the complex situation of the Kerch Strait: thus, it noted that "the particular passage at issue was attempted under circumstances of continuing tension between the Parties".[5] It also noted that, according to Ukraine, other naval vessels had previously passed through the same Strait, "as recently as September 2018, just two months earlier".[6] Under these circumstances, the ITLOS rebutted the argument put forward by Russia, and stated that a "non-permitted 'secret' incursion" by the three Ukrainian naval vessels would have been "unlikely";[7]

ii) the ITLOS recalled the "cause of the incident" was the "denial of passage" by the Russian Federation and noted that, according to the position of the Russian Federation, the passage was refused for failing to comply with the procedure set out in a regulation from 2015 and because of

[1] *Ibid.*, p. 17-18, para. 64-66.
[2] *Ibid.*, p. 18, para. 67.
[3] *Ibid.*, p. 18, para. 68.
[4] *Ibid.*
[5] *Ibid.*, p. 18, para. 69.
[6] *Ibid.*
[7] *Ibid.*, p. 18, para. 70.

"security concerns following a recent storm".[1] The Parties had diverging views about the passage, as the crew of one of the vessels invoked a 2003 Treaty between the Russian Federation and Ukraine on the Cooperation in the Use of Azov Sea and the Kerch Strait. Also, the ITLOS recalled the fact that the Ukrainian naval vessels were physically blocked and ordered to wait "in the vicinity of an anchorage";[2]

iii) the third relevant circumstance recalled by ITLOS was that, indeed, "force was used in the process of the arrest" and offered details about the way in which force was used.[3] From these facts, the Tribunal drew the conclusion that "what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation",[4] and further noted that the subsequent course of events leading to criminal charges against the servicemen for "unlawfully crossing the border" confirms the law-enforcement nature of the operation.[5]

On the basis of the above reasoning, the ITLOS concluded that, *"prima facie,* article 298 paragraph 1 b) does not apply in the present case".[6]

*c. Other relevant elements of the Order*

The ITLOS also examined whether the obligation to proceed to negotiations or other peaceful means, as set out by article 283 of UNCLOS, was complied with. The Tribunal noted that Ukraine expressed willingness to proceed to the settlement of the dispute by a note verbale of 15 March 2019 and indicated a time-limit of 10 days. The ITLOS noted that this timeframe "cannot be considered "arbitrary" in the light of the obligation to proceed expeditiously to an exchange of views".[7] Moreover, it recalled the constant jurisprudence according to which "*a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted"*.[8]

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[1] *Ibid.*, p. 19, para. 71.
[2] *Ibid.*
[3] *Ibid.*, p. 19, para. 73.
[4] *Ibid.*, p. 20, para. 74.
[5] *Ibid.*, p. 20, para. 76.
[6] *Ibid.* p. 20, para. 77.
[7] *Ibid.*, p. 22, para. 84, 86.
[8] *Ibid.*, p. 22, para. 87; the ITLOS quoted *MOX Plant (Ireland v. United Kingdom),* Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, p. 107, para. 60; "*ARA Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, 345, para. 71; "*Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation),* Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, 248, para. 76.

Besides the *prima facie* jurisdiction, which represented, indeed, the main issue of interpretation, the ITLOS examined the plausibility of the rights assessed by the Applicant and the imminent risk of irreparable prejudice.[1] The Tribunal noted that at this stage of the proceedings, it is not called to determine whether the asserted rights exist, but only whether they are "plausible".[2] It recalled that Ukraine claims the right to immunity of warships and their servicemen, under UNCLOS and generally international law,[3] and concluded that the rights claimed by the Applicant, according to articles 32, 58, 95 and 96 of the Convention are "plausible under the circumstances".[4]

With respect to the condition of a real and imminent risk of irreparable prejudice, it is important to note that the ITLOS provided important considerations related to the qualification of the "detention of a warship". It stated that a warship "is an expression of the sovereignty of the State whose flag it flies",[5] and considered that the actions taken by the Russian Federation could irreparably prejudice the rights related to the immunity of naval ships[6] and could also "raise humanitarian concerns".[7]

## 3. Brief evaluation of the Order of 25 May 2019

### 3.1. The question related to the possible application of the law of the armed conflict (international humanitarian law)

When examining existence of a dispute related to the UNCLOS, the ITLOS very briefly stated that "*The Tribunal also notes that the Russian Federation denies the "categorization of the situation as an armed conflict for the purposes of international humanitarian law*".[8] There is no other reference in the order to the possibility of an international armed conflict existing between the parties.

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[1] For the same conditions in the case-law of the International Court of Justice, see, inter alia, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, ICJ Reports 2018 (II), p. 422, para. 44; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I), p. 10-11, paras. 27-30.

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 24, para. 95.

[3] *Ibid.*, p.. 24, para. 96.

[4] *Ibid.*, p. 25, para. 97.

[5] *Ibid.*, p. 27, para. 110; quoted *"ARA Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, 348, para. 94.

[6] *Ibid.*, p. 27, para. 111.

[7] *Ibid.*, p. 28, para. 112.

[8] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 13, para. 44.

It is true that for the purposes of the proceeding before ITLOS, both parties did not qualify the facts as armed conflict.

Ukraine stated that the vessels were involved in "a peaceful transit between two Ukrainian ports"[1] and were subsequently retained by the Russian Federation, and their crews "subject to Russian civilian criminal legal procedures, having been charged with illegally crossing the state border".[2] On its turn, the Russian Federation refers to the fact that Ukraine itself does state in its Claim that Russia has "treated the incident as a criminal law enforcement matter".[3] Nevertheless, in the written proceedings, Russia pointed out on at least seven statements where Ukrainian officials referred to the incident or to the situation of the crewmen as "act of aggression", "armed attack", "prisoners of war", "use of force" – including before the Security Council of the UN, OSCE or in the application before the European Court for Human Rights.[4]

Thus, the question appears: should the Tribunal rely exclusively on the qualification of the parties – exclusively for the purposes of the proceedings – according to which the incident does not amount or is not part of an international armed conflict, or should it have made an "*an objective evaluation of the nature" [of the facts]*, as it has done in the context of interpreting the notion of "military activities"?[5] Practically, the "sequence of the qualifications" attributed to the facts appeared as follows: in different fora, Ukraine qualified the incident as an "armed attack" and referred to the servicemen as "prisoners of war", while Russia denied such status, arguing that it applied criminal law (for "crossing of the illegal border"). Before ITLOS, Ukraine made "a step back in its position", embracing Russia's qualification of the facts. On its turn, it was Russia to invoke Ukraine assessment of the incident as "aggression" – it is true, not for the purposes of the existence of an armed conflict, but for the purposes of demonstrating

[1] *Request of Ukraine for the Prescription of Provisional Measures under Article 290, paragraph 5 of the United Nations Convention on the Law of the Sea, 16 Aprilie 2019, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/01_Request_of_Ukraine_for_Provisional_Measures.pdf* (consulted 25 July 2019), para. 8.

[2] *Ibid.*, para. 11.

[3] Memorandum of the Government of the Russian Federation, 7 May 2019, (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf, consulted 15 July 2019), para. 33; Furthermore, Russia stated: "*Although it appears that Ukraine may wish to make something of the fact that Russia has denied that the Military Servicemen are prisoners of war (and hence is treating this as a matter for its civilian courts), that denial pertains to the categorisation of the situation as an armed conflict for the purposes of international humanitarian law*".

[4] *Ibid.*, para. 32.

[5] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 18, para. 66.

that the incident relates to "military activities". However, the Tribunal chose to rely only on the coinciding statements of the parties for the purposes of the proceedings, in a swift assumption.[1]

Indeed, the links between "armed attack", "armed conflict" and "military activities" are very complex. Certain indications about these links, the above mentioned questions and the "sequence of the positions of the parties" may be found in the declaration of Judge Lizbeth Lijnzaad: she manifested "certain reluctance as to the Tribunal's considerations about the law that may be applicable to the case"[2] and mentioned that "what concerns me is whether the current matter is truly a dispute concerning the interpretation and application of the Convention, or whether other rules of international law, for which the Tribunal may not have jurisdiction, are at issue".[3] She referred to the fact that Ukraine officially mentioned the application of "article 51 of the UN Charter" and of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War.[4] Nevertheless, judge Lijnzaad clarified that the order of the ITLOS distinguished between the fact that: on one side, Russia relied on the military activity exception, on the other side, Russia did not accept the applicability of international humanitarian law. She further stated that the ITLOS has dealt "too succinctly" with the applicable law, when it determined the *prima facie* evaluation of the jurisdiction of the Arbitral Tribunal under Annex VII of UNCLOS.[5]

In the light of the complexity of the above mentioned issues, two elements of debate might be taken into consideration:

a) First, it could be argued that the situation between the Russian Federation and Ukraine linked to the illegal occupation of Crimea in March 2014 could be characterized as an international armed conflict. According to article 2, common to all Geneva Conventions of 1949, their scope is confined to

> "all cases of […] any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war

[1] James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in article 298?* EJIL: *Talk!,* 27 May 2019, at https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/ (consulted 25 July 2019); the author qualifies the assumption of ITLOS as "dubious" and remarks that the ITLOS "avoided a determination on whether there was an armed conflict between the two States".

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*, Declaration of Judge Lijnzaad, para. 1.

[3] *Ibid.*, para. 5.

[4] *Ibid.*

[5] *Ibid.*, para. 6, referring to para. 44 of the Order.

> is not recognized by one of them" and "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".[1]

The definition of "armed conflict" was detailed in the jurisprudence of the International Criminal Tribunal for Yugoslavia ("ICTY"):

> "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[2]

Notwithstanding the legal debate that could surround the notion of "hybrid conflict", it might be argued that, on one hand, the Russian forces were present in Crimea in the context of the annexation,[3] and on the other hand, that the situation could be characterized as "occupation" for the purposes of the second paragraph of article 2 of the Geneva Conventions.[4] Certain provisions on the law on occupation apply as long as the occupation lasts.[5] It is not the purpose of this study to take a definitive view on the

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[1] Article 2, common to the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), UNTS, vol 75, p. 31, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), UNTS, vol. 75, p. 85, Convention (III) relative to the Treatment of Prisoners of War (1949), UNTS, vol. 75, p. 135, Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), UNTS, vol. 75, p. 297.

[2] *Prosecutor v. D. Tadić*. Case IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; see also *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, p. 232, para. 506.

[3] See, for example, Cory Welt, *Ukraine: Background and US Policy,* Congressional Research Services, 1 November 2017, 7-5700, R45008 (available at https://fas.org/sgp/crs/row/R45008.pdf, accessed 25 July 2019), p. 5-6; Valentina Azarova, "An Illegal Territorial Regime? On the Occupation and Annexation of Crimea as a Matter of International Law", in Sergey Sayapin, Evhen Tsybulenko (ed.), *Use of Force against Ukraine and International Law,* TMC Asser Press, 2018, p. 41-71; G. Hughes, 'Ukraine: Europe's New Proxy War?' , Fletcher Security Review, vol. I (2014), p. 105–18, 106.

[4] For example, the official position of the United States mentions that "*In February 2014 Russian forces entered Ukraine's Crimean Peninsula and occupied it militarily* " – see US Department of State, "Ukraine (Crimea), Executive Summary, 13 March 2013, at https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/ukraine/ukraine-crimea/ (accessed 25 July 2019); the United States chose not to use the term "illegal annexation", but "purported 'annexation'" or "attempted 'annexation'"; for the qualification as "occupation" in the doctrine, see, for example, Agnieszka Szpak, *Legal classification of the armed conflict in Ukraine in light of international humanitarian law,* Hungarian Journal of Legal Studies, vol. 58, No 3, p. 261–280, 272-273.

[5] Yoram Dinstein, *The International Law of Belligerent Occupation,* Cambridge University Press, 2009, p. 281.

characterization of the situation of Crimea since March 2014, but, nevertheless, it has to be pointed out that the arguments according to which the illegal annexation led to a situation of "armed conflict" or "occupation" are at least plausible.[1]

b) Second, notwithstanding the above mentioned possible legal debate, the question appears whether the incident itself might not have represented the "triggering point" of an armed conflict. On one hand, it has to be taken into consideration that the notion "resort to armed force" in the definition given to the armed conflict by the Tadić decision of the ICTY implies a "minimum level of intensity".[2] Indeed, distinction is made between, on one hand, border skirmishes, exchange of fire between border patrols or isolated incidents in the air or at sea", that would not reach a "sufficient level of intensity", and on the other hand, "use of force of a comprehensive character", from the quantitative ((scale of military operations and firepower) and quantitative (casualties and destruction of property) points of view.[3] On the other hand, it may be relevant that Ukraine had labelled the incident as "aggression", invoking article 3 d) of General Assembly Resolution 3314 (XXIX) of 1974,[4] and also other members of the Security Council referred to the situation as "deplorable use of military force" (United Kingdom),[5] "serious incident" and "violent manoeuvres […] that have considerably increased tensions and the risk of escalation" (France, also on behalf of Germany),[6] "State-to-State conflict initiated and fueled by Russia" and "active armed conflict" (Poland).[7]

It is not the purpose of this study to argue with certainty that it is the law of the armed conflict applicable to the incident/or the situation in the Sea of Azov and the Kerch Strait, but we consider useful to draw the attention on a

[1] See also Valentin J. Schatz & Dmytro Koval, *Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective*, Ocean Development & International Law, (2019), Vol. 50 no. 2-3,p. 275-297.

[2] Marco Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford University Press, 2014, p. 132.

[3] Yoram Dinstein, *War, Aggression and Self-Defence*, Cambdrige University Press, 6th Ed., 2017, p. 11-12.

[4] The representative of Ukraine stated, in the meeting of 26 November of the Security Council, that "*Russia committed an act of open military aggression against Ukraine by targeting, firing on and capturing three military vessels. I would like to remind everyone that, pursuant to article 3 (d) of the annex to General Assembly resolution 3314 (XXIX), "an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" qualifies as an act of aggression"* – UN Doc. S/PV.8410, p. 12.

[5] UN Doc. S/PV.8410, p. 3.

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

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

legal debate, according to which valuable arguments could be presented both ways. Thus, the argument that the incident might be regarded "as part of a continuing aggression by Russia against Ukraine, in violation of the UN Charter" might have made the object of an analysis.[1]

### 3.2. The interpretation of "military activities"

As recalled above, the ITLOS used the criterion of the "*nature of the activities in question*" in order to assess, following an "*objective evaluation*", the application of the notion "military activities" to the facts of the case.[2]

The question of the military activities exception has been previously analysed in the *South China Sea Arbitration (Philippines v. China)*, where the Tribunal rejected submissions 14 (a) to 14 (c) made by the Phillipines,[3] because the exception concerning „disputes" related to military activities from article 298 1) b) of UNCLOS applied. Specifically, the Arbitral Tribunal held that:

> „the Tribunal finds that the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies. In connection with this stand-off, Chinese Government vessels have attempted to prevent the resupply and rotation of the Philippine troops on at least two occasions. Although, as far as the Tribunal is aware, these vessels were not military vessels, China's military vessels have been reported to have been in the vicinity. In the Tribunal's view, this represents a quintessentially military situation, involving the military forces of

[1] James Kreska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?*, EJIL: Talk!, 3 December 2018, https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/ (accessed 25 July 2019).

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*, para. 18, para. 66.

[3] The Phillipines claimed: "(14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;

(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal" - *The South China Sea Arbitration, Award of 12 July 2016,* p. 42, para. 112.

one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another".[1]

It appears that the essential element of the above mentioned paragraph is, indeed, linked to the fact that the vessels were „engaged in a stand-off", the activities concerned „attempt to prevent the ressuply and rotation" and, on an overall basis, the combined forces were „arrayed in oposition to another". As the Tribunal points out, the fact that the fleet represented a „combination of ships" of the Navy and of the Coast Guard does not prevent the exception from applying.

In the case of the ITLOS Order of 25 May 2019, it is true, the facts presented both common points and differences to the ones in the submissions 14 (a) to 14 (c) of the Philippines in the *South China Sea* arbitration. Nevertheless, common points include the fact that the Russian Federation tried to „prevent" an activity of the Ukrainian vessels (passage through the Strait). Moreover, from the moment when the Ukrainain wessels were stopped and blocked, it may be argued that the incident developped into a „stand-off".[2]

The *South China Sea* arbitration interpretation given to „disputes concerning military activities"[3] was also recalled by the Separate Opinion of Judge Gao to the ITLOS Order of 25 May 2019. On one hand, judge Gao notes opinions in the doctrine that the term „military activities" should be interpreted widely, considering the highly political nature of these activities.[4] On the other hand, Judge Gao points out to the „considerable lower threshold" set by the Arbitral Tribunal.[5]

It would appear, indeed, that the ITLOS had pursued a differend approach to interpreting the notion of „military activities" or „disputes related to military

[1] *The South China Sea Arbitration, Award of 12 July 2016,* p. 456, para. 1161.

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels,* Separate Opinion of Judge Gao, p. 6, para. 24.

[3] James Kraska considers that the Arbitral Tribunal provided a "broader understanding of military activities" – James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in Article 298?*, *loc. cit.*

[4] Stefan Talmon, "The South China Sea Arbitrations: is there a Case to Answer?" in Stefan Talmon and Bing Bing Jia, *The South China Sea Arbitration: A Chinese Perspective*, Hart Publishing, 2014, pp. 57-58, quoted by *Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Gao, p. 5, para. 19.

[5] David Letts, Rob Mclaughlin and Hitoshi Nasu, *Maritime Law Enforcement and the Aggravation of the South China Sea Dispute: Implications for Australia*, Australian Year Book of International Law, vol. 34, 2017, p. 53-63, 62, quoted by *Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Gao, p. 5, para. 20.

activities". Nevertheless, from this point of view, the following aspects could be pointed out:

a) Besides pointing out to the „continuing tensions between the parties",[1] the Tribunal did not refer in any way to the fact that the sovereignty over Crimea – and, consequently, of its territorial waters, including certain territorial waters in the Kerch Strait, is disputed between the parties. Thus, from Ukraine's point of view, the vessels were transiting through a Strait compraising both Ukrainian and Russian territorial waters. This may represent an element that would fuel the „political nature" of the „activity" of „passage" through the Strait.

b) It can be noted that a number of judges who formulated separate opinions and declarations which commented the military activities exemption.

Judge Gao considers that, from a certain point in time, the incident „*escalated from a normal passage into a fully fledged stand-off at sea*".[2] Moreover, he argued that „*firing target shots against a naval vessels is therefore tantamount to use of force against the sovereignty of a State whose flag the vesssel flies. This important fact falls well within the military activities. [...] This mere factor has effectively converted what was initially a law enforcement operation into a military situation."*[3] Judge Gao also considers that ITLOS „considerably raised the threshold" for military exceptions. On one hand, this may represent a „conflicting interpretation" with respect to the conclusion that the *South China Sea* arbitration came to.[4] On the other hand, the political implications may be represented by „frustration and disappointment" on the part of States that made declarations under article 298 1) b).[5] However, judge Gao concludes that the incided has „mixed nature", comprising both law-enforcement and military activities, and it is the former element that afforeded a basis for *prima facie* jurisdiction.[6]

At the same time, Judge Anthony Lucky stated that „*at this stage, I think it could be both military and law enforcement"*.[7] Judge Jesus appreciated that

[1] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 18, para. 69.

[2] *Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Gao, p. 5, para. 20.

[3] *Ibid.*, p. 8, para. 33, 34.

[4] *Ibid.*, p. 9, para. 41, 42.

[5] *Ibid.*, p. 10, para. 46.

[6] *Ibid.*, p. 11, para. 49-50.

[7] *Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Lucky, p. 5, para. 21.

„*the characterization of the military activities as an exception […] cannot be made in the abstract. Rather, it has to be made in the context of a particular activity being undertaken in a particular maritime space".*[1] He noted that the incident occurred "while crossing the Russian territorial sea"[2] and further remarked that "*it may well be that the Ukrainian warships have engaged themselves in acts that could qualify as military activities*",[3] but affirmed that the parties did not provide for sufficient information for ITLOS to reach a *prima facie* conclusion.[4]

c) A third point that could be relevant for the determination of the *prima facie* jurisdiction refers to the fact that, on one side, the ITLOS considered that the dispute concerns a series of activities that took place in the framework of a "law enforcement operation".[5] Nevertheless, the reservation made by the Russian Federation according to article 298 (1) b) covered both "military activities by government vessels and aircraft", and "*disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction*" (emphasis added). The Order did not note this second part of the exception. It is only the Separate Opinion of Judge Gao that noted very briefly that:

> "Both Parties have made declarations to exclude disputes concerning military activities from compulsory dispute settlement procedures under section 2 of Part XV of the Convention. But, in comparison, the Russian Federation further excludes in its declaration "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".[6]

It is true, the Russian Federation maintained the only argument that the dispute referred to the military activities exemption[7] and did not invoke the "law enforcement" exception (it is also true that the Russian Federation did not take part in the proceedings).

A comparable situation appeared in the *South China Sea* arbitration, where the Philippines argued that a decision to rely on an exception is a matter of

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[1] *Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Jesus, p. 3, para. 12.

[2] *Ibid.*, p. 3. para. 13.

[3] *Ibid.*, p. 5, para. 20.

[4] *Ibid.*, p. 5, para. 20, 21.

[5] *Case concerning the Detention of Three Ukrainian Naval Vessels*, p. 20, para. 74, 75.

[6] *Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Gao, p. 4, para. 14.

[7] Memorandum of the Government of the Russian Federation, 7 May 2019, para. 28-30 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf, consulted 15 July 2019).

choice, and the respondent is not bound to insist on an exception to jurisdiction (meaning that if the responded did not invoke a certain exemption, the Tribunal needed not look into it further)[1]. The Arbitral Tribunal rejected this point of view. It held that:

> "Article 298 (1) provides for a State Party to "declare in writing that it does not accept" a form of compulsory dispute resolution with respect to one or more of the enumerated categories of disputes. […] In contrast to an objection under Article 297, the Tribunal sees nothing to suggest that a provision of Article 298 (1) must be specifically invoked. Once made, a declaration under Article 298 (1) excludes the consent of the declaring State to compulsory settlement with respect to the specified categories of disputes. […] Such a declaration stands until modified or withdrawn. The absence of any mention of Article 298 (1) (b) from China's Position Paper and public statements does not obviate the Tribunal's need to consider the applicability of this provision".[2]

It could have been debated whether the language of the reservation ("law-enforcement activities in regard to *the exercise of sovereign rights or jurisdiction"*) is applicable to the facts of the case. Moreover, one could argue that certain area over which "sovereign rights or jurisdiction" are exercised, are subject to dispute between the parties in the context of the annexation of Crimea. Nevertheless, the whole construction appears to be subject to the "*prima facie"* determination of jurisdiction and might be further analyzed by the Annex VII Tribunal.

## 4. Conclusion

It is true that the ITLOS adopted a high threshold for the notion of "dispute related to military activities". In our view, this does not prove necessarily a "jurisprudential divergence", in relation to the Arbitral Tribunal in the *South China Sea* arbitration, but a different approach between the "mere determination of jurisdiction" (in the case of the *South China Sea*) and the determination of the *prima facie* jurisdiction, in the case before the ITLOS. Thus, as the judges Gao,[3] Kittichaisaree,[1] Jesus,[2] Lucky,[3] Lijnzaad[4]

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[1] *The South China Sea Arbitration, Award of 12 July 2016*, p. 454, para. 1156.

[2] *Ibid.* see also Lori Fisler Darmosch, *Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS*, American Journal of International Law, (2016), vol 110, pp. 273-278.

[3] *Separate Opinion of Judge Gao*, p. 11, para. 51.

expressed in their separate opinions or declarations, the ITLOS determination on the applicability of the exception is only for the purposes of adjudging upon the *prima facie* jurisdiction, and it will be for the Annex VII Tribunal to make a final determination.[5] Thus, in our opinion, what the ITLOS did was not to increase the "margin" of the "military activities" exception (in order to include what appears to be a "mixed" law enforcement and military activities operation), but to "increase the margin of the determination of the *prima facie* jurisdiction". Practically, it is our view that the interpretation for the purposes of the *prima facie* jurisdiction shall have to be distinguished from the interpretation for the purposes of the "mere" determination of jurisdiction.

Without saying, the ITLOS might have in mind the "right cause" of Ukraine, when requesting that the vessels and the crewmen be released (notwithstanding the aspects of jurisdiction). Practically, the majority of the members of the Security Council, in the debate that took place the date after the incident, considered that the seizure of the vessels and of their crew violates international law.[6] Moreover, the "traditional immunity of warships" is both largely accepted by UNCLOS and by customary international law.[7] Appeals to the Russian Federation to release the crewmen were largely shared within the international community.[8] Therefore, it is not excluded that the ITLOS "used in a wise manner" the discretion given by the margin of *prima facie* jurisdiction, in order to uphold the general purpose of ensuring compliance with international law.

It is true, as Judge Gao points out, that certain political consequences of the interpretation of "military activities" exception, for the purpose of determining the *prima facie*, jurisdiction, might exist. This is due to the

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[1] *Declaration of Judge Kittichaisaree,* p. 1, para. 3.

[2] *Separate Opinion of Judge Jesus,* p. 5, para. 20.

[3] *Separate Opinion of Judge Lucky,* p. 5, para. 20-21.

[4] *Declaration of Judge Lijnzaad,* p. 3, para. 8.

[5] See also Yurika Ishii, *The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order*, EJIL: *Talk!*, 31 May 2019, available at https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/ (accessed 25 July 2019).

[6] UN Doc. S/PV.8410, p., 2-8.

[7] *See also Case concerning the Detention of Three Ukrainian Naval Vessels*, Separate Opinion of Judge Gao, p. 1, para. 4.

[8] For example – Conclusions of the European Council, 13-14 December 2018, para. 8 (https://www.consilium.europa.eu/media/37558/13-14-euco-final-conclusions-en.pdf, consulted 25 July 2019).

specificity of the procedure provided by article 290 (5) of UNCLOS, where the ITLOS has the competence only for provisional measures, while the proper jurisdiction will belong to another arbitration tribunal. Thus, practically, the "competence" of the ITLOS to issue provisional measures in cases where "military activities" might be involved, may be enlarged, and this may have consequences over the positions of countries that formulated such exceptions.[1]

Despite these elements of interpretation, enlarging the jurisdiction (even only for the purposes of provisional measures, which supposes a *prima facie* determination), does not necessarily lead to "frustration" and "disappointment" (as judge Gao put it), but may be likely to increase general adherence to rule of law on international level. Nevertheless, it is important for States to acknowledge certain developments.

In the end, the order prescribing provisional measures might have a certain role in the overall situation of the Ukrainian vessels and servicemen. It is an effort towards a "laudable goal".[2] As the *Arctic Sunrise* case[3] has proven, even if the execution of the order is not achieved immediately, it might have a role in the settlement of a dispute through peaceful means.

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[1] (1) Algeria (on 22.05.2018); (2) Argentina (upon ratification on 01.12.1995); (3) Belarus (upon ratification on 30.08.2006 ); (4) Cabo Verde (upon ratification on 10.08.1987); (5) Canada (upon ratification on 07.11.2003); (6) Chile (upon ratification on 25.08.1997); (7) China (on 25.08.2006); (8) Cuba (upon ratification on 15.08.1984); (9) Denmark (upon ratification on 16.11.2004); (10) Ecuador (upon accession on 24.09.2012); (11) Egypt (upon ratification on 26.08.1983 and on 16.02.2017); (12) France (upon ratification on 11.04.1996); (13) Greece (upon ratification on 21.07.1995 and on 16.01.2015); (14) Guinea-Bissau (upon ratification on 25.08.1986); (15) Mexico (on 06.01.2003); (16) Nicaragua (upon ratification on 03.05.2000); (17) Norway (upon ratification on 24.06.1996); (18) Portugal (upon ratification on 03.11.1997); (19) Republic of Korea (on 18.04.2016); (20) Russian Federation (upon signature on 10.12.1992 and ratification on 12.03.1997); (21) Saudi Arabia (on 02.01.2018); (22) Slovenia (on 11.10.2011); (23) Thailand (upon ratification on 15.05.2011); (24) Tunisia (upon ratification on 24.04.1985 and on 22.05.2001); (25) Ukraine (upon ratification on 26.07.1999); (26) United Kingdom (on 12.01.1998 and 07.04.2003); (27) Uruguay (upon ratification on 10.12.1992) – mentioned also by Separate Opinion of Judge Gao, p. 3, para. 11; according to James Kraka the US considers such a declaration, if it decides to ratify the UNCLOS (quoting congressional debates) - James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in Article 298?, loc. cit.*

[2] James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in Article 298?, loc. cit.*

[3] *The "Arctic Sunrise" Case (The Kingdom of the Netherlands v. Russian Federation),* ITLOS Case no. 22, Order of 22 November 2013.

***Editor-in-chief's Note**: On 7 September 2019, the 24 Ukrainian crewmen were released as part of an exchange of prisoners between Ukraine and Russia, following a political deal between the presidents of the two countries.*

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# Tackling Racial Discrimination: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. The United Arab Emirates)*

***Simona Andra OBROCARU***[1]

***Abstract*****:** *The present article will be based on the examination and analysis of the racial discrimination issue and it will explain and present aspects that are relevant for the case study (The State of Qatar v. The United Arab Emirates). The purpose of this paper is to shed light on the racial discrimination matter and to reach the core of this problematic by offering a more comprehensive understanding for the situation as a whole. Bearing this in mind, we will also be analysing other similar cases in which common elements can be found: Koptova v. Slovak Republic, Dragan Durmic v. Serbia and Montenegro, Ms. L.R. et al v. Slovak Republic (Dobsina). The paper presents an objective and a realist approach in order to propose a series of solutions for a peaceful and rightful settlement of the conflict between the UAE and Qatar. The conclusions reached by following a thorough analysis can be summarized by stating that racial discrimination should be taken more seriously by the national courts and tribunals, so that it would not be necessary for so many complaints to be addressed international bodies.*

***Key-words***: *racial discrimination, dispute.*

## 1. Introduction

### 1.1 The main issue

During the course of history, humanity has been going through numerous periods of time in which it experienced violent attacks, stigmatization, unfair treatment, discrimination based on certain aspects and so many other

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similar situations. Even though discrimination has been an openly discussed subject in recent times, it does not mean that it appeared once we started acknowledging it; in fact, it preexists most studies or debates on this matter.

The subject of this article is relevant in today's society and it is also important to be aware of the fact that even though important steps in diminishing discrimination are being taken, there still are numerous cases in which people are not treated equally, the quality of their lives being tremendously affected.

### 1.2 Measures taken against racial discrimination

One of the earliest manifestos against racial discrimination among people can be attributed to Friedrich Tiedemann who was a prolific expert when it comes to the anatomy of the human brain. Following his many years of experience in terms of anatomy and physiology, he published an article in 1836 entitled *On the Brain of the Negro, compared with that of the European and Orang-Outang*[1] in Britain's most prestigious journal. The purpose of that article was to bring forward scientific proof which would convince the rest of the people that individuals having different physical traits than the average Caucasian are not less biologically evolved than them. The author mentions the following:

> *The mistaken notion of these naturalists arose from [the study] of a few skulls of Negroes living on the coasts, who, according to credible travellers, are the lowest and most demoralized of all the Negro tribes; the miserable remains of an enslaved people, bodily and spiritually lowered and degraded by slavery and ill treatment.*[2]

The main conclusion drew by Tiedemann was the fact that many anthropologists chose in their studies the smallest-brained and the biggest-jawed African individuals in order to sustain their arguments regarding the difference in evolution among Caucasians and Africans. However, he finishes his study by explaining that human races cannot be distinguished by looking at the size of their brains.

Another important moment in history when it comes to the elimination of racial discrimination on an international scale, belonged to Japan in 1919. During the Paris Peace Conference, the Japanese delegation proposed

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[1] Friedrich Tiedemann, JSTOR, *On the Brain of the Negro, compared with that of the European and Orang-Outang*, p. 511.

[2] Stephen Jay Gould, *The Great Physiologist of Heidelberg – Friedrich Tiedemann – Brief Article*, Natural History, July 1999, p. 4.

certain articles which were meant to put racial equality on top of the priority list of the League of Nations Covenant. Even though the proposal was accepted with a majority of 11 votes out of 16, Woodrow Wilson, the US President, declined the plea stating that this kind of issue should be approved by all the members, not just by the majority.[1]

## 2. The research course

### 2.1 *Qatar v. The United Arab Emirates*

On 11 June 2018, the State of Qatar submitted to the International Court of Justice (ICJ) an Application against the United Arab Emirates (UAE) in which it requested the enforcement of institutional proceedings upon the UAE concerning its treatment towards the Qataris living in the UAE. The legal basis referred to by Qatar was the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) which entered into force on 4 January 1969 and to which both Qatar and UAE are parties.[2]

According to the Application submitted by the State of Qatar, there are numerous violations of the ICERD by the UAE concerning the pressure of the latter towards the former in allowing it to interfere with Qatar's sovereignty through a series of discriminatory acts such as: expulsion of Qataris from the UAE within a time frame of two weeks, prohibition of Qataris from entering or passing the UAE, hereby enforcing harsh penalties (nationality deprivation and criminal sanctions), closing the UAE airspace and ports for Qatar and its citizens and also prohibition of all inter-State transportation ways, interference with the legal conditions under which Qataris lawfully possess properties in the UAE, prohibition of all types of speech through which Qataris could be supported and also enforcing legal penalties such as financial ones or imprisonment up to fifteen years, silencing of all Qatari owned and sponsored media outlets such as Al Jazeera. As such, Qatar requested the International Court of Justice to conclude that the UAE:

> *expelled all Qataris within its borders, without exception, giving them just two weeks to leave; prohibited Qataris from entering into or passing through the UAE, and ordered UAE nationals to leave Qatar or face*

[1] Reginald Kearney, *Japan: Ally in the Struggle Against Racism, 1919-1927*, Kanda University of International Studies in Japan, Volume 12 *Ethnicity, Gender, Culture, & Cuba (Special Section)*, 1994, p. 2.

[2] International Court of Justice, *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (The State of Qatar v. The United Arab Emirates)*, p. 2.

> *severe civil penalties, including deprivation of their nationality and the imposition of criminal sanctions; closed UAE airspace and seaports to Qatar and Qataris and prohibited all inter-state transport; interfered with the rights of Qataris who own property in the UAE; prohibited by law any speech deemed to be in "support" of Qatar or opposed to the actions taken against Qatar, on threat of severe financial penalty or up to fifteen years imprisonment; shut down the local offices of Al Jazeera Media Network ("Al Jazeera") and blocked the transmission of Al Jazeera and other Qatari stations and websites.* [1]

It is vital to understand the causes that led to the situation in which UAE alongside Egypt, Bahrain and Saudi Arabia imposed some extreme sanctions against Qatar and why the situation escalated leading to alledged racial discriminatory attitudes against Qataris in the UAE. The UAE decided to isolate Qatar on the basis of allegations that it supports extremist groups and, consequently, terrorism. These allegations gained proportion based on Qatar's support for the Muslim Brotherhood, its close ties to Taliban groups and other Al-Qaeda affiliates and especially because of its close relation to Iran; this led to statements on Saudi Arabia's part suggesting that the Qatari media outlet, Al Jazeera supports and promotes Houthi rebels who are fighting in Yemen against governmental forces endorsed by Saudi Arabia and the UAE.[2]

Upon analyzing the case, the International Court of Justice reached a conclusion and presented its Judgment on this regard, solving the dispute between the State of Qatar and the UAE. ICJ found that the UAE was obliged by the ICERD to make sure that families including a Qatari citizen, that were separated, be reunited, that the Qatari students who were deprived of their rights to education be granted their opportunities to study and that Qatari citizen be provided once again with legal services and access to judicial facilities.

Furthermore, the Court decided that, except for the provisional measures requested by the State of Qatar, it also needed to indicate certain other additional measures to be addressed by both parties, not only by the UAE, and which would refer to a provision that would not allow the escalation of the dispute.

### 2.2 Similar cases

[1] ibid.

[2] Tom Keatinge, *Why Qatar is the focus of terrorist claims*, BBC, Centre for Financial Crime and Security Studies, June 2017.

As previously stated, we will also analyze similar cases in which the issues encountered by the petitioners are directly brought before international Courts by the individuals themselves. Even though the problematic is similar in all cases, the main distinction between the first case we presented and the following ones relies on the fact that in the former situation, the case was brought forward on behalf of the State before ICJ, as opposed to the latter series of cases in which the individuals themselves submitted the petitions on their behalf, before CERD.

### 2.2.1 *Koptova v. Slovak Republic*

This case was brought before the United Nations Committee on the Elimination of Racial Discrimination at the end of 2000 by Anna Koptova, a Roma Slovak citizen against Slovakia, claiming that articles 2, 3, 4, 5 and 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination* have been breached.[1]

The Committee concluded by deciding that the State (The Slovak Republic) must take all necessary measures in order to make sure that all the practices which so far have been restricting the Roma freedom of movement and also of residence are permanently eliminated and not promoted. In both situations (*Qatar v. The United Arab Emirates* and *Koptova v. Slovak Republic*) the targeted minority had to leave the region because of the frictions, pressure and hostility promoted and prolonged by the majority residing in each specific area. In each case, certain resolutions, laws or acts were issued and enforced in order to alienate the targeted groups only based on their race and not on their actions or competences. In the UAE, the Federal Decree-Law no. (5) of 2012, *On Combatting Cybercrimes* focused on anyone who *shows sympathy…towards Qatar*[2] and, in Slovakia, both resolutions given by the Municipal Council of Rokytovce and the Municipality of Nagov.

### 2.2.2 *Dragan Durmic v. Serbia and Montenegro*

On March 6, 2002, Dragan Durmic, a petitioner of Roma origin and a national of Serbia and Montenegro (represented by the European Roma Rights Center and the Humanitarian Law Center) submitted a petition to the

[1] United Nations Human Rights Office of the High Commissioner, *International Convention on the Elimination of All Forms of Racial Discrimination – Selected Decisions of the Committee on the Elimination of Racial Discrimination*, p. 55.

[2] International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) – Request for the Indication of Provisional Measures, Order,* p. 14.

UN Committee on the Elimination of Racial Discrimination against Serbia and Montenegro, claiming that he was a victim of racial discrimination based on the breaches of article 2, paragraph 1 (d), read together with article 5 (f), as well as articles 3, 4 (c) and 6 of the International Convention on the Elimination of Racial Discrimination.[1]

The Committee came to the conclusion that the submission was admissible and it also demonstrated that Article 6 from the Convention was violated by the State. Besides that, the Committee condemned the State's plea regarding the inability of identifying the perpetrators and that the Statute of Limitations was not applicable in this situation considering the delays in the investigations. The State was found guilty of not being able to provide a proper protection and specific measures under Article 6 of the Convention.

The common factor in both of these cases (*Qatar v. The United Arab Emirates* and *Dragan Durmic v. Serbia and Montenegro*) is related to the State's denial of a minority of having access to public services, those being either in the educational, legal or medical field (*Qatar v. The United Arab Emirates*) or in the leisure one, such as discotheques, restaurants, clubs etc. (*Dragan Durmic v. Serbia and Montenegro*). In both cases, the persons targeted observed the discriminatory behaviour and the prohibition of accessing certain public spaces based on their ethnicity and invoked the International Convention on the Elimination of All Forms of Racial Discrimination having in mind specific articles which can be applicable in different contexts.

### 2.2.3 *Ms. L.R. et al v. Slovak Republic (Dobsina)*

Another situation in which a case of blatant racial discrimination was presented before the CERD Committee being submitted by Ms. L.R. alongside other 26 Roma citizens (represented by the counsel of the European Roma Rights Centre, Budapest, Hungary, and the League of Human Rights Advocates, Bratislava) from Dobsiná, Slovakia in August 2003 claiming that the Slovak Republic had breached Article 2, paragraph 1, subparagraphs (a), (c) and (d); Article 4, paragraph (a); Article 5, paragraph

[1] United Nations Human Rights Office of the High Commissioner, *International Convention on the Elimination of All Forms of Racial Discrimination – Selected Decisions of the Committee on the Elimination of Racial Discrimination*, Communication No. 29/2003, p. 88.

(e), subparagraph (iii); and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.[1]

The Committee concluded that it was clear that the State party was guilty for the practice of racial discrimination and that it breached Article 2, paragraph 1 (a), Article 5, paragraph (e) (iii) and Article 6 of the Convention. Ergo, according to the Convention, the State party was obliged to offer the petitioners an effective remedy and come up with such measures that would allow them to live in equality and also to prevent similar breaches from happening in the future. It was also requested by the Committee to receive in a matter of ninety days maximum, details from the State party regarding the measures it decided to take in solving the dispute.

Once again, it is clear that in all cases presented so far, including *Qatar v. The United Arab Emirates*, the State parties being petitioned had breached Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination and that because of their racist behavior, the minorities in question had to suffer by having no access to basic life conditions. However, an important aspect in this regard should be taken into consideration, namely the fact that even though the same article has been breached in all of the cases we briefly presented, in the first one we encounter the situation in which there is a dispute between two states, as opposed to the last three cases in which the individuals were the ones that submitted their petitions against the state. Still, it is rather obvious that mainly the same breaches were highlighted in all four cases and primarily, the targeted minority was the one to be affected by the consequences of racial discrimination.

## 3. Conclusions and outcome

We can easily observe that during the last decades numerous cases of racial discrimination had arose and consequently, an important number of them had been brought in the public's attention. Seeing that the racial discrimination phenomenon does not disappear by itself, both the national and the international community have reacted and decided to take appropriate measures. Special treaties, conventions, acts and bills have been decided upon in order to establish series of punishments in the case of breaching certain obligations to which the parties had agreed to in the

[1] United Nations Human Rights Office of the High Commissioner, *International Convention on the Elimination of All Forms of Racial Discrimination – Selected Decisions of the Committee on the Elimination of Racial Discrimination*, Communication No. 31/2003, p. 108.

international arena or the natural persons have automatically accepted when being a citizen of a specific state.

Moreover, a great number of special judicial bodies has been established, especially designed for situations in which racial discrimination would be promoted, encouraged and endorsed. Those international judicial bodies that deal with this issue are judging the cases brought to them based on the international conventions and treaties concluded by states.

Most states have accepted to be a part of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which led to the implementation in each state's national legislation of the obligations and values embedded in this Convention. This means that in the case of a racial discriminatory situation, the victim firstly addresses a national legal body which is obliged, if it has jurisdiction, to consider such a case, to offer a proper solution, to defend the victim and punish the perpetrator.

### 3.1 Solutions and possible steps in the future for solving the racial discrimination issue

When it comes to solutions to be found in order to at least confine and/or prevent situations in which racial discrimination could be used against someone, we could provide some potential solutions.

First of all, racial discrimination should be taken more seriously by the national courts and tribunals, so that it would not be necessary for so many victims to address international bodies, considering that the procedures and steps that must be taken in this regard are far more extensive and large-scaled than the ones at the national level. The national legal bodies should be more attentive when judging a racial discrimination case and should investigate and invest more time in analyzing such a matter.

On the other hand, another important solution would be a more precise and comprehensive national legal framework that should be put in place by many states; this solution would come as an addition to the first one, considering that it is possible to experience a racist situation but not to be helped by a national legal entity because of the lack of proper legislation on this matter.

One other feasible solution could be the enforcement of stricter punishments for those who engage in a racist behavior. Harsher regulations on this matter might help in preventing this unwanted behavior and might

make people reconsider their options before initiating or being part of a racial discrimination context.

One last solution should be addressing more the problematic of racial discrimination at the educational level in the sense that it should be talked about more openly and that people should learn at least from school that it is not normal to engage in such activities. A racial behavior is not inherited, it is learnt and because of that, it is vital to make people open their eyes more when it comes to this matter and one of the best ways to do that is through education.

As far as the main case presented in the present paper and its settlement, having in mind that it is still an on-going case, we would rather abstain from making predictions and assumptions because the behavior of both states can be unpredictable and the accusations brought before the Court by each of them can be false, misleading or exaggerated. As it was already settled, the Court has the needed jurisdiction in order to handle this situation and offer a series of measures, but, until then, it is impossible to predict how the frictions between the two states could be solved.

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

## Building a Human Rights-Based Climate Claim – Challenges and Approaches

***Andreea Teodora CHILAN***[1]

***Abstract:*** *Rights-based climate litigation has become more and more common in the recent two decades. However, plaintiffs encounter a multitude of issues in building a successful claim. The present paper aims at providing a critical overview of the most common challenges bringing such a claim entails. It will mainly focus on existing case law for exemplification of how the claims were built in both successful and unsuccessful climate litigations. Standing, causation and the basis of the claim will be assessed in turn in order to provide a way in which such issues are best addressed and handled before a court. While the legal requirements for standing differ from State to State, most of the times it is necessary that causation be thoroughly established. When it comes to the basis of the claim, a breach of the legal obligations assumed by States internationally needs to be interpreted in the light of an infringement of a human right that resulted from that breach. As such, due regard needs to be paid to the establishment of all these requirements when trying to assert a violation of a human right in a climate litigation case.*

***Key-words:*** *climate litigation, human rights, standing, causation*

### 1. Introduction

"Litigation has arguably never been a more important tool to push policymakers and market participants to develop and implement effective

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means of climate change mitigation and adaptation."[1] However, as it can be seen from the rights-based climate litigations until now, there are many challenges in building a successful case before a court even when the evidence is strong or irrefutable.

While this paper does not aim at exhausting the discussion on all potential issues on this matter, it will provide an assessment of the three most common challenges, in the author's opinion. Looking at the relevant case law for exemplification, it will firstly address the issues of standing and causation and, secondly, the ones regarding the basis of the claim.

## 2. Standing and causation

Standing seems to be a leitmotif when it comes to obstacles in bringing such a claim. For example, in the *Juliana* case, standing has been questioned on eight occasions since its filing in 2015.[2] Means of tackling this issue depend on the national law of the State where the claim is brought and, therefore, are to be dealt with on a case by case basis. As such, one can notice two main different approaches.

### 2.1. Public interest litigation

The first one is standing based on public interest litigation. This is recognized for example by the law of Pakistan where a rights-based climate claim has successfully been brought in the *Leghari* case.[3] In justifying the decision, the Court there made references to the violations of the rights of the people of Pakistan in general and not only the plaintiff's.[4]

### 2.2. Personal interest causality and the issue of causality

The second approach comes with an added challenge as, in this scenario, national law requires personal interest as a basis for bringing a claim.[5] It becomes, therefore, particularly demanding to design a successful claim as

[1] M Burger, J Gundlach, A Kreilhuber, L Ognibene, A Kariukia and A Gachie: "The Status of Climate Change Litigation: A Global Review" (UNEP and Sabin Center for Climate Change Law at Columbia University 2017), p. 8.

[2] Climate Case Chart "*Juliana v United States*" (Available at: <http://climatecasechart.com/case/juliana-v-united-states/> [accessed 07/05/19]). Dismissing standing on 08/03/19, 02/01/19, 28/06/18, 22/05/18, 09/05/18, 05/09/17, 07/03/17 and 17/11/15.

[3] *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court, [Leghari].

[4] *Leghari*, [6, 8].

[5] see for example: FSC 140 II 315, 11/04/2014.

Climate Change's effects are "global in scope."[1] It affects the *res communis* which, by their nature, belong to the all humankind, and thus, cannot be the object of private property.[2] As such, it is difficult to establish a personal interest given the fact that a successful ruling would naturally benefit the large public.

In cases where personal interest needs to be demonstrated, the hurdle lies on establishing the causal link between the wrongful act of inadequately contributing to climate change and the human rights violations.[3] There were many cases, such as *Washington Environmental Council v Bellon*[4] and *Kivalina v. ExxonMobil Corporation*[5] where standing was denied due to the failure to prove this connection.

Additionally, the plaintiffs in *KlimaSeniorinnen* scientifically established the causality between climate change and the likeliness of premature deaths in older women.[6] However, their claim was dismissed twice for lack of standing, the Federal Court identifying it as being an *actio popularis*, not a personal interest one.[7]

Another interesting approach can be seen in cases such as *Juliana*, where the claim, although being based on the *public trust doctrine*,[8] was

[1] Un.org. (2019). Climate Change. [online] Available at: https://www.un.org/en/sections/issues-depth/climate-change/ [Accessed 9/05/2019].

[2] Brian Preston: "Recent climate litigation concerning environmental rights. Using Constitutions to Advance Environmental Rights and Achieve Climate Justice", (26/02/2018).

[3] Jacqueline Peel, Hari M. Osofsky: "A Rights Turn in Climate Change Litigation?", 7:1 (CUP, *Transnational Environmental Law*, (2018), (p. 37–67), [Peel], p. 46.

[4] *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013), reh'g en banc denied, 741F.3d1075 (9th Cir. 2014).

[5] *Native Village of Kivalina v. ExxonMobil Corp*., 663F.Supp.2d863, 881 (N.D.Cal.2009), aff'd on other grounds, 696 F.3d849 (9th Cir. 2012), cert. denied, 133S.Ct.2390 (2013).

[6] *Swiss Senior Women for Climate Protection v Swiss Federal Council et al*., filed 25 October 2016, English translation, [3] http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf, [284], [Request]; see also WHO <http://www.who.int/mediacentre/factsheets/fs266/en/>.

[7] See KlimaSeniorinnen "Unofficial Translation of DETEC Reasoning" [2.1] (Available at <http://klimaseniorinnen.ch/wp-content/uploads/2017/11/Verfuegung_UVEK_Abschnitt_C_English.pdf> [Accessed 10/05/2019]).

[8] *Juliana v United States of America*, Opinion and Order [2016] The United States District Court for the District of Oregon 6:15-cv-01517-TC US D Or, (2016), [Juliana].

strategically brought by youths who could irrefutably evidence injury caused by climate change.[1]

### 2.3. Causation beyond standing

Furthermore, another setback was offered in *People v. Arctic Oil*, where Norway was sued by Greenpeace Nordic Association and *Natur og Ungdom* for granting oil drilling licenses in the Barents Sea to thirteen companies.[2] Standing was indeed not an issue in the case but failure to observe causation can be interestingly inferred.

The case relied on the violation of Article 112 of the Norwegian Constitution which proscribes for the right of current and future generations to a healthy environment "where production ability and diversity are preserved."[3] The Oslo District Court found, similarly to the *Urgenda* case,[4] that the Norwegian Constitution indeed protects the right to a healthy environment, however, in the end, it reached the conclusion that Norway was not in breach of such a duty to protect.[5]

The Court based its decision on the argument that Article 112 does not apply extraterritorially as the oil extracted in Norway will be exported to other countries and thus, the Carbon Dioxide (CO) emissions will take place abroad. It claimed that it "cannot see that the duty to assess impacts includes climate consequences of CO emissions from oil and gas exported abroad or therefore the costs of such emissions."[6] This decision raises a lot of questions, as it seems not only contradictory in itself, but it also clashes with the current tendencies in Europe and the world regarding climate litigation.

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[1] Such as having their homes swept away by rising sea levels, flooding, or desertification, all linked to Climate Change; see Epps, Garrett: "The Government Is Trying to Silence 21 Kids Hurt by Climate Change", The Atlantic, Retrieved (24/10/2018).

[2] The legal written submission to Oslo District Court (October 18th, 2016) against the decision of the 23rd licensing round (unofficial translation), [*The People v. Arctic Oil* Written submission].

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[5] Greenpeace International. (2019). *Decision made in case against Arctic Oil in Norway: Right to a healthy environment acknowledged.* [online] Available at: https://www.greenpeace.org/international/press-release/11705/decision-made-in-case-against-arctic-oil-in-norway-right-to-a-healthy-environment-acknowledged/ [Accessed 9/05/2019].

[6] *The People v. Arctic oil*, Judgement, [16-166674TVI-OTIR/06, 4/01/2018], District Court of Oslo, (unofficial translation), p. 45.

Whilst this is an issue of extraterritoriality of human rights related obligations, in the author's opinion, it also depicts the difficulty of the Oslo Court to thoroughly understand the concept of causality in the Climate Change regime. The export and use of oil in other States will increase global CO emissions which will lead to the increase of global Climate Change that will eventually have its impact on Norway and its people.

Thus, standing creates one of the biggest challenges in rights-based climate litigation. One must pay attention to the legal system where the claim is brought and, regardless, apparently, whether or not it requires personal interest, causation must be thoroughly established.

### 3. Basis of the claim

Another detail to carefully take into consideration is choosing the basis of the claim. Consequently, plaintiffs need to focus on the violation of their human rights as a result of the State breaching its international environmental law obligations and not only on the breaches of the latter.

To exemplify, in *KlimaSeniorinnen*, the older women alleged violations of their constitutional right to life,[1] and their rights under the European Convention on Human Rights.[2] The plaintiffs in *Carbon Majors* claimed breaches of the rights to life, to the highest attainable standard of physical and mental health, to food, to water, to adequate housing, and to self-determination resulting from the adverse impacts of climate change.[3] A similar claim was brought by the *Inuit people*.[4] *People v. Arctic Oil* case[5] relied on the violation of the above mentioned Article 112 of the Norwegian, this being the first time where this article was used in a high-level court case.

All of these human rights violations occurred due to failure by the governments to fulfil their obligations under international environmental

[1] Federal Constitution of the Swiss Confederation (SR [Classified Compilation of Federal Legislation] 101).

[2] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (Adopted 4/11/1950, in force 03/09/1953).

[3] Republic of the Philippines, Commission on Human Rights, Petition requesting for investigation of the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change, CHR-NI-2016-0001, p. 7.

[4] Simone Vezzani: "The Inuit Tapiriit Kanatami II Case and the Protection of Indigenous Peoples' Rights: A Missed Opportunity?", e-Journal, European Papers, p. 308-309.

[5] *The People v. Arctic Oil* Written submission, p. 39-40.

law, be them enshrined in the Paris Agreement[1] or other international treaties.

Moreover, claims with the purpose of judicial review are unlikely to succeed as national laws are consistent in denying their admissibility.[2] Governments usually raise objections in this regard.[3] This is why it is advisable that the plaintiffs only use the State's international obligations existing under the relevant framework to interpret its duties under its constitutional law and other human rights treaties.[4]

This was intelligently done in *Urgenda*, *Juliana*, *KlimaSeniorinnen* where the courts decided that the disputes actually dealt with violations of human rights as a consequence of climate change[5] and were within the scope of the judiciary[6] as they were challenging administrative acts and how the existing framework was implemented rather than purely legislative acts.[7]

However, *Massachusetts v EPA* was a successful case despite dealing with the failure of the federal US government to legislate carbon dioxide and other greenhouse gases emissions.[8] The US Supreme Court concluded that the Environmental Protection Agency (EPA) breached its responsibility to protect rights due to denial of their rulemaking petition.[9]

Consequently, the issues depicted illustrate the complexity of such claims and the diversity of possible approaches. However, notably, it is usually the right to life that is brought into question.

## 4. Conclusion

[1] UNFCC *Paris Agreement on Climate Change* C.N.63.2016.TREATIES-XXVII.7.d (4/11/2016).

[2] See for example, Federal Constitution of the Swiss Confederation of 18 April 1999, Article 190.

[3] See for example: Urgenda.

[4] Bähr et al "KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation" 9 Journal of Human Rights and the Environment 2, [Bahr], p. 218.

[5] *Urgenda*, [4.95].

[6] *Juliana*, [16].

[7] Request to stop omissions in climate protection pursuant to Art.25a APA and Art.6 para.1 and 13 ECHR, <http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf>.

[8] *Massachusetts v. E.P.A.*, 549 U.S. 497, 499 (2007) [Massachusetts v. E.P.A].

[9] *Massachusetts v. E.P.A*, p. 12–23.

From the abundance of cases dealing with climate change and human rights, it results that such litigations are not "entirely new phenomenon."[1] Surveying the previous litigation attempts, one cannot help but notice the difficulties in building a successful rights-based climate claim and the needed versatility in making such a case happen. To meet all these requirements, standing, causations and an appropriate basis of the claim, due consideration must be given to national systems, evidence, the strictness of law and, ultimately, the willingness of the relevant court to dive into the complexity of the matters posed.

Despite all these hurdles, it has been stated that the adverse effects climate change has on the enjoyment of human rights should be considered the most convincing argument to determine action to address the issue in court.[2]

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# The Exceptions to Immunity of State Officials from Foreign Criminal Jurisdiction between the Legal Desideratum and Reality of the International Community

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***Abstract:*** *At its fifty-ninth session, in 2007, the UN International Law Commission (ILC) decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its current programme of work. Since then, two Special Rapporteurs have been successively appointed – Mr. Román A. Kolodkin and Mrs. Concepción Escobar Hernández. This paper presents mainly the views related to the exceptions to immunity of State officials from foreign criminal jurisdiction, as they are reflected in the Special Rapporteurs` reports and the work of the Commission.*

***Key-words:*** *Exceptions to immunity of State officials from foreign criminal jurisdiction; International Law Commission; International crimes.*

## 1. Introduction

Considering that this year, on 18th April, Mrs. Concepción Escobar Hernández submitted the seventh report on immunity of State officials from foreign criminal jurisdiction and the work of the Commission on the topic is in full swing, also bearing in mind that the fight against impunity of perpetrators of serious crimes in international context intensified, it could be useful to draw some intermediate conclusions concerning the exceptions to this type of immunity.

In order to have an as clear as possible image of the debate at this stage, we will take into account the Special Rapporteurs` reports, the draft articles provisionally adopted by the Commission, incident jurisprudence, States` reactions and scholars` opinions concerning the topic.

Essentially, the purpose of this study is to identify whether or not, at this moment in time, there are enshrined in international law exceptions to immunity of State officials from foreign criminal jurisdiction. To do so, we

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will analyze the relation between the sphere of immunity of State officials from foreign criminal jurisdiction and the sphere of exceptions to it (more precisely, whether or not international crimes can be committed in an official capacity), potential exceptions to immunity of State officials from foreign criminal jurisdiction of substantial nature and waiver of immunity as a form of exception of procedural nature.

## 2. Relation between the sphere of immunity of State officials from foreign criminal jurisdiction and the sphere of the exceptions to it. General Organization of the Paper

In order to analyze whether there are or not exceptions to immunity of State officials from foreign criminal jurisdiction, firstly, it is necessary to establish that the acts referred to were covered by immunity at the beginning.

According to international customary law, immunity *ratione materiae* is activated only in relation with acts performed in an official capacity. Thus, to determine if it applies to a concrete act, it is necessary to establish that the act in question was performed in an official capacity. In this regard, we have to identify the criteria to take into consideration when it comes to qualify an act as being performed in an official capacity. We have to mention that these criteria are, in principle, irrelevant in relation to immunity *ratione personae*, because, according to international customary law, this type of immunity covers acts performed both in an official and in a private capacity.

Related to the criteria above mentioned, the Special Rapporteur Kolodkin noted that the *"classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct. The determining factor is that the official is acting in a capacity as such. The concept of an "act of an official as such", i.e. of an "official act", must be differentiated from the concept of an "act falling within official functions". The first is broader and includes the second"*.[1] He also mentioned that *"there can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official – official or personal – and, correspondingly, of attributing or not attributing this conduct to the State, must logically be considered before*

[1] Second report of the Special Rapporteur Román A. Kolodkin on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/631, 2010, p. 425, para. 94(d).

*the issue of the immunity of the official in connection with this conduct is considered"*.[1]

The definition of an "act performed in an official capacity" proposed by the Special Rapporteur Escobar Hernández is the following:

> *"an "act performed in an official capacity" means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction"*.[2]

Out of it, we can extract the features of an act performed in an official capacity, as the current Special Rapporteur views it, in the context of her work: *"(i) act of a criminal nature; (ii) act performed on behalf of the State; (iii) act involving the exercise of sovereignty and elements of the governmental authority"*.[3]

Nevertheless, the draft article was provisionally adopted by the Commission as it follows:

> *"an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority"*.[4]

It seems that this wording represents the common ground, meeting the views expressed on the matter.

It was highlighted that *"ultimately whether an act is to be considered one "performed in an official capacity" will depend on the facts of each case. It is not a question amenable to detailed prescriptive statements. Discerning the line between an official's official and private capacities can be a subtle task of factual appreciation, although it can also be made more complicated than it need be"*.[5]

Once outlined the criteria to take into consideration to qualify an act as being performed in an official capacity, we can analyze whether an international crime can be committed in such a capacity.

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[1] *Ibidem*, para. 94(c).

[2] Fourth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/686, 2015, p. 55, para. 127.

[3] *Idem*, p. 42, para. 95.

[4] Report of the Drafting Committee, A/CN.4/L.865, 2015.

[5] Roger O`Keefe, *Immunity Ratione Materiae from Foreign Criminal Jurisdiction and the Concept of "Acts Performed in an Official Capacity"*, p. 10 (https://rm.coe.int/1680097836.pdf - accessed 7 July 2019).

It is commonly accepted that genocide,[1] enforced disappearance[2] and apartheid[3] are international crimes or crimes under international law. Also, when provisionally adopting the draft article 7 – *Crimes under international law in respect of which immunity ratione materiae shall not apply* – the Drafting Committee included in the category of crimes under international law genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance.[4] Thus, in the present analysis, we will refer to these crimes.

With regards to the relation between the sphere of immunity of State officials from foreign criminal jurisdiction and the sphere of international crimes, as potential exceptions to it, *"it has been argued that international crimes cannot under any circumstances be regarded as "acts performed in an official capacity" or benefit from immunity. The opposing view holds that international crimes are acts performed in an official capacity and are therefore covered by immunity. An intermediate position is that, while international crimes have been viewed as acts performed in an official capacity, they cannot, by their nature, be regarded as benefiting from immunity. Lastly, in some cases it has been argued that international crimes cannot benefit from immunity without some pronouncement being made as to whether or not they are acts performed in an official capacity"*.[5]

Nevertheless, considering the definitions of the international crimes provided by the relevant conventions,[6] it could be, *prima facie*, concluded that those acts could be committed in an official capacity, because, in the case of torture and enforced disappearance, the provisions make express reference to agents of the public authority or agents of the State as perpetrators; in the case of crime of apartheid, *actus reus* includes, in certain conditions, the adoption of legislative measures, that is only the

[1] Preamble of the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948).

[2] Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006).

[3] Preamble of the International Convention on the Suppression and the Punishment of the Crime of Apartheid (30 November 1973).

[4] Report of the Drafting Committee, A/CN.4/L.893, 2017.

[5] Fourth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/686, 2015, p. 53, para. 121.

[6] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), art. 1; International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006), art. 2; International Convention on the Suppression and the Punishment of the Crime of Apartheid (30 November 1973), art. II(c), (d); Rome Statute of the International Criminal Court (17 July 1998), art. 7 – Crimes against humanity, 8 – War crimes.

privilege of the State`s authorities; also, in order to meet the conditions referred to in the Rome Statute – *acts committed as part of a widespread or systematic attack* or *as part of a plan or policy or as part of a large-scale commission of such crimes* – it appears as necessary the involvement of a State official effectively able to orchestrate such plans or policies.

In this regard, the Special Rapporteur Kolodkin noted that *"immunity ratione materiae extends to ultra vires acts of officials and to their illegal acts; immunity ratione personae (…) extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office"*.[1] These assertions could be interpreted as it is possible to commit international crimes in an official capacity and those acts would be covered both by immunity *ratione personae* and *ratione materiae*.

The current Special Rapporteur pointed out that "*the conclusion that an international crime cannot be regarded as an act performed in an official capacity is based on the assumption that such crimes cannot be committed in exercise of elements of the governmental authority or as an expression of sovereignty and State policies. However, the argument that torture, enforced disappearances, extrajudicial killings, ethnic cleansing, genocide, crimes against humanity and war crimes are devoid of any official or functional dimension in relation to the State is at odds with the facts. Indeed, as has been highlighted on many occasions, including in the work of the International Law Commission, such crimes are committed using the State apparatus, with the support of the State, and to achieve political goals that, regardless of their morality, are those of the State. Such crimes are on many occasions committed by "State officials", within the meaning given to this term for the purposes of the topic under consideration. Furthermore, the participation of State officials is an essential element of the definition of some forms of conduct characterized as international crimes under contemporary international law"*.[2]

Also, she noted that *"the assertion that an international crime cannot be considered as having been performed in an official capacity could perversely, and doubtless unintentionally, give rise to an understanding of international crimes as acts that are not attributable to the State and can only be attributed to the perpetrator. The potential major consequences of this assertion with regard to responsibility require little explanation: if the act is not attributable to the State, the State would be exempted from any*

[1] Second report of the Special Rapporteur Román A. Kolodkin on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/631, 2010, p. 426, para. 94(f), (i).

[2] Fourth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/686, 2015, p. 54, para. 124.

*international responsibility in relation to that act, and instead of international responsibility being attributed to the State, criminal responsibility would be attributed to the individual. That conclusion is incompatible with the very nature of immunity and with the latest developments in international law in the area of responsibility, one of the distinctive features of which has been the adoption of the model of dual responsibility (State and individual)".*[1]

Nevertheless, Mrs. Escobar Hernández concluded that *"the characterization of international crimes as "acts performed in an official capacity" does not mean that a State official can automatically benefit from immunity ratione materiae for the commission of such crimes. On the contrary, given the nature of those crimes and the particular gravity accorded to them under contemporary international law, there is an obligation for them to be taken into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction".*[2]

For the particular situation of torture, there are relevant the judgments in *Pinochet (no. 3)* and *Jones* cases. In the *Pinochet (no. 3)* case,[3] out of the seven Lords, only two (Lord Browne-Wilkinson and Lord Hutton) concluded that torture is not an official act. In the *Jones* case,[4] Lord Hoffmann pointed out that *"in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that the same act was official for the purposes of the definition of torture but not for the purposes of immunity"* and Lord Bingham noted that *"it is, I think, difficult to accept that torture cannot be a governmental or official act, since under art 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity"*.

[1] *Ibidem*, para. 125.

[2] *Idem*, p. 55, para. 126.

[3] *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening)* (*No.3*), House of Lords, 1999.

[4] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, House of Lords, 2006.

## 3. Exceptions to immunity of State officials from foreign criminal jurisdiction

### 3.1 Exceptions to the immunity *ratione personae*

With regard to immunity *ratione personae*, it is almost unanimously accepted in the national judicial practice that there are no exceptions to immunity of State officials from foreign criminal jurisdiction .[1]

The ICJ, after examining State practice, found that *"it has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."*[2]

Also, it noted that *"although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition*,[3] *thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions"*.[4] In its subsequent jurisprudence, the Court referred to its findings in the *Arrest Warrant* judgment.[5]

When it comes to the jurisdiction of the international courts and tribunals, the situation is completely different. Of particular interest at this moment and relevant for the present paper is the *Al Bashir* case.

Considering the particularities of the case – the Darfur situation was referred to the Court by the UN Security Council – the ICC highlighted that *"by*

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[1] Fifth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/701, 2016, p. 46, para. 110.

[2] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 24, para. 58.

[3] For example, the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948), art. 4; the International Convention on the Suppression and the Punishment of the Crime of Apartheid (30 November 1973), art. III; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), art. 5, 16; the International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006), art. 2, 6.

[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 25, para. 59.

[5] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, p. 236-237, para. 170.

*referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole"*[1] and that *"the Security Council implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the Democratic Republic of the Congo and Sudan as regards the execution of the 2009 and 2010 Requests"*.[2]

Issues related to the different regime of the exceptions to immunity when it comes to the exercise of jurisdiction of an international criminal court were addressed by the ICC in its most recent judgment in the *Al Bashir* case.

Thus, the ICC stated that *"the Appeals Chamber fully agrees with Pre-Trial Chamber I's conclusions in the Malawi Decision as well as that of the SCSL's Appeals Chamber in the Taylor case and notes that there is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary (...) such immunity has never been recognized in international law as a bar to the jurisdiction of an international court"*[3] and *"no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction"*.[4]

It also added that *"the Appeals Chamber considers that the absence of a rule of customary international law recognizing Head of State immunity vis-à-vis an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular*

[1] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-trial Chamber I, Decision on the Prosecution`s application for a warrant of arrest against Omar Hassan Ahmad Al Bashir (4 March 2009), p. 16, para. 45.

[2] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-trial Chamber II, Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir`s arrest and surrender to the Court (9 April 2014), p. 14, para. 29.

[3] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* case no. ICC-02/05-01/09 OA2, Appeals Chamber, Judgment in the Jordan referral re Al Bashir appeal (6 May 2019), p. 57, para. 113.

[4] *Idem*, p. 58, para. 114.

*State or States. Rather, international courts act on behalf of the international community as a whole. Accordingly, the principle of par in parem non habet imperium, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court"*.[1]

Even if we agree that the principle of par in *parem non habet imperium* doesn`t apply in relation with an international court, it seems like the functional necessity theory represents a more contemporary rationalization of immunities, considering that the ICJ, in the *Arrest Warrant* case, found that *"in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States"*.[2] With that in mind, it appears like the ICC`s argument fades, because the exercise of the jurisdiction of an international court would also hinder the effective performance of a State official`s functions.

Furthermore, it stated that *"(...) the onus is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and opinio juris*".[3] *"In the view of the Appeals Chamber, this is best achieved by reading article 27(2), both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to a Head of State's arrest and surrender"*.[4] We think that this argument is a reversed one. Considering the functional necessity theory and the fact that, beginning with the Charter of the International Military Tribunal and ending up with the Rome Statute of the International Criminal Court, all statutes of the international criminal courts expressly stipulate that the current or former official capacity of State officials is

[1] *Ibidem*, para. 115.

[2] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 21, para. 53.

[3] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09 OA2, Appeals Chamber, Judgment in the Jordan referral re Al Bashir appeal (6 May 2019), p. 59, para. 116.

[4] *Idem*, p. 61, para. 122.

irrelevant in relation with the exercise of their jurisdiction,[1] we consider that would be up to the ICC to establish sufficient State practice and *opinio juris* to show that in the international customary law there is a rule enshrining exceptions to immunity of State officials from the jurisdiction of an international criminal court, which rule was codified in the Rome Statute. Otherwise, simply accepting the existence of such a customary rule would mean that it could apply to the States, irrespective of them being parties to the Statute or not.

It is worth mentioning that the agenda of the UN General Assembly includes in the section "Promotion of justice and international law" an item entitled *"Request for an advisory opinion from the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials"*.[2] That item was included at the request of Kenya on behalf of the African States Members of the United Nations and is directly related to the internal debate that has developed concerning cooperation with the ICC on charges brought against various African leaders, in particular Presidents Al Bashir of Sudan and Kenyatta of Kenya.

In this regard, it was shown that *"article 119(1) of the Rome Statute requires that any dispute concerning the judicial functions of the ICC is to be settled by a decision of the ICC, and not be referred to any other body. That provision is consistent with the international law principle known as kompetenz-kompetenz: meaning that it is for each court to pronounce on the limits of its own jurisdiction. No international court may purport to circumscribe the jurisdiction of another international court. Ultimately, the fact remains that the ICJ is not bound by ICC jurisprudence; nor is the ICC bound by the jurisprudence of the ICJ. All that international law could expect is that the body of jurisprudence that serves its purposes is a complement of persuasive case law to which each international court must*

[1] Charter of the International Military Tribunal (Annex of the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London, 8 August 1945), art. 7; Charter of the International Military Tribunal for the Far East (Special Proclamation by the Supreme Commander for the Allied-Powers at Tokyo, General Douglas McArthur, 19 January 1946), art. 6; Statute of the International Tribunal for the Former Yugoslavia (Resolution no. 827 of the UN Security Council, 25 May 1993), art. 7(2); Statute of the International Tribunal for Rwanda (Resolution no. 955 of the UN Security Council, 8 November 1994), art. 6(2); Rome Statute of the International Criminal Court (17 July 1998), art. 27.

[2] Agenda of the seventy-third session of the General Assembly (A/73/251), item 89.

*do its best to contribute from its own perspective - generated from each court's exercise of its own specific jurisdiction"*.[1]

Thus, it remains to be seen what the content of the ICJ`s advisory opinion will be (if such an opinion will be given) and how ICC will relate to it.

In relation with immunity of foreign criminal jurisdiction, the Institut de Droit International noted that *"in criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity"*[2] and that *"the Head of Government of a foreign State enjoys the same inviolability, and immunity from jurisdiction recognized, in this Resolution, to the Head of the State"*.[3]

The Special Rapporteur Kolodkin pointed out that *"immunity ratione personae, which is enjoyed by a narrow circle of high-ranking State officials, extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office. This is what is known as absolute immunity."*[4]

*"With a few exceptions, most of the [International Law] Commission members who have expressed an opinion on the matter have stated that exceptions to immunity do not apply to persons enjoying immunity ratione personae (Head of State, Head of Government and Minister for Foreign Affairs) during their term in office"*.[5]

The draft article 7 was proposed by the current Special Rapporteur as it follows:

> *"Crimes in respect of which immunity does not apply*
>
> *1. Immunity shall not apply in relation to the following crimes:*
>
> *(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;*

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[1] https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf (accessed 11 July 2019).

[2] Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Institut de Droit International, Vancouver session, 2001, 1st Part – Serving Heads of State, art. 2.

[3] *Idem*, 3rd Part – Heads of Government, art. 15.

[4] Second report of the Special Rapporteur Román A. Kolodkin on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/631, 2010, p. 426, para. 94(i).

[5] Fifth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/701, 2016, p. 11, para. 19(f).

*(ii) Corruption-related crimes;*

*(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.*

*2. Paragraph 1 shall not apply to persons who enjoy immunity ratione personae during their term of office.*

*3. Paragraphs 1 and 2 are without prejudice to:*

*(i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;*

*(ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State."*[1]

Apparently, the Drafting Committee embraced the same position concerning this type of immunity, because, in the version of the draft article 7 provisionally adopted by it, there is no reference to the immunity *ratione personae*.

### 3.2 Exceptions to the immunity *ratione materiae*

Concerning the international criminal jurisdiction, the mentions made in the previous section remain valid in relation with this type of immunity too.

With respect to the immunity *ratione materiae*, *"the positions adopted by States (...) are less uniform, although it can be concluded that domestic courts, in a certain number of cases, have been accepting the existence of limitations and exceptions to immunity in circumstances relating to the commission of international crimes, crimes of corruption or related crimes, and other crimes of international concern, such as terrorism, sabotage, or causing the destruction of property and the death and injury of persons in relation to such crimes. Furthermore, it should be borne in mind that national courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity"*.[2]

The *"national courts have used various arguments to conclude that immunity ratione materiae is not applicable. For example, while some*

[1] *Idem*, p. 95.

[2] Fifth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/701, 2016, p. 48-49, para. 114.

*courts have held that immunity should not apply owing to the gravity of the acts committed by the State official, in other cases, the denial of immunity has been based on the violation of jus cogens norms or even on the consideration that the acts in question cannot be regarded as acts performed in an official capacity since the commission of such crimes cannot, under any circumstances, be considered an ordinary function of the State or of a State official"*.[1]

On this matter, the Institut de Droit International noted that "*he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources"*.[2] *"Articles 13 and 14 are applicable to former Heads of Government"*.[3]

Also, the members of the Institut held that *"no immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes"*.[4]

The Special Rapporteur Kolodkin concluded that *"the practice of States is also far from being uniform in this respect. The judgment in the Pinochet case* [in which the House of Lords held, considering the ratification of the Convention and its implications, that Mr. Pinochet was not entitled to immunity in respect of charges of torture and conspiracy to commit torture where such conduct was committed after 8 December 1988, the date upon which the 1984 Torture Convention entered into force in the United Kingdom]*, having given an impetus to discussion on this issue, has not led to the establishment of homogeneous court practice. In this respect, it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm. A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the exercise in its territory of the activity which led to the crime, and to the presence in its territory of the foreign official who committed this*

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[1] *Idem*, p. 50, para. 115.

[2] Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Institut de Droit International, Vancouver session, 2001, 2nd Part – Former Heads of State, art. 13(2).

[3] *Idem*, 3rd Part – Heads of Government, art. 16.

[4] Resolution on Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Institut de Droit International, Napoli session, 2009, art. III - Immunity of persons who act on behalf of a State.

*alleged crime stands alone in this regard. There would in such a situation appear to be sufficient grounds for talking of an absence of immunity".*[1]

On the contrary, the current Special Rapporteur identified a series of exceptions to the immunity *ratione materiae* and they are reflected in the draft article 7 proposed by Mrs. Escobar Hernández.[2]

The Drafting Committee embraced only partially the Special Rapporteur`s proposal, provisionally adopting the draft article 7 as it follows:

> *"Crimes under international law in respect of which immunity ratione materiae shall not apply*
>
> *1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:*
>
> *(a) crime of genocide;*
>
> *(b) crimes against humanity;*
>
> *(c) war crimes;*
>
> *(d) crime of apartheid;*
>
> *(e) torture;*
>
> *(f) enforced disappearance.*
>
> *2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles."*[3]

It should be noted that the draft article 7, as it was provisionally adopted, is very different from the Special Rapporteur`s proposal. It addresses only immunity *ratione materiae* and refers only to crimes under international law.

Thus, *"the Drafting Committee decided not to include the crime of corruption in draft article 7, even though it underscored the seriousness of the crime. It was argued that corruption could never constitute an official act or be performed in an official capacity, as it was always committed with the objective of private gain or that corruption was not an international*

[1] Second report of the Special Rapporteur Román A. Kolodkin on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/631, 2010, p. 425, para. 90.

[2] *Supra*, footnote 40.

[3] Report of the Drafting Committee, A/CN.4/L.893, 2017.

*crime, as it did not derive its criminal character from international law; rather, it was a crime under domestic law that often required transnational cooperation for its effective prevention and punishment"* .[1]

Related to the "territorial tort exception", it was pointed out that *"the exception could not apply to acts jure imperii and, to the extent that these acts are subjected to the principle of territorial sovereignty, they do not enjoy immunity ratione materiae"*.[2]

Also, the Drafting Committee noted that, *"if the "without prejudice clauses" were to be included, they ought to apply to the draft articles as a whole, so it decided to consider their inclusion, possibly in a separate draft article, together with other procedural aspects"*.[3]

It should be mentioned that the States` reactions related to this draft article were very strong and diverse.

*"A number of delegations expressed support for draft article 7. While some delegations considered the inapplicability of immunity ratione materiae in cases of serious crimes under international law lex lata, other delegations considered draft article 7 to be progressive development of the law or reflective of a trend towards exceptions and limitations to immunity for serious crimes in current international law. A number of delegations maintained that draft article 7 did not reflect customary international law and disputed the existence of a trend to that effect. The view that draft article 7 was rather a proposal for "new law" beyond codification or progressive development was expressed. The Commission was asked to provide stronger evidence if it wished to assert that draft article 7 represented customary international law or clearly indicate to what extent it fell within the area of progressive development. A disappointment was also expressed with regard to the manner in which draft article 7 had been adopted and at the repercussions for the working methods of the Commission in the future. Several delegations recalled that draft article 7 was provisionally adopted by a recorded vote and a number of delegations urged the Commission to seek to achieve a consensual outcome"*.[4]

*"Some delegations considered the current approach in draft article 7 of identifying certain international crimes to which immunity ratione materiae*

[1] Statement of the Chairperson of the Drafting Committee, Mr. Aniruddha Rajput, 20 July 2017, p. 8.

[2] *Idem*, p. 11.

[3] *Idem*, p. 12.

[4] Report of the International Law Commission on the work of its seventieth session (2018), A/CN.4/724, 2019, p. 14, para. 65.

*shall not apply inadvisable, as such a list would cause unnecessary controversy or because there were no criteria to identify which crimes should be included"*.[1]

Also, *"some delegations noted that if the Commission went beyond codification of existing law, the outcome of its work should be a draft treaty subject to express consent by States. A view was expressed that the acceptable way of regulating immunity of State officials from foreign criminal jurisdiction was through the conclusion of an international treaty"*.[2]

Some really virulent reactions against the draft article 7 can be identified in the specialty literature too.[3]

## 4. Waiver of immunity

We need to mention that, in relation with the international criminal courts, this institution does not apply, considering that their statutes do not recognize such an immunity.

With reference to the foreign criminal jurisdiction, as the ICJ stated, *"the immunities enjoyed by an incumbent or former Minister for Foreign Affairs* [or other State official] *do not represent a bar to criminal prosecution in certain circumstances (...) they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"*.[4]

The Institut de Droit International highlighted that "*the Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implied, provided it is certain. The domestic law of the State concerned determines which organ is competent to effect such a waiver; Such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her*

[1] *Ibidem*, para. 66.

[2] *Idem*, p. 15, para. 78.

[3] For example, Sean D. Murphy, *Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?* in AJIL Unbound, 2018, vol. 112, p. 8; Roger O`Keefe, *An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*. in AJIL Unbound, 2015, vol. 109, p. 168, 170-171.

[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 25, para. 61.

*functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take."*[1]

Also, it noted that *"States should consider waiving immunity where international crimes are allegedly committed by their agents"*.[2] In this regard, it was shown that *"clearly, however, what is envisaged here is not only the State's right, as the beneficiary of immunity, to waive that immunity, but also a recommendation that it do precisely that when a crime is committed"*.[3]

However, *"it should be noted that waiver is designed in all the draft articles* [previously adopted by the ILC on other topics] *as a power of the State of the official, and there is no obligation for said immunity to be waived, regardless of the seriousness of the facts allegedly imputed to the official"*.[4]

As it has been mentioned, *"(...) waiver of immunity by the State of the official invalidates any debate as to the existence or application of immunity and as to the limitations and exceptions thereto. Simply put, this means that the ultimate owner and beneficiary of the immunity waives its right to claim it. Therefore, this is not a true exception to immunity; it is a procedural act that removes any obstacles that might prevent the courts of the forum State from exercising their jurisdiction"*.[5]

The issue of waiver of immunity was addressed by the both Special Rapporteurs, each of them highlighting (in his third report, respectively, hers seventh report) the existing debate on the authority competent to waive immunity and the forms of such a waiver.

The draft article 11 on waiver of immunity proposed by Mrs. Escobar Hernández has the following content:

*"Waiver of immunity*

[1] Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Institut de Droit International, Vancouver session, 2001, 1st Part – Serving Heads of State, art. 7.

[2] Resolution on Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Institut de Droit International, Napoli session, 2009, art. II (3) - Principles.

[3] Third report of the Special Rapporteur Román A. Kolodkin on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/646, 2011, p. 234, footnote 71.

[4] Seventh report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/729, 2019, p. 27, para. 72.

[5] *Idem*, p. 26, para. 70.

*1. A State may waive the immunity of its officials from foreign criminal jurisdiction.*

*2. Waiver shall be express and clear and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains.*

*3. Waiver shall be effectuated preferably through the procedures set out in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. A waiver of immunity may be communicated through the diplomatic channel.*

*4. A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver.*

*5. Where a waiver of immunity is not effectuated directly before the courts of the forum State, the authorities that have received the communication relating to the waiver shall use all means available to them to transmit it to the organs competent to determine the application of immunity.*

*6. Waiver of immunity is irrevocable."*[1]

As, at the moment of writing the present paper, the ILC` seventy-first session is in full swing, it remains to be followed how the debate on this topic will come to an end.

## 5. Conclusion

As the current Special Rapporteur admitted, *"the limitations and exceptions to immunity are undoubtedly (...) a highly politically sensitive issue"*[2] and this is fully reflected in the debates on the topic.

Based on the above analysis, it appears as clear that international crimes could be committed in an official capacity and those acts are covered by the immunity of State officials from foreign criminal jurisdiction.

[1] *Idem*, p. 37, para. 103.

[2] Fifth report of the Special Rapporteur Concepción Escobar Hernández on Immunity of State officials from foreign criminal jurisdiction, A/CN.4/701, 2016, p. 9, para. 15.

At this moment, in the international customary law, there has not been enshrined any exception of substantial nature to the immunity from foreign criminal jurisdiction, neither *ratione personae*, nor *ratione materiae*, not even based on the perpetration of a crime under international law. Nevertheless, the waiver of immunity is accepted as a form of exception of procedural nature to the immunity from foreign criminal jurisdiction, being thus designed as a discretionary right of the State.

It is also clear that there are exceptions of substantial nature to the immunity from international criminal jurisdiction, both *ratione personae* and *ratione materiae,* based on the express provisions of the statutes of the international courts. In principle, those provisions are applicable only in relation with the States parties to the respective statutes.

However, certainly, the debates on the exceptions to immunity of State officials from foreign criminal jurisdiction will go on and it remains to be seen if a common point will be reached.

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# Recenzie de carte / Book Review

## El Derecho del mar y las personas y grupos vulnerables (coord. by Gabriela A. Oanta, Bosch Editor, 2018, 426 pages)

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Gabriela A. Oanta is an associate professor of public international law and international relations at the University of A Coruña (Spain) and currently holds the position of Director of 'Salvador de Madariaga' University Institute of European Studies within the same university. She is also in charge of the coordination of the Jean Monnet Module "European Union's Integrated Maritime Policy".

Both experts and students will find this book very useful, taking into account that very few publications manage to address so easily a broad range of audiences at once.

The evolution of the law of the sea has exposed the situation of vulnerability that human people and groups are going through. This paper tries to echo this evolution and the current issues related to vulnerable people and groups in a maritime environment, presenting these situations from a legal perspective. In this sense, issues such as: human rights approached from a perspective of the Law of the Sea; failed States in the legal order of the seas and oceans; the case of children who may be subject to human trafficking and forced labor; the particular situation of retired seafarers; the situation of people who lend their work in unscrupulous work environments with respect for social rights, as often occurs on vessels with flag of convenience or not complying with international standards; the migratory crisis at sea;

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vulnerable people and groups in developing countries and small island and archipelagic States facing unique and particular challenges highlighted by the evolution of the law of the sea, such as global warming, sea level rise, as well as access and distribution of the benefits derived from the use of marine genetic resources; the situation of the non-autonomous territories in the contemporary law of the sea; and the fishing rights of indigenous people.

The migratory crisis that continues to plague Europe, especially that of the Member States of the European Union (EU) bordering the Mediterranean, has triggered the adoption of a huge amount of legislative measures and this topic has also been carefully analyzed in this paper. In addition, the book approaches the most current and controversial issues related to the law of the sea, issues that have been affecting States worldwide like migration by sea or human trafficking, providing a more complete picture of the legal paradigm that applies in this domain.

When it comes to the structure of the book, we may notice that the 11 chapters are independent one from another, since it is a collective volume encompassing more authors' contributions, which in our view adds a plus to this paper.

Most of the chapters are accompanied by several excerpts taken from relevant case law or statistics, which contribute to persuading the reader that the law of the sea is not just a sum of Conventions and other relevant instruments, but is actually a lively evolving body of law. The wide array of supporting documents and the dynamic way of presenting each topic shows the authors' desire to combine the theoretical with the practical approach.