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Cuvânt înainte / Foreword

It is with great enthusiasm that we introduce the latest issue of the Romanian Journal of International Law, featuring an engaging collection of scholarly contributions that present crucial debates and challenges in international law. The articles selected for this edition traverse diverse and pressing themes, providing rigorous analyses and insightful perspectives on various dimensions of international legal practice.

The issue begins with a study on maritime dispute resolution by examining the UNCLOS mechanism. This article evaluates the structure and practical efficacy of UNCLOS dispute settlement procedures, noting states' tendencies towards informal negotiation and the growing phenomenon of "forum shopping". Continuing, we feature an commentary on UN General Assembly Resolution 79/133, addressing the critical issue of illicit trafficking in cultural property. The article assesses the resolution's reaffirmation of fundamental principles, exploring its potential impact on the restitution of unlawfully removed cultural items, and questioning whether non-binding instruments can achieve meaningful practical effects.

The principle of distinction in international humanitarian law is then explored through the lens of natural disasters in armed conflict. This piece significantly contributes to ongoing scholarly debates by examining whether the exploitation of disaster effects constitutes an inherent violation of IHL or demands case-specific scrutiny. Further, this issue addresses the intricate matter of functional immunity concerning international crimes. By revisiting foundational legal principles and landmark judicial decisions, the study convincingly argues that immunity *ratione materiae* does not shield state officials from accountability for international crimes. The journal also engages with the ongoing debate over government recognition, analyzing the various criteria ranging from constitutionality and effective control to democratic legitimacy and international acceptance. Concluding the issue is a timely article on the legal implications of sea-level rise and the freezing of maritime baselines, discussing how the shifting geography of coastlines challenges established norms of the law of the sea.

We trust that readers will find this collection both enriching and thought-provoking, further enhancing scholarly discourse and informing practice in international law.

Professor Dr. Bogdan Aurescu

Judge of the International Court of Justice

Maritime Dispute Settlement Practice
UNCLOS Mechanism Explained

Ioana-Roxana OLTEAN[*]

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Abstract: *Maritime dispute resolution has always proven to be a volatile field of international law. This article will examine the mechanism of solving disputes as set up by UNCLOS and will look at the tendencies or particularities resulting from the cases of states involved in such matters. Despite its initial promise, the use of these mechanisms has been limited, with many states opting for informal negotiations or avoiding adjudication altogether. The article explores the structural aspects of UNCLOS's dispute resolution system, highlighting challenges such as "forum shopping" and the reluctance of powerful states to comply with adverse rulings. It concludes by discussing the future viability of the UNCLOS dispute resolution system, raising concerns over the increasing resistance of major powers to international legal processes, and the potential long-term impact on global maritime governance.*

Keywords: *Maritime Disputes, UNCLOS, Forum Shopping, Case law.*

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1. Introduction. Settlement of Maritime Disputes Before UNCLOS came into force

Before the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[1] entered into force in 1994, international maritime disputes were primarily resolved through customary international law, bilateral agreements, and adjudication by international courts and tribunals. The absence of a comprehensive legal framework led to uncertainty and inconsistencies in how disputes were handled, often resulting in prolonged conflicts and, in some cases, military confrontations. These types of situations led states to rely on different mechanisms for resolving their conflicts.

One of the primary ways maritime disputes were settled was through diplomatic negotiations.[2] States frequently engaged in direct bilateral or multilateral talks to resolve territorial and resource-related conflicts at sea. These negotiations sometimes resulted in treaties that established maritime boundaries, settled fishing rights, and gave access to strategic waterways. However, in cases where negotiations failed, disputes often remained unresolved for decades, increasing tensions between states. The "cold war" status quo that characterized these types of relationships had a lasting impact on economic and political development, furthering the divide between nations.

Another mechanism used before UNCLOS was arbitration and adjudication through international legal bodies, particularly the International Court of Justice (ICJ). The ICJ played a significant role in maritime dispute resolution by issuing rulings based on principles of customary international law and earlier legal agreements[3], such as the 1958 Geneva Conventions on the Law of the Sea. However, states were not obligated to submit their disputes to the ICJ, and many major powers avoided legal adjudication to maintain flexibility in their maritime claims[4]. Additionally, the Permanent Court of Arbitration (PCA) occasionally handled maritime disputes through arbitration

[1] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[2] Mwelwa Musambachime, International Journal on World Peace, vol. 18, no. 2, 2001, pp. 76–81. JSTOR, http://www.jstor.org/stable/20753308. Accessed 1 Mar. 2025.

[3] Malcolm Evans and Nicholas Ioannides, The International Court of Justice and the Law of the Sea Dispute Settlement System (July 19, 2023). Achilles Skordas and Lisa Mardikian (eds), Research Handbook on the International Court of Justice (Edward Elgar, Forthcoming), Available at SSRN: https://ssrn.com/abstract=4514860. Accessed 1 Mar. 2025.

[4] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, Drept International Public, Scurta culegere de jurisprudenta pentru seminar, Hamangiu, Bucharest, 2018, pp. 104-128

agreements between states, providing a less formal but legally binding avenue for settlement[5].

In the absence of a binding global legal framework, states also relied on power dynamics and geopolitical considerations to assert their maritime claims. Some disputes have been settled through demonstrations of naval power, coercion, or even armed conflict. A notable example includes the "Cod Wars" between the United Kingdom and Iceland in the 1950s and 1970s[6], where both nations engaged in naval confrontations over fishing rights. Such conflicts underscored the need for a more structured and enforceable legal system to prevent maritime disputes from escalating into hostilities.

The establishment of UNCLOS marked a turning point by providing a universal legal framework with compulsory dispute resolution mechanisms. Prior to its adoption, maritime law lacked uniformity, and while diplomatic negotiations, arbitration, and adjudication by the ICJ provided some avenues for settlement, they were often limited by states' unwillingness to submit to jurisdiction. UNCLOS aimed to address these gaps by offering clear legal rules and binding mechanisms for dispute resolution, reducing reliance on unilateral actions and military confrontations in maritime conflicts. However, the initial enthusiasm that characterized the international community when the UNCLOS emerged along with its dispute resolution mechanisms, has since diminished, the practice of states being to sway away from the said structure.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) serves as the foundational legal framework governing maritime affairs, establishing rules for oceanic navigation, resource management, and territorial claims. One of its most significant contributions to international law was the introduction of a compulsory dispute resolution system—a groundbreaking step at the time—intended to provide structured mechanisms for resolving conflicts among states. Under this system, when a country joins the Convention, it must select from the available forums for resolving disputes[7]: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), arbitration under Annex VII, or specialized

[5] Garth Schofield, "The Permanent Court of Arbitration: From 1899 to the Present." *The Cambridge Companion to International Arbitration*. Ed. C. L. Lim. Cambridge: Cambridge University Press, 2021. 349–388. Print. Cambridge Companions to Law.

[6] Sverrir Steinsson, "Do Liberal Ties Pacify? A Study of the Cod Wars." *Cooperation and Conflict*, vol. 53, no. 3, 2018, pp. 339–55.

[7] Emilia Justyna Powell and Sara McLaughlin Mitchell. "Forum Shopping for the Best Adjudicator: Dispute Settlement in the United Nations Convention on the Law of the Sea." *The Journal of Territorial and Maritime Studies*, vol. 9, no. 1, 2022, pp. 7–33.

tribunals handling scientific and environmental matters under Annex VIII. By creating these options, UNCLOS aimed to reduce the likelihood of unilateral actions or escalating conflicts over maritime issues.

Despite these ambitions, the dispute resolution system has seen relatively little used since the Convention entered into force in 1994. Many states have opted for informal diplomatic negotiations to resolve maritime disagreements, while others have simply left disputes unaddressed rather than submitting them to legal adjudication. Very few member states have made an official selection of a preferred forum, reflecting a broader hesitation to engage with the system. However, among the cases that have been adjudicated, emerging trends suggest that states strategically select forums based on legal, procedural, and geopolitical considerations—a practice commonly referred to as "forum shopping."[8]

2. UNCLOS Legal Framework

The starting point of dispute resolution under the UNCLOS is Part XV of the Convention[9]. It establishes the legal framework for resolving disputes between states concerning the interpretation and application of the Convention. Recognizing the potential for conflict over maritime boundaries, resource rights, and navigational freedoms, Part XV provides a compulsory and binding dispute resolution system, making it one of the most significant advancements in international maritime law[10].

Various states, particularly those with competing maritime interests, recognized that without such a mechanism, disputes could escalate into coercion, intimidation, or even armed conflict. As a result, the inclusion of a formal dispute resolution system became a key element in securing widespread agreement on the Convention.

Western industrialized nations were particularly insistent on the need for a structured system to resolve disputes.[11] These states were wary of the

[8] Markus Petsche, What's Wrong with Forum Shopping - An Attempt to Identify and Assess the Real Issues of a Controversial Practice, 45 INT'L L. 1005 (2011).

[9] Carmen-Gina Achimescu (Puscasu), Ion Galea,Drept international public, Hamangiu,Bucharest, 2023, pp 151-154

[10] Andreas Østhagen, Maritime boundary disputes: What are they and why do they matter?, Marine Policy, Volume 120, 2020.

[11] Wolfgang Friedmann, “United States Policy and the Crisis of International Law: Some Reflections on the State of International Law in ‘International Co-Operation Year.’” *The American Journal of International Law*, vol. 59, no. 4, 1965, pp. 857–71.

significant departures from customary international maritime law introduced by UNCLOS, particularly the expansion of coastal state jurisdiction over vast maritime areas such as the Exclusive Economic Zone and continental shelf. Given the potential for conflicting interpretations, these countries believed that a binding adjudicative process was essential to maintaining legal certainty and ensuring that their maritime rights and freedoms were protected under the new legal framework. The dispute resolution system ultimately became a critical factor in their willingness to accept the treaty's provisions.

On the other hand, smaller and less powerful nations saw the binding dispute resolution mechanism as a vital tool to assert their rights against larger and more influential states. Many of these nations lacked the military or economic leverage to enforce their claims in maritime disputes, making legal adjudication a crucial safeguard against domination by major powers. By ensuring that all states, regardless of size, had access to an impartial system for settling disputes, the mechanism has been perceived as a means of leveling the playing field in global maritime affairs.

The inclusion of this system was regarded as a necessary compromise to balance the competing interests at stake. While the Convention granted coastal states expanded jurisdiction over maritime zones, it also imposed legal obligations and oversight mechanisms to prevent unilateral assertions of power. By subjecting all parties to compulsory and binding dispute settlement procedures, the system was designed to reinforce legal stability and prevent the arbitrary exercise of maritime claims.

At the time of its adoption, the dispute resolution framework was considered one of the most innovative and ambitious aspects of UNCLOS. Legal scholars and policymakers expressed optimism that it would enhance global maritime governance by reducing reliance on force and fostering adherence to legal principles[12]. Though challenges in enforcement and participation have emerged over time, the system remains a cornerstone of the Convention, reflecting the international community's commitment to the rule of law in maritime affairs.

From a structural standpoint, the system is divided into three sections, each outlining different aspects of dispute settlement. It also establishes a three-tier method states can follow when faced with a disagreement. Firstly, states should attempt to resolve disputes through peaceful means, such as

[12] Jolle Demmers, Good governance in the era of global neoliberalism: Conflict and depolitisation in Latin America, Eastern Europe, Asia and Africa, Routledge Studies in the Modern World Economy, ISBN 978-0-203-47869-1, Routledge, London.

negotiation, mediation, or conciliation. If diplomatic efforts fail, parties may mutually agree on another method of resolution outside of the formal mechanisms provided by UNCLOS. If no resolution is reached through negotiations, a state may unilaterally initiate proceedings under UNCLOS's compulsory dispute resolution mechanism. States must choose from one of four adjudicative bodies for resolving disputes:. Should a state not select a preferred forum then the default mechanism available under Annex VII comes into play.

Part XV provides for exceptions from the compulsory settlement, such as disputes related to military activities, law enforcement actions at sea, and certain fisheries or marine scientific research matters. It should also be noted that coastal states enjoy a special status under UNCLOS, the convention providing the latter with special rights and exemptions, regarding disputes concerning their exclusive economic zone and continental shelf, whilst limiting the jurisdiction of international judicial bodies in these matters.

3. Practical effects: Forum selection

Part XV establishes a clear and predictable process for states to resolve disputes, reducing the risk of conflict and unilateral actions. By providing a binding mechanism, it ensures that disputes are settled based on legal principles rather than power dynamics, while still respecting state sovereignty by allowing parties to attempt diplomatic solutions first. The inclusion of exceptions and limitations also acknowledges the sensitive nature of certain maritime disputes.

This part of UNCLOS played a crucial role in shaping international maritime law, influencing court rulings, diplomatic negotiations, and regional dispute resolution frameworks. Its binding nature discourages military confrontations, helping to channel maritime tensions into legal and diplomatic processes. However, its long-term effectiveness, that depends on continued state participation and compliance, has seen oscillations.

It has been noted that states are reserved in engaging in formal adjudication. Powerful states (such as China, the United States, and Russia) have either rejected the jurisdiction of UNCLOS dispute resolution mechanisms or refused to comply with adverse rulings[13]. This raises concerns about the

[13] Nong Hong, "The South China Sea Arbitral Tribunal Award: Political and Legal Implications for China." *Contemporary Southeast Asia*, vol. 38, no. 3, 2016, pp. 356–61.

enforceability of UNCLOS rulings and the potential for states to ignore or circumvent binding decisions.

The actual practice of forum selection has diverged significantly from their expectations. Despite this requirement, approximately a quarter of all UNCLOS signatories have formally declared their forum preference[14]. The overwhelming majority of states have either declined to make a selection, or remained strategically ambiguous, leaving the default dispute resolution process to come into play if needed.

In many instances, disputes are ultimately adjudicated in forums different from those initially designated by states. This is because states involved in a maritime dispute sometimes choose to bypass their stated preference and refer the matter to a different forum that both parties find more suitable.[15] In a case[16], although neither country had explicitly chosen Annex VII arbitration, both states agreed to settle the dispute using that mechanism. The tribunal ultimately resolved the issue by drawing an equitable maritime boundary, which both states accepted.

In another case[17], China refused to participate in the proceedings, and because the two parties had not pre-selected a forum under Article 287, the case was compelled into Annex VII arbitration. The tribunal ruled against China's claims, though China refused to recognize the decision.

Additionally, some states strategically select a venue where they believe they have the best chance of a favorable ruling. In a case[18], Somalia brought its dispute against Kenya to the International Court of Justice instead of opting for UNCLOS mechanisms. Kenya, however, challenged the ICJ's jurisdiction and later withdrew from the proceedings, highlighting how states may attempt to avoid binding rulings by contesting jurisdiction.

The limited use of formal forum declarations and the frequent reliance on Annex VII arbitration suggests that states prioritize flexibility over procedural

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[14] Christopher Ward, "Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.)." *American Journal of International Law* 118.2 (2024): 324–331.

[15] David Anderson. "Bay of Bengal Maritime Boundary (Bangladesh v. India)." *The American Journal of International Law*, vol. 109, no. 1, 2015, pp. 146–54.

[16] Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Bangladesh v India, Final Award, ICGJ 479 (PCA 2014), 7th July 2014, Permanent Court of Arbitration [PCA]

[17] South China Sea Arbitration, Philippines v China, Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration [PCA].

[18] Maritime Delimitation in the Indian Ocean, Somalia v Kenya, Preliminary Measures, ICGJ 508 (ICJ 2017), 2nd February 2017, United Nations [UN]; International Court of Justice [ICJ].

certainty. While the UNCLOS framers envisioned a more structured selection process, states often prefer to maintain diplomatic maneuverability, reserving the ability to negotiate or contest jurisdiction based on evolving political and legal considerations.

In sum, while UNCLOS provided a clear framework for forum selection, state practice has introduced considerable variation in how disputes are actually resolved. This divergence underscores the complexity of international maritime disputes and the challenges in enforcing a uniform approach to adjudication under UNCLOS.

4. The Future of Binding Dispute Resolution under UNCLOS

The outcomes of *Arctic Sunrise*[19] and *The South China Sea Arbitration* raise concerns about the long-term viability of Part XV. If major powers such as China, Russia, and the United States continue to reject the legitimacy of the dispute resolution system when rulings go against them, other states may be less inclined to submit to adjudication when faced with unfavorable outcomes. These cases appear to reinforce each other, demonstrating how states can effectively evade international tribunal decisions by invoking Article 298 declarations[20]. Given that Russia and China have faced no significant consequences for their refusals to comply, it will likely become increasingly difficult for ITLOS and the PCA to ensure adherence to the system in future cases.

Recent geopolitical developments further illustrate this challenge. Russia has withdrawn from the Rome Statute, rejecting the jurisdiction of the International Criminal Court[21], while China recently seized a U.S. Navy research drone operating outside its *Nine-Dash Line* claim in the South China Sea[22]. These actions signal a broader rejection of international legal mechanisms by both countries and a preference for unilateral approaches to disputes rather than engaging in peaceful resolution through established institutions. Considering their prior resistance to UNCLOS proceedings, such

[19] The Arctic Sunrise Case, Netherlands v Russian Federation, Provisional Measures, ITLOS Case No 22, ICGJ 455 (ITLOS 2013), 22nd November 2013, International Tribunal for the Law of the Sea [ITLOS]

[20] Douglas Gates, "International Law Adrift: Forum Shopping, Forum Rejection, and the Future of Maritime Dispute Resolution," Chicago Journal of International Law: Vol. 18: No. 1, Article 8.

[21] Natasha Kuhrt and Rachel Kerr. “The International Criminal Court, Preliminary Examinations, and the Security Council: Kill or Cure?” Journal of Global Faultlines, vol. 8, no. 2, 2021, pp. 172–85.

[22] “United States Confronts China over Seizure of Unmanned Drone in the South China Sea.” *American Journal of International Law* 111, no. 2 (2017): 513–17.

behavior appears to reflect a consistent pattern of dismissing international legal authority.

A shift in the U.S. stance on UNCLOS could serve as a strong counterbalance to the positions of Russia and China.[23] Ratifying the convention would bolster the legitimacy of U.S. efforts to enforce maritime law and strengthen its ability to hold other nations accountable. However, the likelihood of such a shift remains low.

5. Conclusion

This analysis has demonstrated that UNCLOS Part XV has played a significant role in resolving maritime disputes through its structured approach to forum selection. Over the past two decades, it has contributed to the advancement of international law, particularly in the realms of maritime law enforcement and territorial boundaries. While some procedural mechanisms have not functioned as originally envisioned, Part XV continues to offer peaceful means for dispute resolution.

Recent years have introduced a serious challenge to the system: the refusal of major global powers to participate in dispute resolution processes. As Russia and China have adopted a stance similar to that of the United States regarding international courts, they have weakened the effectiveness of the UNCLOS dispute settlement framework and deprived smaller states of meaningful legal recourse. While Part XV may continue to function in certain capacities for the time being, the next high-profile dispute could mark a turning point for the system's credibility and longevity.

[23] Nengye Liu and Shirley Scott. "China in the UNCLOS and BBNJ Negotiations, Yesterday Once More?" *Leiden Journal of International Law*, 2024, 1–20.

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UN General Assembly Resolution 79/133 (12 December 2024) – A Step Forward towards the Protection of Cultural Property from Illicit Trafficking?

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Abstract: *On 6 December 2024, the General Assembly of the United Nations adopted, without a vote, Resolution 79/133, dealing with the pressing issues of return and restitution of cultural property items unlawfully removed from their countries of origin. This Resolution, though not legally binding, stands to prove the reaffirmation of fundamental principles and rules in this field by the international community of States, showing, in our view, a firm commitment to these values as already enshrined in international treaties and conventions. This article seeks to briefly comment the Resolution and its most important provisions, as well as whether the legal effects thereof have any actual practical efficiency.*

Key-words: *Cultural Property, Illegal Traffic, Return and Restitution of Cultural Property, General Assembly, UNESCO.*

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1. Introduction

The issue of the return and restitution of cultural heritage items unlawfully removed from their countries of origin has long presented challenges for both Public and Private International Law alike. Starting with the adoption by UNESCO of the First Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,[1] passing through the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[2] and eventually unifying the lingering private law aspects by UNIDROIT under the 1995 Convention on Stolen or Illegally Exported Cultural Objects,[3] these issues have been tackled before both international and domestic courts, tribunals and commissions, which have endeavored to reconcile diverging aspects held by the various private legal systems around the world, such as the statute of limitations for such claims, the doctrine of the good faith holder or the acquisitive prescription of items. These matters have also been, particularly in recent years, a very important part of the international judicial cooperation in criminal matters, with police and law enforcement agencies around the world coming together to fight against and prevent traffic in cultural heritage.

Although entire treatises can be (and have been) written on these matters, the purpose of the present article is to discuss a very recent development in the field: in December 2024, the UN General Assembly (hereinafter 'UNGA') passed Resolution 79/133, entitled 'Return or restitution of cultural property to the countries of origin',[4] bringing back into the light the various aspects covered by these issues as well as the multiple branches and organs directly involved, underlining and re-encouraging international efforts to this end.

This article provides a short analysis of the Resolution, its historical and legal characteristics and its implications for the international protection of cultural heritage. As will be shown, the Resolution explores (although briefly and in a non-legally binding manner) several legal principles including State obligations under

[1] First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (done at The Hague, 14 May 1954, entered into force 7 August 1956), 249 UNTS 358.

[2] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted at Paris, 14 November 1970, entered into force 24 April 1972), 823 UNTS 231.

[3] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (done at Rome, 24 June 1995, entered into force 1 July 1998), 2421 UNTS 457.

[4] UN General Assembly Resolution 79/133 (6 December 2024), A/RES/79/133.

International Law, jurisdictional and immunity challenges and various enforcement mechanisms.

2. Procedural and Legal Background

The Resolution started as a draft co-sponsored by 25 States, among which Afghanistan, Bosnia and Herzegovina, China, Egypt, Germany, Greece (which had the original initiative of the project), Italy, Serbia and Yemen.[5] Most notably, the resolution was adopted without a vote and without reference to a Main Committee, signifying in our view the significance given unanimously by all UN Member States to these issues and their willingness to enhance international cooperation in order to tackle the most recent challenges in the field.

A very interesting aspect is that the Resolution recalls in its very first preambulary paragraphs the main international legal framework adopted throughout the decades with respect to the protection of cultural property and cultural heritage, including the above-mentioned 1970 Convention on Illicit Traffic, the 1995 UNIDROIT Convention, but also the 1972 World Heritage Convention,[6] the 2001 Underwater Heritage Convention[7] and the 2003 Intangible Heritage Convention.[8] This works, in our opinion, as more than just an enumeration of the relevant legal instruments, by reaffirming the commitments undertaken by the international community under these key treaties. By reference to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict as well as a number of (binding) Security Council Resolutions, most notably Resolution 2347 of 2017[9] (the first one to directly focus on the protection of cultural heritage from armed conflict), the Resolution also aligns with the relevant International Humanitarian Law rules seeking to protect cultural property from the threats of armed conflicts, dangers which include misappropriation

[5] UN General Assembly, 79th session, Agenda item 10, 'Return or restitution of cultural property to the countries of origin' (Draft resolution, 19 November 2024), A/79/L.16.

[6] Convention Concerning the Protection of the World Cultural and Natural Heritage (done at Paris, 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151.

[7] Convention on the Protection of the Underwater Cultural Heritage (done at Paris, 2 November 2001, entered into force 2 January 2009), 2562 UNTS 45694.

[8] Convention for the Safeguarding of the Intangible Cultural Heritage (done at Paris, 17 October 2003, entered into force 20 April 2006), 2368 UNTS 3.

[9] UN Security Council Resolution 2347 (24 March 2017), S/RES/2347 (2017).

and theft of cultural items, often followed by the illicit import, export and traffic thereof.

By referencing these international conventions, the General Assembly Resolution seeks to strengthen the existing normative framework for the restitution of cultural items, urging States to develop efficient and effective legal mechanisms in order to facilitate such returns. However, given the non-legally binding character of the Resolution and the fact that International Law is heavily reliant on the cooperation and the good will of States, the actual and proper enforcement of these legal instruments and the provisions thereof naturally depends upon domestic legislation and international legal cooperation[10].

3. Key Principles Provided by the Resolution

We point out that General Assembly Resolution 79/133 outlines specific measures to enhance the return and restitution of cultural property which, albeit adopted under a non-binding form, still represent in our view valuable guidelines for the actions of States, international agencies and NGOs in this domain.

The main key principles we have identified shall be set out below in turn:

3.1. Strengthening and enhancing international cooperation

The Resolution calls upon both States and international structures such as UNESCO, INTERPOL, ICOM (the International Council of Museums), the UN Office on Drugs and Crime, as well as other relevant agencies, in order to collaborate in fighting against the illicit trafficking of cultural items and facilitating restitution efforts of such items, including (and this, in our view, is a good idea, but one which should be further explored and developed) through international judicial cooperation in criminal matters.[11]

UNESCO is also commended for its training and awareness programmes for museum managers and experts, legal professionals and law enforcement authorities all around the world.[12]

Very interestingly in our opinion, the Resolution also makes direct and express reference to the UN Convention against Transnational Organised

[10] Carmen-Gina Achimescu (Puscasu), Ion Galea,Drept international public, Hamangiu,Bucharest, 2023, pp 6-8

[11] UNGA Resolution 79/133, paras 1, 5, 16, 22, 38.

[12] UNGA Resolution 79/133, para 3.

Crime,[13] urging States to 'fully' make use of its provisions in preventing, prohibiting and fighting against cultural property traffic.[14] This, we believe, sets the ground for ensuring the Convention's further application in this field, though of course this can only be achieved through State practice and law enforcement procedures.

States are also asked to strengthen and – though not expressly written as such but, we believe, this can be inferred from the *corpus* of the Resolution – even synchronise and perhaps standardise – their criminal justice policies and strategies in the field, which naturally comes by means of cooperation.[15]

Not least of all and very pragmatic in our view, the Resolution underlines that one of the main ways cooperation is achieved is represented by the conclusion of bilateral treaties and the development of mutual legal assistance, as well as the application of the *aut dedere aut judicare* principle[16] which, should be noted, fully finds its place in this field.

3.2. Bilateral negotiations and mediation

Going one step beyond simply underlining the value of negotiations for the promotion of international cooperation, the Resolution also encourages States to further engage in bilateral negotiations (heavily promoted by UNESCO and the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation) in order to make arrangements for the voluntary return and restitution of removed or misappropriated cultural objects.[17]

The Resolution also makes appeal to States to consider the rules of procedure on mediation and conciliation, adopted by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation[18] as well-recognized and well-established alternative dispute resolution mechanisms under International

[13] United Nations Convention against Transnational Organised Crime (done at New York, 15 November 2000, entered into force 29 September 2003), 2225 UNTS 209.

[14] UNGA Resolution 79/133, para 22.

[15] UNGA Resolution 79/133, para 27.

[16] UNGA Resolution 79/133, para 44.

[17] UNGA Resolution 79/133, para 2.

[18] UNGA, Director-General of the United Nations Educational, Scientific and Cultural Organization on the action taken by the organization on the return or restitution of cultural property to the countries of origin (1 August 2012), UN Doc A/67/219, Annex I ('Recommendations adopted by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its sixteenth session'), 21-23 September 2010, Recommendation No. 4.

Law.[19] The General Assembly thus invites States to settle any disputes concerning the return of restitution of cultural property by using these means rather than the more traditional litigation before international courts and tribunals. History has shown that more recent non-judiciary, alternative mechanisms have been (surprisingly) successful in settling such issues. This was the case, for example, with the UN Compensation Commission created under the Security Council in order to process and settle claims and compensations for the losses incurred during the Iraqi invasion of Kuwait (and which included aspects relevant for the return of stolen cultural property[20]), as well as with the Eritrea-Ethiopia Claims Commission, established as an independent arbitration body intended to settle all claims and damages deriving from the armed conflict taking place between the two States between 1998 and 2000, which once again covered very relevant aspects for the protection of heritage.[21]

From our research, these alternative mechanisms of conciliation and mediation have not yet been used by States in the field of cultural property restitution and reparation, but of course the appeal made by the General Assembly is valid in our opinion and may indeed lead to a development of easier, faster and more efficient dispute resolution.

3.3. Capacity building and training

As recently as June 2023, UNESCO reported that the domain of ensuing the proper restitution and return of cultural property is well supported through the good practices of providing either technical support or professional training to the individuals, bodies and organisations directly involved in this field.[22] As also discussed below, such training and programmes may very well pave the way for more efficient cultural dialogue and bilateral agreements between States, with recent examples of relevant practice including the repatriation by the British of over 170 cultural items belonging to the Aboriginal

[19] UNGA Resolution 79/133, para 33.

[20] See, for example, UN Compensation Commission, 'Report and Recommendations Made by the Panel of Commissioners concerning Part Two of the First Installment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)', UN Doc S/AC.26/1998/3 (12 March 1998).

[21] See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia – Central Front – Eritrea's Claims 2, 4, 6, 7, 8 and 22* (28 April 2004).

[22] UNESCO, UNESCO Round Table – 'New forms of agreement and cooperation in the field of return and restitution of cultural property' (27 June 2023) – Full synthetic report <https://unesdoc.unesco.org/ark:/48223/pf0000388845> accessed 8 March 2025.

Anindilyakwa people of Northern Australia, or the restitution by the French of more than two dozens of items to the people of Benin.[23]

In fact, the Resolution appreciates the work undertaken by UNESCO through an ambitious project carried out between 2021 and 2024 among experts in Europe, Africa, Asia and Latin America for the specific purpose of preventing and stopping illicit trafficking in cultural items, by supporting training programmes and emphasising the need to align domestic laws with the States' international obligations under treaties and customary law.[24] UNESCO has also launched several specialised partnerships with various cultural institutions around the world for implementing and disseminating higher awareness among the general public,[25] which should also contribute to properly and timely identifying and reporting any unlawful or criminal activity directed against cultural items.

3.4. Digital inventories and provenance research

The Resolution appreciates the work undertaken by UNESCO and by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in having prepared inventories of cultural items and implementing various modern standards of cataloguing, describing and recording,[26] such as the 'Object-ID' international standard facilitating the identification of cultural property in case of theft, used by INTERPOL[27] or by the International Council of Museums (ICOM).[28]

States Members are of course invited and encouraged to draw up inventories of their cultural objects (even in digital form), in order to prevent the theft of items and to facilitate the return thereof in case of misappropriation.[29] All these inventories – created by States on their own initiatives, as well as to

[23] UNESCO, 'UNESCO's action to promote new forms of agreement and cooperation for the return and restitution of cultural property' (22 March 2024) <www.unesco.org/en/fight-illicit-trafficking/agreement-and-cooperation-return-and-restitution> accessed 8 March 2025.

[24] UNGA Resolution 79/133, para 3.

[25] UNGA Resolution 79/133, para 38.

[26] UNGA Resolution 79/133, paras 2 and 31.

[27] INTERPOL, Cultural heritage crime – Object ID <www.interpol.int/Crimes/Cultural-heritage-crime/Object-ID> accessed 8 March 2025

[28] ICOM, Object ID <https://icom.museum/en/resources/standards-guidelines/objectid/> accessed 8 March 2025.

[29] UNGA Resolution 79/133, para 28.

register items found during excavations or which are subject to illegal traffic – should be shared and should contribute to worldwide databases.[30]

We firmly believe that the idea of creating and developing national and international databases to document cultural items is an already extending procedure, which is more than welcome in establishing and pointing out the clear provenance of such items, addressing evidentiary challenges in legal proceedings and helping improve cooperation between international law enforcement agencies.

4. Issues of State Responsibility and State Jurisdictional Immunities

The legal framework surrounding the restitution of cultural property raises several complex questions concerning State sovereignty, jurisdiction and responsibility. These are briefly tackled by the Resolution and the main ideas are described here in turn:

4.1. State sovereign immunity vs. restitution claims

First, the Resolution affirms the importance of the sovereign jurisdictional immunities of States in that some States may invoke sovereign immunity to resist claims for restitution of cultural items, arguing that objects held in State collections and museums may be beyond the reach of foreign legal claims for the return thereof to their countries of origin.

As such, the Resolution takes note of the UN Convention on Jurisdictional Immunities of States and Their Property,[31] which may apply to cultural heritage since items of cultural property being part of a State's cultural heritage and not intended to be sold, as well as items placed on an exhibition of a cultural character and not intended to be sold, are given as specific examples of property of the State against which post-judgment measures of constraint are prohibited unless the State agrees to this or specifically earmarks the property for satisfying a specific claim.[32] The Convention is not yet in force (having only 24 of the required 30 States Parties as of March 2025), but the Resolution invites States to consider becoming Parties thereto nevertheless.[33]

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[30] UNGA Resolution 79/133, para 29.

[31] United Nations Convention on Jurisdictional Immunities of States and Their Property (done at New York, 2 December 2004, not yet in force), UNGA Resolution 59/38, Annex.

[32] UN Convention on Jurisdictional Immunities of States and Their Property, Art 21(1)(d) and Art 21(1)(e).

[33] UNGA Resolution 79/133, para 14.

However, even if the Convention is not yet in force, State practice, national and international jurisprudence and doctrine all seem to point out that cultural heritage is subject to a customary rule of 'qualified' immunity from measures of constraint, in the sense that allegations of theft, misappropriation or illegal removal from the country of origin may allow such measures be taken even against foreign sovereign States, as the restitution of seized or stolen cultural items should prevail.[34]

4.2. State responsibility and due diligence

The Resolution reaffirms the international obligations of States to prevent and prohibit illicit trafficking in cultural items, to ensure the return of stolen cultural property and, of course, not to engage in such acts themselves. Under International Law, failure to take proactive measures in this sense may constitute a breach of state responsibility, potentially triggering legal consequences. All this should of course be analysed by reference to the Articles on State Responsibility for Internationally Wrongful Acts[35] and established custom.

First, States have to comply with their duties assumed under the main international treaties in the field – the 1954 Hague Convention, the 1970 Illicit Traffic Convention, the 1995 UNIDROIT Convention etc. States therefore have the obligation to act to the utmost of their abilities in order to put an end to, prohibit and prevent acts of illicit trafficking, import or export of stolen cultural property.

Secondly, reading in light of the International Court of Justice reasoning in the *Bosnian Genocide* case,[36] States have an additional obligation not to commit such acts *themselves*[37], as it of course may be illogical for them to have to prohibit such acts from being committed by others, while being allowed to do so themselves. Naturally, breaches of these obligations may entail the international responsibility of States before international courts and tribunals.

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[34] See, for example, Riccardo Pavoni, 'Cultural Heritage and State Immunity' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 551-580.

[35] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', Annex to General Assembly Resolution 56/83 (12 December 2001), UN Doc A/RES/56/83, as corrected by UN Doc A/56/49(Vol. I)/Corr.4.

[36] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Serbia and Montenegro), Judgment, ICJ Reports 2007,* p. 43 [166].

[37] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Hamangiu, Bucharest, 2018, pp 168-174

5. Conclusion

By reaffirming the international commitments under the existing framework of the UNESCO conventions and by promoting enhanced cooperation in this field, General Assembly Resolution 79/133 strengthens legal mechanisms for the restitution of cultural items unlawfully removed from their countries of origin.

The Resolution itself is not legally binding, but it carries significant moral and political weight and value, especially – in our view – since it was adopted by consensus and without a vote, being eventually able to influence State practice, judicial decisions and law enforcement, as well as even leading to the development and evolution of Customary International Law.

However, as it happens with this category of *soft law* international acts, it is eventually up to the States, to their good faith, good cooperation and good policies, to actually adopt, implement and enforce these recommendations and suggestions made by the General Assembly.

Several obstacles exist, such as a lack of uniformity between the domestic laws of the various States (which would necessitate, we believe, stronger enforcement from the international level), the still-existing reluctance of certain States and certain State-owned institutions in ensuring the full restitution of misappropriated cultural items, the lack of funds, financing and/or institutional capacity for the proper training and instruction of the relevant personnel in enhancing the fight against illicit trafficking and, an ever-present menace, armed conflicts, which threaten to give birth to further violations and breaches of International Law.

In our view, Resolution 79/133 clearly represents a step forward in the restitution and return of cultural property at least from a political point of view, if not also from a legal one. Indeed, it lacks the force and effects specific to a binding Security Council Resolution or that of an international treaty, but we believe that it is a good starting point for the unification and development of the global endeavours towards cultural restitution.

By strengthening international cooperation, encouraging recourse to legal and diplomatic solutions as well as alternate dispute resolution mechanisms, underlining the importance of training and cultural diplomacy and policies, while reinforcing the obligations States have under existing International Law, Resolution 79/133 contributes to a more just and equitable framework for the return of cultural heritage. However, its success will depend on how effectively (and efficiently) the key international legal principles shall be integrated into the domestic legal systems of States, and whether the relevant enforcement mechanisms can be strengthened to hold States and institutions

accountable for any violations. Indeed, the law exists, but we feel that without proper accountability and enforcement it may very well remain without effect and application.

Furthermore, the relevance of these provisions in armed conflicts underlines the need for stronger legal measures and, in our opinion, stronger enforcement in order to prevent the destruction and particularly the illicit trade of cultural property in war zones. As the global community continues to grapple with the legacies of cultural displacement of the past and as we continue to bear witness to conflicts affecting cultural property either through destruction and damage or through misappropriation and theft, International Law continues to play a crucial role in shaping the future of cultural heritage protection, return and restitution.

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The Principle of Distinction at the Crossroad of Armed Conflict and Natural Disasters[*]

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Abstract: *This article examines the challenges and limits of the principle of distinction in regard to the instrumentalization of natural disasters in armed conflict. While IHL requires parties to a conflict to distinguish between civilians and combatants, as well as between civilian and military objects, the disruption caused by natural disasters complicates this fundamental obligation. Existing scholarship has analyzed distinction in conventional warfare, but its application in disaster-affected conflicts remains underexplored. This study employs a legal doctrinal approach, assessing primary IHL sources to determine whether the exploitation of disaster effects constitutes a breach of distinction. The findings reveal two potential theories – one states that such instrumentalization inherently violates IHL, while the second advocates for a case-by-case analysis focused strictly on human action. The study underscores the need for heightened scrutiny in targeting decisions within disaster zones. By addressing this issue, this article contributes to the ongoing discourse on adapting IHL to contemporary challenges and ensuring the continued protection of civilians in conflict settings.*

Key-words: *International Humanitarian Law, Distinction, Natural Disasters, Armed Conflict.*

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[*] *This article is an adapted section of the author's PhD thesis, titled "The Legality of Instrumentalizing Natural Disasters as a Method of Warfare" which is currently in progress at the University of Bucharest School of Law. The final version of this section will be included in the completed thesis*

This article was prepared with the assistance of AI tools, solely for editing purposes. All original ideas, legal reasoning, and conclusions presented in this article are solely those of the author.

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1. Introduction

The principles of International Humanitarian Law (IHL) constitute the primary legal framework governing conduct during armed conflicts.[1] Among these principles, distinction serves as a cornerstone, aiming to shield civilians and civilian infrastructure from the harmful effects of hostilities. While the rules of distinction are generally clear and effective in conventional warfare, their application becomes significantly more complex when armed conflict overlaps with natural disasters. In such settings, the neat separation between military and civilian spheres - fundamental to the principle of distinction - is increasingly blurred.

Natural disasters such as earthquakes, floods, and hurricanes profoundly disrupt civilian life, exacerbate humanitarian crises, and introduce new dynamics into conflict zones. These disasters often displace civilians into makeshift shelters, repurpose civilian infrastructure for immediate survival needs, and create acute resource scarcities. Consequently, military decisions in disaster-affected environments must consider not only adversarial strategy but also the chaotic and unpredictable conditions imposed by disasters themselves. Challenges include damaged communication networks, obstructed transportation routes, and disrupted humanitarian relief operations, all complicating accurate assessments and predictions regarding civilian movements and needs. Furthermore, infrastructures traditionally protected under IHL may become dual-use out of necessity: a civilian bridge facilitating humanitarian relief might become essential for military logistics, while military installations may serve as emergency civilian shelters. Such practical dilemmas highlight potential gaps in IHL's existing framework, raising critical questions about whether current legal provisions adequately address scenarios involving disaster conditions. Specifically, although IHL clearly prohibits direct attacks on civilians and civilian objects, it remains unclear whether it similarly forbids exploiting the effects of natural disasters, particularly disaster-induced vulnerabilities.

This article examines how the principle of distinction applies within armed conflicts occurring in disaster-affected regions, evaluating whether existing legal protections are sufficiently robust to handle the unique vulnerabilities created by natural disasters. Given the increasing frequency of armed conflicts in areas susceptible to climate-related disasters, understanding how IHL adapts to these compounded challenges is critical. Ultimately, this

[1] Dieter Fleck (ed.), The Oxford Handbook of International Humanitarian Law, 4th edn, Oxford University Press, Oxford, 2021, pp. 81-92; International Committee of the Red Cross, "Fundamentals of International Humanitarian Law" Casebook ICRC, https://casebook.icrc.org/law/fundamentals-ihl, accessed 20.11.2024.

analysis seeks to determine whether the exploitation of disaster conditions should be understood as an inherent breach of distinction or if a case-by-case legal assessment is required to evaluate compliance with IHL. By addressing these critical gaps, the article contributes to broader discussions on adapting IHL to contemporary realities, ensuring civilians remain protected even under complex and unpredictable conflict environments.

2. Definition and Scope

Called the "basic rule", which already indicates its importance, the principle of distinction provides that "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[2]

Several elements are clearly identifiable in this provision. First, the purpose of the norm is centered around the protection of civilians and their property. Second, this obligation is incumbent on the parties to the conflict. Third and most important is the obligation itself, which is to distinguish at all times between the civilian population and civilian objects, on the one hand, and combatants and military objectives, on the other. Finally, after distinguishing between the two categories, the parties to an armed conflict must direct their operations only against military objectives.

Under this principle, combatants are legitimate targets, while civilians are afforded protection from direct attack unless and for such time as they directly participate in hostilities.[3] Similarly, military objectives, defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage",[4] may be lawfully targeted. On the other hand, civilian

[2] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Art. 48 AP I. See also Bogdan Aurescu, Ion Galea, Lazar Elena, Ioana Oltean, Drept international public, *Scurta culegere de jursprudenta pentru seminar*, Editura Hamagiu 2018, p. 470.

[3] For a comprehensive analysis on the notion of direct participation in hostilities, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009.

[4] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Article 52(2).

objects, which are all objects that are not military objectives,[5] must not be targeted by military operations. Distinction thus plays a critical role in regulating the conduct of warfare by drawing clear boundaries around acceptable targets. By upholding this principle, IHL aims to prevent the indiscriminate violence that characterizes total war and instead enforce a more controlled approach to hostilities. It functions as a safeguard to ensure that military operations remain directed solely at military forces, thereby preserving civilian lives, infrastructure, and essential services.

A common misconception surrounding this principle is that AP I limits its protection of civilians and civilian objects to prohibiting only direct attacks. While AP I does indeed prohibit direct attacks on civilians, this is only part of the protection framework. Article 48 AP I extends the prohibition beyond attacks, covering all military operations against civilians and civilian objects. The term "attack", as understood under IHL, is defined in Article 49 AP I, which provides that "'Attacks' means acts of violence against the adversary, whether in offence or in defence." AP I differentiates in several instances between attacks and military operations, making it clear that these two terms are not interchangeable and have distinct meaning.[6]

To understand the difference between attacks and military operations, we must look closely at how the two terms are defined and differentiated within IHL. The definition used for attacks in Article 49 restricts the term to acts involving direct violence aimed at harming the opponent's military capabilities or personnel, distinguishing it from other types of actions taken in the course of an armed conflict. The term "military operation," however, encompasses a far wider range of activities that do not necessarily involve acts of violence. Military operations include strategic movements, encirclements, and logistical maneuvers that impact the broader conflict dynamics but may not involve direct hostile engagements. Article 51(4) AP I specifies that indiscriminate attacks - attacks that fail to distinguish between military targets and civilians - are prohibited. Article 51(5) AP I expands on this by defining indiscriminate actions in two specific ways: actions that target areas containing a mix of civilian and military assets without aiming at a specific military objective, and actions likely to cause excessive harm to civilians in relation to the military advantage gained. However, it is the same article that emphasizes that "the civilian population and individual civilians shall enjoy general protection against dangers arising from military

[5] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Article 52(1).

[6] Other instances in AP I where the notion of 'military operation' is used: Articles 3, 39, 44, 56, 57, 58, 59, 60.

operations." This clause clarifies that civilian protection encompasses all risks associated with military actions, whether or not these actions qualify as direct attacks. By including "military operations" in its language, Article 51 broadens the principle of distinction to prohibit indiscriminate harm from both combat actions and broader strategic maneuvers.

The differentiation between attacks and military operations in IHL highlights the comprehensive scope of the principle of distinction. This principle does not merely prohibit violent, direct attacks on civilians; it also imposes a duty to avoid any military operations targeted at civilians or civilian objects. Therefore, the prohibition in Article 48 extends to the entirety of military conduct in armed conflict. Such differentiation has significant implications, as it clarifies that all actions within a military strategy, whether direct or indirect, offensive or defensive, must respect the boundaries set by the principle of distinction.[7]

3. Application to Natural Disasters

Having established that all military operations targeting civilians and civilian objects are prohibited under IHL, we must now consider how the principle of distinction applies in the context of natural disasters. This presents a unique challenge, as natural disasters, by their very nature, are indiscriminate phenomena that usually affect civilians and combatants alike without distinction. The central question is whether exploiting the effects of such phenomena can itself breach the principle of distinction. In addressing this, two possible theories emerge.

One line of argument would be that the exploitation of the effects of natural disasters inherently violates the principle of distinction. Natural disasters, as indiscriminate events, impact civilians and combatants without differentiation. If a party to the conflict uses these effects to achieve a military advantage, it inherently fails to distinguish between civilians and combatants or between civilian objects and military objectives. This theory argues that the obligation under Article 48 of AP I extends not only to direct military actions but also takes into account the backdrop against which such military action is taken. By leveraging the indiscriminate effects of a natural disaster, the party effectively disregards its duty to direct operations solely against

[7] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005, p. 3. For a study on the practice of states, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), C*ustomary International Humanitarian Law, Volume II: Practice*, International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005, p. 3.

military targets.

Another, more temperate view, on the other hand, would be that the effects of natural disasters and their instrumentalization should be treated independently from the natural disaster itself. Since natural disasters are not man-made and do not originate from a party to the conflict, their effects cannot be attributable to a party and thus automatically cause the party to be in breach of its obligations under the principle of distinction. Instead, the focus should shift strictly to the specific actions taken by the belligerent party. Under this theory, exploiting the effects of a disaster is not inherently unlawful but must be evaluated on a case-by-case basis to determine whether the belligerent's conduct respects the distinction between civilians and combatants and between civilian and military objects. In this scenario, targeting resources or areas already affected by a disaster would only breach distinction if those actions directly or indiscriminately harm civilians or civilian property, irrespective of who and what the natural disaster itself has damaged. Building on these two perspectives, the debate over whether exploiting the effects of natural disasters violates the principle of distinction requires a deeper analysis of their respective strengths, weaknesses, and broader implications.

3.1. The Theory of Inherent Breach

The first theory (the author's theory) posits that instrumentalizing the indiscriminate effects of natural disasters inherently breaches distinction, while the second theory argues for a more nuanced, case-by-case approach that assesses the specific actions of the parties to the conflict. The argument for inherent violation of distinction asserts that the very nature of natural disasters makes their exploitation a violation of distinction. Natural disasters, by definition, impact civilians and combatants indiscriminately, as they are uncontrollable phenomena that do not differentiate between military and civilian. When a party to a conflict exploits these effects to achieve a military objective, it arguably fails to uphold its duty to ensure that military operations are directed solely at military targets.

It is important to acknowledge that in rare circumstances where a natural disaster is highly localized and affects only combatants and military objectives, the instrumentalization of its effects by an opposing party would not breach the principle of distinction. In such cases, the disaster itself cannot be deemed indiscriminate, and leveraging its effects would not inherently

violate the obligation under Article 48.[8] However, in all other scenarios where natural disasters impact both civilians and combatants in a given region, exploiting the effects of these events would constitute an inherent breach of the principle of distinction. This interpretation suggests that while the belligerent party did not cause the natural disaster, its decision to exploit the disaster's effects essentially makes it as though such effects were part of its own conduct. In this view, the indiscriminate nature of the underlying event transfers to the actions of the belligerent, bypassing the need for a separate evaluation of the specific acts or the manner in which the effects were exploited. The mere act of exploiting the effects of a natural disaster, under these conditions, would itself violate the principle of distinction, irrespective of the details of the belligerent's conduct. Imagine that a powerful earthquake devastates a densely populated urban area in the midst of an armed conflict. The destruction impacts both civilian neighborhoods and military installations. A belligerent force, aware of the widespread devastation, deliberately delays or obstructs resources from reaching areas where enemy combatants are also present, hoping that the lack of such resources will weaken the opposing forces. Under the first theory, this act would inherently violate the principle of distinction. The earthquake, as an indiscriminate event, affects civilians and combatants alike. By choosing to exploit its consequences, i.e. intentionally blocking resources and obstructing recovery efforts, the belligerent effectively assumes responsibility for the disaster's effects as if they were part of its own military strategy. Since the disaster itself does not distinguish between military and civilian populations, any instrumentalization of its effects would necessarily fail the distinction test. There is no need to look further, at the specific manner in which the belligerent instrumentalized the disaster, e.g. whether they allowed certain exceptions for aid delivery to civilians or not. The mere connection with the disaster constitutes an inherent breach of the principle of distinction

This argument faces significant challenges. The principle of distinction is traditionally understood to regulate human actions, particularly those involving direct targeting. Extending it to encompass natural phenomena - events beyond the control of any party - risks overreaching the scope of the principle. While IHL often addresses indirect consequences, such as incidental harm to civilians, the causative link between the actions of the party and the harm caused by the disaster's effects must be more clearly defined.

[8] Although a case could be made that distinction requires not only not to target civilians and civilian objects, but also an active effort to differentiate the two from military objectives, something a natural phenomenon is of course incapable of performing. Even though a flood may only affect a military base, no one could argue that a distinction was made and that military objective was identified and targeted.

Without this causal connection, the argument that mere exploitation of a natural disaster inherently breaches distinction becomes tenuous.

3.2. The Case-by-Case Assessment Theory

The second theory offers a more restrained approach, arguing that the effects of natural disasters and their instrumentalization should be treated independently from the disaster itself. Since natural disasters are not caused by parties to the conflict, their indiscriminate nature cannot automatically be attributed to the actions of those exploiting their effects. Under this view, whether the principle of distinction is breached depends on the specific conduct of the parties involved. This theory shifts the focus to the intent and actions of the belligerents, requiring an evaluation of whether those actions distinguish between civilians and combatants and between civilian and military objects.

This perspective is more aligned with the existing IHL framework. As we've seen, attacks are defined as "acts of violence against the adversary, whether in offence or in defence,"[9] stressing the fact that the principle of distinction governs deliberate human actions. This only takes into account the restrictive scope of the principle of distinction, as applicable for attacks and not military operations in general. But even the term 'military operation' itself indicates a focus on human actions, regardless of the background against which these actions are performed. The indiscriminate natural disaster that acts as a premise for the military operation is irrelevant for the analysis of the human actions that follow. Exploiting the effects of a natural disaster would, therefore, need to be assessed strictly through the following lens: does the action directly or indirectly target civilians or civilian objects? For example, bombarding a disaster-affected hospital to establish a military base would breach the principle, as it involves attacking a civilian object. Conversely, using a floodplain as a natural defensive barrier without causing additional harm does not necessarily violate distinction. In the example of the earthquake presented in the previous section, it would be necessary to assess the specific conduct of the belligerent. If the obstruction of resources were targeted solely at military installations, without preventing civilian rescue efforts, then a case could be made that distinction was preserved. However, if the obstruction targeted aid aimed for civilians, the action would likely still constitute a breach. This perspective requires a more detailed analysis of the exact measures taken by the belligerent rather than assuming a blanket violation based on the disaster's indiscriminate nature.

[9] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Art. 49.

The strength of this theory lies in its flexibility and adherence to established legal principles. It avoids conflating natural phenomena with human agency and provides a clear standard for evaluating conduct. However, its focus on direct actions risks overlooking the broader context of heightened civilian vulnerability in disaster-affected areas. In such scenarios, even actions that might comply with the letter of IHL could harm civilians, raising questions about whether a stricter interpretation of distinction is needed.

3.3. A Nuanced Case-by-Case Approach

While the second theory provides a more robust and legally sound framework, it benefits from incorporating elements of a third approach: the idea that the principle of distinction implicitly imposes heightened obligations in disaster contexts. Natural disasters often exacerbate civilian vulnerability, displacing populations, damaging infrastructure, and creating scarcity of essential resources. These conditions demand greater care in distinguishing between civilians and combatants, as the risks of harm are magnified.

A significant challenge in applying the principle of distinction in post-disaster settings arises when civilian objects take on dual-use functions, simultaneously serving both military and civilian needs.[10] The principle of distinction requires that parties to a conflict distinguish at all times between civilian objects and military objectives. However, the disruption caused by natural disasters often forces the repurposing of civilian infrastructure,[11] creating ambiguity regarding the application of this principle. Food and water supply infrastructure, such as grain storage facilities or water treatment plants, may be used by both civilian populations and military forces, particularly when a disaster has reduced the number of viable alternatives. Similarly, roads and transport networks damaged by disasters may emerge as critical supply routes for humanitarian relief efforts while also facilitating military logistics. The presence of military personnel or logistical activities in these

[10] The issue of dual-use objects has been addressed in Yves Sandoz et al (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987, para. 2022-2023. It has come also in the case law of international tribunals, such as ICTY, Prosecutor v Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric and Berislav Pusic, Case No IT-04-74-A, 29 November 2017, Judgment. For an analysis of the judgment, see Maurice Cotter, "Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlić et al. Proceedings on the Destruction of the Old Bridge of Mostar," Journal of Conflict and Security Law, vol. 23, no. 2, 2018, p. 283-305.

[11] A comprehensive analysis of dual-use object targeting can be found in Oona A. Hathaway et al, "The Dangerous Rise of 'Dual-Use' Objects in War: History, Evidence, and the Case for Reform," Yale Law Journal (forthcoming 2025), currently available at SSRN: https://ssrn.com/abstract=4938707 or http://dx.doi.org/10.2139/ssrn.4938707.

locations raises the question of whether such objects remain protected under the principle of distinction.

Article 52(2) AP I provides that an object loses its civilian protection only if it makes an effective contribution to military action and if its destruction, capture or neutralization offers a definite military advantage. This threshold remains difficult to assess in disaster contexts, where civilian infrastructure often assumes strategic significance without necessarily losing its primary humanitarian function. An infrastructure facility may provide some level of military advantage while remaining indispensable to the civilian population. In such circumstances, the classification of an object as a military target is not straightforward. The issue becomes even more complex when considering objects that temporarily serve military purposes before returning to civilian use. A school or hospital used briefly as a military command post does not remain a military objective indefinitely. The principle of distinction does not provide explicit guidance on the timeframe within which an object regains civilian status. However, the logic of Article 52(3) suggests that targeting decisions must be based on an object's current, rather than past, use, and that once an object ceases to be used for military purposes, it must be treated as a civilian object again.

The determination of whether an object has lost its civilian status is further complicated by the issue of evidentiary standards. Article 52(3) AP I establishes a presumption of civilian protection in cases of doubt. This requirement imposes an evidentiary burden on the attacking party, which must demonstrate that an object has become a military objective before launching an attack. In post-disaster contexts, the practical challenges of intelligence gathering and real-time assessment often lead to disputes over whether a facility's military use was sufficiently established.

Incorporating this perspective into the case-by-case approach ensures that the principle of distinction is applied with the heightened scrutiny required in disaster scenarios. Actions that may appear lawful under normal circumstances, such as targeting dual-use infrastructure, should be reassessed in light of the disaster's impact on civilian populations. This hybrid approach aligns with the humanitarian purpose of IHL, emphasizing that parties to a conflict must account for the unique challenges posed by natural disasters while adhering to the core tenets of distinction.

4. Conclusions

The debate over the application of the principle of distinction to the instrumentalization of natural disasters highlights the complexities of balancing IHL's protective aims with the realities of conflict. While the first possible theory we have analyzed underscores the inherent risks of exploiting indiscriminate phenomena, its broad application risks overextending the principle of distinction. The second theory offers a more pragmatic and legally grounded approach, focusing on the conduct of parties and their adherence to IHL norms. However, integrating a heightened obligation to protect civilians in disaster contexts strengthens this framework, ensuring that the principle of distinction is both flexible and responsive to the unique vulnerabilities created by natural disasters. This nuanced interpretation provides the most balanced and effective way forward, addressing the legal and ethical challenges of modern armed conflict.

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Functional Immunity in Relation to Crimes Pursuant to International Law

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Abstract: *This paper examines whether functional immunity applies to crimes pursuant to international law, addressing whether State officials can evade responsibility for international crimes by resorting to immunity ratione materiae. The topic is significant as it explores the balance between State sovereignty and individual accountability for international crimes. The research builds on foundational concepts of State sovereignty, the Nuremberg Principles, and decisions in landmark cases such as Pinochet. It relates to contemporary discussions by the International Law Commission and various domestic and international court rulings that challenge the traditional scope of functional immunity. The findings demonstrate that functional immunity does not apply to crimes pursuant to international law. Courts consistently rule that such crimes, due to their gravity and the involvement of State authority, override immunity claims. Universal jurisdiction and the peremptory nature of jus cogens norms further undermine functional immunity in these cases.*

Key-words: *Functional Immunity, International Crimes, Jus Cogens, Universal Jurisdiction, State Sovereignty*

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The opinions in this paper are solely the author's and do not engage the institution she belongs to.

1. What is functional immunity?

In international law, immunity is typically understood as the right to be exempt from binding measures imposed by a foreign State.[1] It generally entails protection from any foreign authoritative actions, whether administrative or judicial in nature.[2]

The prevailing view holds that immunity stems from the principles of equality, independence, and dignity of States within the international community.[3] As a concept that precludes the exercise of superior authority among equals, immunity can be seen as a natural extension of sovereignty on the international stage.

Two categories of immunities are to be relied upon in international law: functional immunity, also called immunity *ratione materiae* and personal immunity, also referred to as immunity *ratione personae*.[4]

Functional immunities are based on the principle of sovereignty and non-intervention, hence, State agents are not accountable to other States for acts undertaken in official capacity.[5] Personal immunity stems from the notion that the activity of Heads of State, heads of government and foreign ministers[6] must be immune from foreign jurisdiction in order to avoid foreign States from interfering with official functions.[7]

Functional immunity covers official acts carried out on behalf of the State[8] of any *de jure* or de facto State agent, subsists even after the said official leaves their position[9] and is applicable *erga omnes*, therefore it may be invoked

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[1] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2014), p. 7.

[2] Alina Kaczorowska, *Public International Law* (Routledge 2010), p. 363.

[3] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), p. 488.

[4] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), p. 264.

[5] C Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), p. 265.

[6] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], para 51.

[7] Ian Brownlie, *Principles of Public International Law* (1990), p. 361.

[8] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2014), p. 14; Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), para. 38

[9] International Law Commission, *Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction,* (2017), Article 6.

towards any other State.[10] The status of the person performing the said act is irrelevant – functional immunities applies for all individuals covered by Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts.[11]

The determining factor is the nature of the act—if it is classified as an official act, it will be exempt from foreign scrutiny.[12] To qualify as official, an act must meet two criteria: the act must be executed in pursuance to a State policy and it must be carried out using the apparatus of the State.[13]

Since State officials typically carry out such acts, functional immunity becomes inevitable. They are regarded as the extended arm of the State[14] and their acts are considered acts of the State under international law.[15] State officials are considered mere instruments of the State and therefore they cannot suffer the consequences of wrongful acts committed on behalf of that State, benefitting from functional immunity.[16] Therefore, the responsibility is shifted from the individual to the State, making it internationally responsible for those acts.[17]

Immunity is generally considered to be a procedural bar in judicial proceedings.[18] However, functional immunity, being a mechanism that shifts responsibility, is perceived as a question of substantive law.[19] This substantive nature has been confirmed by the International Criminal Tribunal

[10] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), p. 266.

[11] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), Article 4

[12] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff 2014), p. 14

[13] International Law Commission, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, A/CN.4/631 (June 10, 2010), para 23, 27.

[14] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008), p. 114.

[15] Articles on the Responsibility of States for Internationally Wrongful Acts, Article 4.

[16] Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), para. 38.

[17] Antonio Cassese, *International Law* (Oxford University Press 2005), p. 112.

[18] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], para 60.

[19] Antonio Cassese, *International Law* (Oxford University Press 2005), p. 318;

for the Former Yugoslavia, stating that it diverts responsibility from the individual to the State.[20]

2. What are crimes pursuant to international law?

Crimes pursuant to international law are serious offenses that violate peremptory norms, including acts that threaten international peace, security and humanity's core values. These crimes concern the international community as a whole as they violate the most fundamental values protected by international law. [21] These acts constitute crimes pursuant to international law not only when committed on a large scale and in a systematic manner, but also when a single occurrence is in question – *e.g.* when a single individual is tortured[22].

Most commonly, crimes pursuant to international law are known as those referred to in the Rome Statute of the International Criminal Court: genocide, crimes against humanity, war crimes, and the crime of aggression.[23] The International Law Commission has extended this notion to a series of other crimes through its work regarding immunity, including crimes of apartheid, torture and enforced disappearances.[24]

3. Is functional immunity applicable to crimes pursuant to international law?

The aim of this article is to analyse whether functional immunity is applicable for crimes pursuant to international law. In other words – can a State official hide behind the veil of the State when such grave violations of human rights are committed?

The rule regarding functional immunity – according to which State officials may not be held accountable for acts performed in an official capacity - was undermined after the Second World War.

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[20] Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Decision of the Appeals Chamber on Application for Subpoenas (July 1, 2003), para. 26.

[21] *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) preamble, para. 5.

[22] Carmen-Gina Achimescu (Puscasu), Ion Galea,Drept international public, Hamangiu,Bucharest, 2023, pp 68-70

[23] *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) arts 5–8bis.

[24] ILC, *Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction,* Article 7.

The United Nations General Assembly unanimously adopted Resolution 95 (I) in 1945, which affirmed the principles recognized by the Charter of the Nuremberg Tribunal.[25] According to the renowned resolution, the fact that a person committed a crime pursuant to international law acting in official capacity does not relieve them from responsibility under international law and therefore cannot benefit from functional immunity before foreign courts.

This issue was more recently analysed by the International Law Commission, in its work regarding the Draft Articles on Immunity of State Officials. It has pointed out that these crimes most often require the involvement of individuals in positions of governmental authority and in doing so, they not only provide the means required to commit the crime, but also abuse the power vested in them.[26]

The 2009 Naples Resolution of the Institut de Droit International reaffirms this principle: "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes."[27]

These claims are supported by the interaction of functional immunity with various principles of international law: *ultra vires* action, universal jurisdiction and the *jus cogens* nature of crimes pursuant to international law.

3.1. Ultra vires action

Many domestic courts have ruled that functional immunity cannot be applied to illegal *ultra vires* acts. In Xuncax v. Gramajo, the former Guatemalan Minister of Defence, Hector Gramajo, was sued for his alleged involvement in the commission of serious crimes, including torture.[28] In Enahoro v. Abubakar, which concerned the responsibility of Abdusalami Abubakar for grave human rights violations allegedly committed during his time as the Head of State of Nigeria, a Circuit Judge pointed out that "officials receive no immunity for acts that violate international jus cogens human rights norms."[29] This is also held in the renowned *Pinochet* case, where it was considered that such severe crimes went beyond the scope of the functions of

[25] UN General Assembly, *Resolution 95 (I)*, *The Status of the International Court of Justice* (11 December 1946).

[26] International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, A/51/10, para. 26.

[27] Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes* (Napoli Session, 2009).

[28] *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) at 176.

[29] *Enahoro v. Abubakar*, 408 F. 3d 877 (7th Cir. 2005) at 893.

a Head of State[30] and are not included even in the most extensive meaning of official acts performed in the exercise of official functions.[31]

According to the rationale in such cases, no immunity, especially functional immunity, is applicable for acts that fall out the official functions of a State official.[32] However, through the nature of the acts, crimes pursuant to international law are in most cases only possible if State authority is abused, profiting from official status to facilitate their commission or by abusively using the State apparatus, *e.g.* police officers or military personnel, through orders they do not have the power or the courage to contest. In other cases, these crimes can by definition only be committed in official capacity, such as torture, crimes of aggression or enforced disappearances.

Even so, such conduct is regarded as *ultra vires* at it exceeds public authority. It may often be identified when an individual commits a crime pursuant to international law by contravening instructions or acting in an excess of power.[33]

An act is considered *ultra vires* by analysing domestic law or instructions given by the State on behalf of which the official is acting.[34] The designation of persons competent to act on behalf of the State or the determination of their mandate, functions or authority belongs to the State's *domaine réservé*. [35] If this determination was left at the discretion of the State, these acts could be prevented by qualifying as *ultra vires* conduct through mandates given to officials to commit such crimes.[36]

On the other hand, the concept of functional immunity itself would have no efficiency if it were only available for legal acts, allowed by State policies and national laws. If applied in such way, it would have no bearing in any

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[30] See R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 1), [2000] 1 a.c.

61 at 115–116, per Lord Steyn;;

[31] R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 1), [2000], p. 115.

[32] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), p. 315.

[33] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), p. 318.

[34] International Law Commission, Report of the International Law Commission on the Work of its Fifty-Third Session, A/56/10, para. 45.

[35] Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), para. 41.

[36] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), p. 319.

criminal proceeding. In the final *Pinochet* decision, Lord Browne-Wilkinson criticised that the argument that torture cannot be part of the functions of the Head of State was insufficient, since, on the other hand, acts that constituted crimes under domestic law could attract functional immunity if they fell under the definition of official acts. [37]

Doctrine has evolved and reached the conclusion that the real test for whether functional immunity is applicable is to determined whether or not the conduct was committed is "ostensible exercise of public authority".[38]

In this regard, immunity *ratione materiae* cannot be applied to crimes pursuant to international law as they cannot fall under the normal exercise of State authority.

3.2. Universal Jurisdiction

Jurisdictional clauses establish a link between a relevant action and a State for the purpose of justifying jurisdiction.[39]Jurisdictional clauses include territoriality, nationality, passive personality and universal jurisdiction. Universal jurisdiction applies "irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law", as defined by the Institute of International Law.[40] The only relevant condition for the application of universal jurisdiction is for the perpetrator to be on the territory of the State exercising jurisdiction. Universal jurisdiction attaches to a specific conduct, which is grave enough that it violates fundamental values protected by the international community as a whole.[41]

Since the Second World War, several multilateral treaties have surfaced providing for prevention and punishment of specific crimes, allowing[42] or

[37] R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [1999], p. 203.

[38] Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* in *British Contributions to International Law,* p. 56–57.

[39] Robert Cryer, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014), p. 43–44;

[40] Institute of International Law, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes*, Resolution of Krakow Session (2005), para. 1.

[41] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 343.

[42] International Convention on the Suppression and Punishment of the Crime of Apartheid, Article 5; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 4(2)(b); United Nations Convention against Transnational Organized Crime, Article 15(4).

even obliging[43] States to establish universal jurisdiction. Beyond treaty obligations, the principle of universal jurisdiction also exists under customary international law.[44] In *Eichmann*, the Israeli Supreme Court considered that the gravity of the crimes alleged "vests in every State the authority to try and punish those who participated in their commission."[45]

In the *Pinochet* decision, it was found that immunity *ratione materiae* cannot be applied for crimes over which universal jurisdiction is established. A variety of arguments are presented by the Law Lords in the case. In the case, it was found that the conferment of immunity was excluded among the States that are parties to the Convention against Torture, as all domestic courts are allowed to exercise universal jurisdiction for these crimes.[46]

Moreover, the acceptance of the terms of a convention granting universal jurisdiction amounts to an implicit waiver of immunity.[47] Since functional immunity is based on the principle that the wrongful acts are attributed to the State, its application is incompatible with an express permission in international law to prosecute a crime under universal jurisdiction. If immunity would be applicable, the legal mechanisms that are destined to address these crimes would be rendered ineffective. This contradictory character is even more evident when the acts is required to be carried out in official capacity.

On the other hand, it was found in the *Arrest Warrant* case by the majority of the judges that immunity is not connected with jurisdiction, as the question arises only after jurisdiction is determined.[48]

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[43] International Convention against the Taking of Hostages, Article 5(2); International Convention for the Protection of All Persons from Enforced Disappearance, Article 9(2).

[44] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana-Roxana Oltean, *Drept internațional public*, (Hamangiu, 2018), p. 26.

[45] Attorney-General of Israel v. Eichmann, Supreme Court of Israel, Judgment of 29 May

1962, [1962], p. 298

[46] R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [2000], p. 266–267.

[47] R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [2000], p. 267. On the implicit waiver of immunity, particularly in relation to the obligation to extradite or prosecute, see also Filip Andrei Lariu, Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute – Part I: The Principle of aut Dedere aut Judicare". *RJIL,* 27/2022, "Part II: Immunities and the Existence of a Conflict of Norms", *RJIL,* No. 28/2022 and "Part III: The Effects of Immunities on the Obligation to Extradite or Prosecute", *RJIL,* No. 29/2023.

[48] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], para. 46.

The question raised is whether universal jurisdiction can override rules regarding immunity *ratione materiae*, more specifically, if these two principles can coexist and apply simultaneously or whether they are in conflict.

According to treaty law, a number of crimes pursuant to international law can only be committed in official capacity, such as torture,[49] crimes of agression,[50] or enforced disappearances.[51] This leads to the conclusion that universal jurisdiction and immunity *ratione materiae* coexist, as they both pertain to responsibility for official acts.

Rules regarding universal jurisdiction and immunity *ratione materiae* refer to different stages of criminal proceedings, as universal jurisdiction creates the basis for these proceedings and immunity is part of the merits of the case.[52] However, these rules are in conflict when crimes are committed in official capacity, as immunity protects the individual from criminal responsibility while universal jurisdiction allows for an alleged offender to be held responsible.

Two principles of interpretation can be used to determine which rule prevails in such a conflict– *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.[53]

The principle of immunity ratione materiae has its origins in the 18th century.[54] The principle of universal jurisdiction also has an extensive history, deriving from crimes of piracy, as pirates were considered enemies of mankind.[55] It is difficult to precisely indicate the date of the emergence of universal jurisdiction, however it is accepted that it developed during the twentieth century, as it was extensively analysed in regard to the crimes included in the Rome Statute.[56] Regarding the principle of *lex specialis*, the principle of functional immunity relates to any act that is performed in official capacity, while universal jurisdiction attaches only to crimes pursuant to

[49] Art. 1(1) of the Convention against Torture, Article 1 (1).

[50] Rome Statute, Article 8bis(2).

[51] International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

[52] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 360.

[53] Mark E Villiger, *Customary International Law and Treaties* (Martinus Nijhoff 1997), p. 59–60.

[54] Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber ii of 18 July 1997 (Oct. 29, 1997), para. 38.

[55] Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart & Winston 1966), p. 203–205.

[56] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 365.

international law. It can be concluded, that universal jurisdiction prevails over the principle of immunity *ratione materiae* and entails the lifting of such immunity.

3.3. The jus cogens nature of crimes pursuant to international law

Having *jus cogens* status, rules regarding crimes pursuant to international law can override not only contrary substantive rules which do not share this status, but also rules which prevent their enforcement,[57] including rules on immunity *ratione materiae*.[58] This is also held in *Pinochet*, confirming that the *jus cogens* nature of the prohibition of an international crime has priority over immunity *ratione materiae*.[59]

Immunity *ratione materiae* is a rule of *jus dispositivum*, as evident from rulings denying such immunity for crimes under international law and from national legislation.[60]

In the *Lozano* case, the Italian Court of Cassation asserted that such a conflict should be solved by given priority to the higher rank and the *jus cogens* character of crimes pursuant to international law.[61] The EctHR has also accepted that the prohibition of crimes pursuant to international law has a *jus cogens* status and prevails over immunity *ratione materiae*.[62]

Moreover, in a decision concerning Saddam Hussein, the Higher Regional Court of Cologne concluded that a (former) State official cannot hide behind the veil of the State for acts committed in official capacity which constitute crimes pursuant to International Law.[63] Austrian courts found that crimes under International Law could not be considered official acts and supported a removal of immunity *ratione materiae*.[64] A decision of the Belgian Court of Cassation regarding Israeli officials concluded that when crimes pursuant to International Law are involved, no protection by immunity *ratione materiae*

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[57] S. I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, (2018), p. 394, 404.

[58] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement, [2002], Dissenting Opinion of Judge Al-Khasawneh, para. 7.

[59] Hazel Fox, *The Law of State Immunity* (2002), p. 528.

[60] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p. 401.

[61] Lozano v. Italy, Court of Cassation of Italy, 24 July 2008, n. 31171, i.l.d.c. 1085 (it 2008) at § 6.

[62] Al-Adsani v. United Kingdom, App. No. 35763/97, 2001-xi Eur. Ct. h.r. at § 65;

[63] In re Hussein Oberlandesgericht (Higher Regional Court) Köln [16 May 2000], 2 Zs 1330/99, para. 9.

[64] Oberster Gerichtshof (Supreme Court of Austria) [14 February 2001], docket No. 7 Ob 316/00x, 74 SZ No. 20, para. 13.

is afforded to foreign State officials.[65] A number of Chilean decisions regarding former Head of State of Peru, Fujimori, shows that immunity *ratione materiae* is not an admissible plea in the context of accusations amounting to crimes pursuant to International Law.[66] In a case regarding a former Algerian Minister of Defence, the Swiss Federal Criminal Court stressed the *jus cogens* character of the prohibition of crimes pursuant to international law and ruled that no immunity *ratione materiae* is available.[67]

These cases provide evidence for the formation of a custom in regards to rejecting the plea of immunity *ratione materiae* due to the *jus cogens* status of norms prohibiting crimes pursuant to international law.

4. Conclusions

The findings of this article demonstrate that functional immunity does not apply to crimes pursuant to international law. While functional immunity is rooted in the principle of State sovereignty and aims to shield officials from foreign jurisdiction for acts performed in an official capacity, international legal developments have consistently limited its scope when it comes to grave human rights violations.

Through the principles of *ultra vires* actions, universal jurisdiction, and the *jus cogens* nature of such crimes, courts and legal bodies have affirmed that State officials cannot evade responsibility by invoking immunity. As international law evolves, the trend remains clear: accountability for serious violations takes precedence over the traditional protections afforded by functional immunity.

[65] H.S.A. v. A.S. and Y.A., Court of Cassation of Belgium [12 February 2003], no. P.02.1139.F, 127 ILR 110 at 124.

[66] In re Fujimori, Supreme Court of Chile, first instance [11 July 2007], no. 5646-05, para. 17, aff'd in Peru v. Chile, Supreme Court of Chile, second instance [21 September 2007], no. 2242-06, ILDC 1443.

[67] A. v. Ministère Public de la Confédération, Bundesstrafgericht (Federal Criminal Court of Switzerland) [25 July 2012], BB.2011.140.

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The Legitimacy Dilemma in Government Recognition

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Abstract: *Government recognition in international law is a complex and evolving issue, shaped by legal principles and political realities. This paper examines the key criteria for recognition, including constitutionality, effective control, democratic legitimacy and international recognition, while highlighting their inconsistencies in State practice. By analyzing diverse doctrinal theories, together with the practice of States, a comprehensive overview of recognition frameworks is provided. Comparative case studies of contested governments illustrate the interaction between law and politics in determining legitimacy. The paper offers valuable insights for legal scholars, policymakers, and international organizations navigating the complexities of diplomatic recognition and State legitimacy.*

Keywords: *Government Recognition, Effective Control, Constitutional Legitimacy, Democratic Legitimacy.*

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The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

1. Introduction

In international law, "recognition" refers to the formal acknowledgment of the existence of an entity or situation, signifying that the legal consequences associated with that recognition will be upheld[1]. It is most commonly applied to States, governments, and groups involved in conflicts or insurgencies within States. Key scenarios requiring recognition include war, foreign occupation, neutrality, and territorial or jurisdictional disputes. While recognition plays an important role in various contexts, it is the recognition of new States and governments within existing States that has attracted the most attention, driving efforts to establish and clarify international legal frameworks.[2]

In order to recognize a government as legitimate, there is an customary international legal framework that is applied, but it does not mean that there is no actual possibility that sometimes the identity of a State's government is unclear or still disputed. There may exist evidential or other difficulties in the application of one or more aspects of this objective framework.[3]

Consequently, various criteria have been applied over time, mostly depending on the situation at hand. It is still questionable whether today there really exists a certain basis regarding governments' legitimacy. The International Law Association affirmed that it is hard to identify a certain basis for recognition.[4] There are several factors that are to be taken into account when making any affirmation with regard to the recognition of a government. In general, these factors include constitutionality, effectiveness, recognition by other States, the will of a government to perform the rights and obligations of the State internationally and the popular support that a government receives through democratic elections or other manifestations of such consent.

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[1] Carmen-Gina Achimescu (Puscasu), Ion Galea, Drept international public, Hamangiu,Bucharest, 2023, pp 95-97

[2] M.J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice*, 1815-1995 (Princeton University Press 1995), p.1.

[3] UNSC, *Official Records, 900th Meeting* (14 September 1960) UN Doc S/PV.900, para. 67; UNGA, 'Official Records, 66th Session, 2nd Plenary Meeting' (16 September 2011) UN Doc A/ 66/ PV.2 ,para. 14.

[4] International Law Association, Resolution no. 3/2018 of the Committee on Recognition and Non-Recognition in International Law, adopted within the 78th Conference of the International Law Association, held in Sydney, Australia, 19-24 August 2018, pct. 6; International Law Association, Sydney Conference (2018), Recognition/Non-recognition in International Law, Fourth (Final) Report, p. 18.

2. The General Framework for Governmental Status - The Question of Constitutionality

On one hand, established governments are presumed legitimate under international law.[5] A government retains its status even without actively exercising state functions, whilst it does not resign.[6]

A government is not legitimate merely because it exists, nor because it has independent rulers.[7] International law supports constitutional claimants over insurgents, even if they control most of a State's territory,[8] as shown in Haiti from 1991 to 1994.[9] Similarly, in 2009, the Honduran military, with legislative and judicial support, removed President Zelaya, violating the constitution.[10]

Furthermore, the UNGA unanimously demanded Zelaya's reinstatement and urged States to recognize only the government of the constitutional President.[11] Accordingly, UN bodies rejected representatives of insurrectional movements, emphasizing the primacy of constitutional legitimacy.[12] In this regard, Eritrea was recognized internationally only after Ethiopia officially gave up its claim, even though Eritrea had previously established control.[13]

If control is lost, the government in question would not be immediately deprived of its status[14] and this would not grant the unconstitutional government the legitimacy to represent its State internationally.[15] However,

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[5] Brad Roth, *Governmental Illegitimacy in International Law*, (2000), [Roth, *Illegitimacy*], pp. 258-9.

[6] Niko Pavlopoulos, *The Identity of Governments in International Law*, (2024), [*Pavlopoulos*] p. 99.

[7] Hersch Lauterpacht, *Recognition in International Law* (1947), [*Lauterpacht*], p.154, 348.

[8] Roth, *Illegitimacy*, p.132.

[9] UNGA Resolution 46/7 UN Doc A/RES/46/7, p. 1–2; UNSC Resolution 841, UN Document S/RES/841, p. 8.

[10] UNGA Resolution 63/301 UN Document A/RES/ 63/301, pp. 1– 3.

[11] *Situation in Honduras: Democracy Breakdown,* GA Res 63/301, UN Document A/RES/63/301 (1 July 2009).

[12] Brad Roth, *Secessions, coups and the International rule of law: assessing the decline of the effective control doctrine,*(2010), p.9.

[13] James Crawford, *State Practice and International Law in Relation to Secession* (1998), p. 69; *The British YearBook of International Law*, pp. 85, 92.

[14] *Republic of Somalia v. Woodhouse Drake & Carey* (Suisse) SA and Others [1993], p. 67.

[15] Roth, *Illegitimacy*, p. 147.

it is important to consider the circumstance in which the constitutional government could be actually achieved by illegitimate means. Therefore, a claimant to power under a State's existing constitution is not necessarily deemed "constitutional", especially if this legitimacy is contested. Even in the absence of such contestation, an ostensibly "constitutional" claimant may still be considered 'unconstitutional.' A notable example is the stance taken by the States of the "Lima Group" which deemed Venezuela's May 20, 2018, electoral process illegitimate and refused to recognize Nicolás Maduro's new presidential term.[16] Subsequently, the Venezuelan National Assembly declared that Maduro had "usurped" power, leading to Juan Guaidó's claim to the presidency.[17]

On the other hand, the constitution of a State, although reflecting the identity of a State's government, can be insufficient for the identification of its government[18] and "irrelevant" from the point of view of international law if no other criterion is met.[19]

There are several examples which prove the fact that constitutionality is not necessarily a requirement for the enjoyment of governmental status under customary international law.[20] The changes of the governmental identity of Libya in 2011, of Egypt in 2013, and of Sudan in 2019[21] provide State practice in this regard. This respective practice highlights that national legal order will cease to be valid as soon as it loses its efficiency.[22]

The Case of Libya in 2011: The Recognition of the Transitional Council

Libya's 2011 civil war created a power struggle between Muammar Qadhafi's regime and the National Transitional Council (NTC), a revolutionary body

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[16] *Lima Group Declaration* (4 January 2019), available at https://www.canada.ca/en/global-affairs/news/2019/02/lima-group-declaration-february-04-2019.html.

[17] National Assembly of Venezuela, *Acuerdo sobre la declaratoria de usurpación de la presidencia de la república por parte de Nicolas Maduro Moros y el restablecimiento de la vigencia de la constitución* (15 January 2019).

[18] *Pavlopoulos*, p. 94.

[19] Josef L. Kunz, *Critical Remarks on Lauterpacht's* Recognition in International Law, p. 715.

[20] UNSC, *Official Records, 899th Meeting* (14 September 1960) UN Doc S/PV.899, para. 37 (Argentina); UNGA, *Official Records, 20th Session, 877th Meeting of the Sixth Committee* (17 November 1965) UN Doc A/C.6/ SR.877, para. 10 (Spain).

[21] *Pavlopoulos*, p. 108.

[22] Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (1961) p. 220.

formed to oppose his rule.[23] While Qadhafi maintained military control and refused to relinquish power, the NTC gradually expanded its territorial influence, eventually securing international recognition as Libya's legitimate authority.

The governmental status was initially contested—Qadhafi retained power despite officially renouncing formal government roles, while the NTC asserted its authority as the revolutionary opposition. Qadhafi's government operated independently, while the NTC relied on international military and political support, raising concerns about its self-sufficiency.

As such, the NTC's legitimacy was not based on existing legal structures but rather on its revolutionary success. Effective control shifted over time, with Qadhafi's forces initially holding key areas before the NTC gradually took control of institutions and territory. Moreover, the recognition by other States played a decisive role—while Qadhafi's regime was initially acknowledged as Libya's government, international support eventually shifted to the NTC, reinforcing its governmental claim. As such, the NTC was widely recognized as Libya's government even at a time when " a number of cities remained outside of the control of the NTC, and military action continued".[24]

As a consequence, while the NTC lacked constitutional grounding, its growing territorial control and global diplomatic support cemented its status as Libya's new governing authority.[25]

The Case of Sudan in 2019

Following the ousting of President Omar al-Bashir in 2019, Sudan entered a turbulent political transition. The Transitional Military Council (TMC) initially assumed power, but sustained civilian protests, led by the Forces for Freedom and Change (FFC), pressured the military into negotiations. This resulted in a power-sharing agreement and the formation of a transitional government. The governmental dispute was initially between the TMC and

[23] UNGA, *Official Records, 66th Session, 2nd Plenary Meeting*, 15.

[24] UNGA, *Official Records, 66th Session, 2nd Plenary Meeting*', 14.

[25] Angus McDowall, *How Libya's Years of Crisis Unfolded After 2011 Uprising* (Reuters, 28 August 2024) https://www.reuters.com/world/africa/how-libyas-years-crisis-unfolded-after-2011-uprising-2024-08-28/.

the FFC, but the eventual power-sharing agreement provided a unified transitional structure.[26]

Constitutionality was addressed through the 2019 Draft Constitutional Charter, which provided a legal framework for governance, although being named a *de facto* constitution.[27] The transitional authority established itself in Sudan, even after overthrowing a democratically-elected government, including the prior constitutional framework.[28]

The Case of Egypt in 2013

Following the ousting of President Mohamed Morsi, the Egyptian military assumed control, establishing an interim government. The military's control over state institutions and security apparatuses was central to its governance.[29] The removal of Morsi, who was democratically elected, raised questions about the constitutional legitimacy of the new government.[30] The suspension of the constitution and the dissolution of the parliament further complicated the constitutional narrative.

Despite its unconstitutional nature, the legitimacy of the 2013 government was widely recognized by certain segments of Egypt's population, particularly those who opposed Morsi's rule. The interim government was supported by the military and other political forces, including secular and liberal groups, who viewed it as a necessary response to what they saw as Morsi's failure to govern effectively and fairly.[31]

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[26] Mai Hassan and Ahmed Kodouda, *Sudan's Uprising: The Fall of a Dictator* (2019) 30 Journal of Democracy, https://www.journalofdemocracy.org/articles/sudans-uprising-the-fall-of-a-dictator/.

[27] *Sudan's 2019 Constitutional Declaration: Its Impact on the Transition*, https://www.idea.int/sites/default/files/publications/sudans-2019-constitutional-declaration-its-impact-on-the-transition-en.pdf

[28] *Sudanese de facto govt working on new constitutional framework*, https://www.dabangasudan.org/en/all-news/article/sudanese-de-facto-govt-working-on-new-constitutional-framework

[29] David D. Kirkpatrick, *Egypt's President Morsi is Ousted in Military Coup*, The New York Times (4 July 2013) https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html.

[30] Ray Bush and Elisa Greco, *Egypt under Military Rule* (2019) 46, Review of African Political Economy, pp. 529- 534.

[31] Michael R. L. Deeb, *Egypt After the Arab Spring: A Legacy of No Advancement* (GIGA Focus, 2015) https://www.giga-hamburg.de/en/publications/giga-focus/egypt-after-the-arab-spring-a-legacy-of-no-advancement.

3. The Exercise of Effective Control

The exercise of effective control over a territory represents a solid criterion when it comes to the recognition of a government.[32] This criterion is usually considered in those circumstances where there is more than one claimant to governmental status, as there are situations where a government which is autonomous does not need to possess complete control in order to be considered the rightful authority. However, concerns rise when there is a rival, unconstitutional claimant to governmental status.

According to the principle of "effectiveness", an "unconstitutional" claimant enjoys governmental status insofar as it exercises effective control over the state's territory and population.[33] This control must extend over a substantial majority of the territory and population of that State.[34] Moreover, it must enjoy the habitual obedience of the population, with a reasonable expectation of permanence in order to be deserving of recognition.[35] As a *de facto* government, it completely takes the place of the regularly constituted authorities in the State, binding the nation.[36]

Therefore, a State cannot be exonerated from responsibility for the conduct of its government based on considerations of legitimacy or illegitimacy of its origin.[37] It was also noted in the *South West Africa Advisory Opinion* that *"physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States"*.[38]

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[32] Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica) (1923) I UNRIAA 37 [*Tinoco*], p. 381.

[33] Federal Department of Foreign Affairs of Switzerland, *The recognition of states and governments under international law*, p. 3.

[34] *Pavlopoulos*, p. 122.

[35] L. Oppenheim, *International Law* (9th edn, 1992), [*Oppenheim*] p. 150.

[36] *Tinoco*, p. 378.

[37] *Report of the ILC on the Work of Its 53rd Session* (2001), p. 51.

[38] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports [1971], para. 118.

4. Recognition by Other States

International recognition of the government does not confer legitimacy to represent the State internationally.[39] It is a political act[40] reflecting a State's willingness to engage in foreign relations with another State.[41] As such, non-recognition by other States does not affect the established government's capacity to represent the State in question,[42] but it is still crucial to emphasize, as it was found by the sole-arbitrator Taft CJ in the *Tinoco Arbitration,*[43] that recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations.[44]

Regardless, international recognition is justified by policy considerations, not legal ones, making it insufficient to confer legitimacy to represent a State internationally or to deny a constitutional legitimate government the right to represent the State.[45]

5. The Importance of Popular Consent[46]

The "legitimacy" test requires that, for an entity to be recognised as a government, it should have come to power through a due process and that it is generally accepted by the population.[47] In order for this criterion to be met, a democratic election needs to be held and its results respected. As such, a new government must be supported by the will of the nation, substantially declared.[48] Moreover, the public should view the entity as the government, including by habitually obeying its laws and orders.[49]

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[39] *Oppenheim*, p. 769.

[40] *Lauterpacht*, p. 385-458; Rüdiger Wolfrum and Christiane Philipp, *The Status of the Taliban: Their Obligations and Rights under International Law*, (2002), p. 569.

[41] Stefan Talmon, *Recognition of Governments in International Law* (Oxford University Press 2001), p. 25.

[42] *Shaw*, p. 337-341.

[43] *Tinoco*, p. 369.

[44] Ibid, p. 380.

[45] Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA and Others [1993], p. 67.

[46] *Oppenheim,* p. 151; The statement of the Secretary of State Stimson made in 1931: *Latin-American Series, No 4* (1931) p. 8.

[47] *SAC-M Briefing Paper: Recognition of Government (Myanmar)*, p. 4, Special Advisory Council for Myanmar, 2021.

[48] Thomas Jefferson to Gouverneur Morris, 7 November 1792, in *Moore* (i) p. 120; *Oppenheim*, p. 151.

[49] H. Lauterpacht, *Recognition in International Law* (1947), p. 88.

This specific basis can also be interpreted and thus, considered together with the exercise of effective control. Consequently, the will of the nation is also reflected and exercised through administrative institutions, such as government ministries and departments. Additionally, its exercise through security institutions, typically police and armed forces,[50] can be an essential factor.

However, in terms of State practice, there have been instances where a democratically representative government has gained widespread recognition over an autonomous rival claimant, even when the latter had effective control over the State's territory and population. Examples include Alassane Ouattara's claim in Côte d'Ivoire in 2010, Adama Barrow's claim in The Gambia in 2016, Jean-Bertrand Aristide's claim in Haiti between 1991 and 1994, and Manuel Zelaya's claim in Honduras in 2009.[51] At the same time, there have been several claimants to governmental authority who, while lacking a credible democratic mandate, were generally recognized by States as legitimate governments—sometimes after overthrowing an elected government. Notable examples include the government of The Gambia in 1994, the government of the Republic of the Congo in 1997, and the transitional authority in Sudan in 2019.[52]

6. The Validity of Acts Under *De Facto* Governments

Another important aspect that is worth analysing is whether the acts concluded under a *de facto* government can actually be treated as valid. Moreover, if the government in question has been recognised only after certain acts have been already made at the time when this government was functioning.

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[50] *SAC-M Briefing Paper: Recognition of Government (Myanmar)*, p. 4, Special Advisory Council for Myanmar, 2021.

[51] UNGA, *Credentials of Representatives to the Sixty-Fifth Session of the General Assembly: Report of the Credentials Committee* (22 December 2010) UN Doc A/65 / 583/ Rev.1, p. 7 , which was approved by the UNGA res 65/237 (23 December 2010) UN Doc A/RES/ 65/ 237; UNSC res 2337 (19 January 2017) UN Doc S/RES/ 2337, p. 2; UNGA res 63/301 (30 June 2009) UN Doc A/RES/ 63 / 301, pp. 1–3; UNGA res 46/ 7 (11 October 1991) UN Doc A/RES/ 46/ 7, pp. 1– 2; UNGA res 47/ 20 A (24 November 1992) UN Doc A/RES/ 47/20 , pp. 1– 2; UNGA res 48/ 27 A (6 December 1993) UN Doc A/ RES/ 48/ 27, pp. 1-3. See also UNSC res 841 (16 June 1993) UN Doc S/RES/ 841, p. 8.

[52] Talmon, *Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, p. 534.

In this regard, *de facto* governments are capable of concluding lawful acts, as recognition *de facto* is indistinguishable from *de jure* recognition.[53] Thus, the acts made by the *de facto* government in question are recognized as valid under international law.[54]

In *South West Africa*, the ICJ noted that the official acts can be rendered invalid only if causing the detriment of the inhabitants of the territory.[55] *Per a contrario*, the acts necessary to maintain the public order among citizens must be regarded as valid when proceeding from an actual, although possibly unlawful government.[56] Moreover, it would constitute a valid act if enacted by a lawful government.[57] Otherwise, justice would be interrupted, and the state thereby exposed to all the disorders of anarchy.[58]

Furthermore, the validity of these acts will stem from the time when the government installed itself, acquiring effective control, the criterion treated *supra* (section 3). As such, by virtue of the principle of retroactivity, recognition, whether *de facto* or *de jure,* is retroactive in the sense that courts will treat as valid the acts of the newly recognised government dating back to when this authority established itself.[59] Therefore, the acts of the recognised government, as a result of the retroactive effect of recognition, will be still considered valid.[60]

However, there are several doctrinal opinions, as well as State practice, that do not acquiesce to this theory and therefore will consider the acts of simply *de facto* governments as nullities.[61] For example, France,[62] Italy,[63] Sweden[64]

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[53] *Oppenheim*, p. 156; *Luther v. Sagor* [1921] 3 KB, p. 532.

[54] *Tinoco*, p. 378.

[55] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports [1971, para. 125.; see also Bogdan Aurescu, Ion Galea, Lazar Elena, Ioana Oltean, Drept international public, *Scurta culegere de jursprudenta pentru seminar,* Editura Hamagiu 2018, pp. 71-77

[56] *Texas v. White* 74 US (7 Wall) 700, (1868), para. 733.

[57] *Texas v. White* (n 225), para. 733.

[58] *Madzimbamuto v. Lardner-Burke* [1969] 1 AC 645, pp. 728, 729 (PC).

[59] *Luther v. Sagor* [1921] 3 KB, p. 432; *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] 53 TLR, p. 751.

[60] *Luther v. Sagor* (n 186) p. 532; *Williams v Bruffy* (1877) 96 US, p. 176.

[61] *Lauterpacht*, p. 144.

[62] *Héritiers Bouniatian v. Société Optorg*, Gazette du Palais, 1924, pp. 96.

[63] *Nonis v. Federation of Seamen*, Court of Appeal of Genoa, 1930.

[64] *Soviet Government v. Ericsson* (Annual Digest, Case. No. 30).

and Belgium[65] refused to acknowledge acts of the Soviet government due to their lack of recognition. Similarly, English courts have consistently denied unrecognised governments' rights, including jurisdictional immunities.[66] It remains at the discretion of every State to consider whether it recognizes the ability of a certain government to conclude valid acts.

7. Conclusions

This research, far from being exhaustive, points us to some conclusions. Certainly, an objective framework exists within customary international law for determining the government of a State, which respects the sovereign right of each State to decide its political system, constitution, and form of government. Customary international law does not impose clear limitations on these sovereign freedoms when establishing governmental status.

However, the criteria for recognizing States and governments, though established since at least 1950, are not universally fixed or consistently applied, it rather depends on the situation at hand. While certain key elements are often considered, their application can be subjective and varies depending on the context. Recognition decisions are frequently influenced by the political and foreign policy interests of States and organizations, meaning that some entities are recognized while others, even if meeting similar criteria, are not. Moreover, the rationality behind these recognition decisions can sometimes lack transparency, especially when made without democratic oversight. As a result, the recognition process is often shaped more by political considerations than by objective legal standards, undermining its legitimacy and accountability.

[65] *Krimtschansky v. Officier de l'État civil de Liège* (Annual Digest, 1929-1930, No. 26).

[66] *Taylor v. Barclay* (1828), English Reports 769, pp. 213, 221; (1823), *Turner v. Russell* [2007] England and Wales Court of Appeal, Civ 79, 297.

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Rising Tides, Shifting Boundaries: The Legal Implications of Sea-Level Rise and the Freezing of Maritime Baselines

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Abstract: *This paper examines the legal and geopolitical implications of rising sea levels, particularly in relation to maritime boundaries and the concept of freezing baselines under international law. Building upon climate science, international legal principles, and case law, this paper synthesizes findings from the Intergovernmental Panel on Climate Change (IPCC), United Nations Convention on the Law of the Sea (UNCLOS), and key international legal precedents. A multidisciplinary legal analysis is employed, incorporating treaty interpretation, state practice, and judicial decisions to assess the viability of fixed maritime baselines. The study finds that while UNCLOS does not explicitly mandate ambulatory baselines, principles such as legal stability and state practice provide a legal basis for fixed baselines. However, counter arguments exist, particularly regarding the dynamic nature of coastlines and maritime zones. The evolving legal landscape requires international cooperation to reconcile legal certainty with environmental realities. The potential codification of fixed baselines, recognition of climate-induced statelessness, and the role of equity in maritime delimitation are explored as future pathways. This paper contributes to the growing discourse on climate change and international law by evaluating the legal justifications for freezing baselines and their potential to shape emerging customary law.*

Keywords: *Sea Level Rise; Maritime Law; Climate Change; UNCLOS; Fixed Baselines; Coastal Erosion; International Law; State Practice*

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The opinions in this paper are solely the author's and do not engage the institution she belongs to.

1. Introduction

Sea-level rise represents one of the most critical challenges of our time. Global warming—through the thermal expansion of oceans and the accelerated melting of land-based ice—has led to an increase in sea levels, posing existential risks to low-lying coastal regions. These risks include coastal erosion, loss of biodiversity, displacement of communities, and disputes over maritime boundaries. Moreover, as coastlines recede, established legal concepts regarding territorial seas and Exclusive Economic Zones [EEZs] are put under strain. This paper explores both the environmental drivers behind sea level rise and the legal and policy responses that have emerged, with particular emphasis on the conceptual "Freezing Law" as a response to these unprecedented challenges.

2. Causes and Effects of Climate Change

The Director-General of the World Health Organization [WHO] highlighted the impact of climate change and the sea-level rise at a public sitting in regards to the Request for advisory opinion submitted by the General Assembly of the United Nations [UNGA] on 13 December 2024. He cited the example of Tuvalu, where inhabitants face the difficult choice between abandoning their home or watching it sink.[1]

Climate change is wreaking havoc, disrupting societies, economies, and development[1] with sea-level rise projected to continue for hundreds of years,[2] as evidenced by the recent initiative of requesting an International Court of Justice [ICJ] advisory opinion on climate change, developed in response to political action by Pacific Island youth groups.[3] Low-lying populations are particularly vulnerable to sea-level rise.[4] Tuvalu, Kiribati, and Fiji are expected to experience 6-15 cm of sea-level rise in the next 30 years.[5] The

[1] WHO, COP29 Special Report on Climate Change and Health: Health is the Argument for Climate Action (2024) ("COP29 Special Report"), pp. 3-10.

[2] Climate Change Damage and International Law Prevention Duties and State Responsibility by Roda Verheyen,[Climate Change, Verheyen] p. 30.

[3] Pacific Island Students Fighting Climate Change, 'We Are the Alliance for a Climate Justice Advisory Opinion', available at: <www.pisfcc.org/alliance> last accessed 14 January 2024.

[4] WHO, Climate Change and Health in Small Island Developing States: A WHO Special Initiative, Pacific Island Countries and Areas (12 November 2018), available at https://www.who.int/publications/i/item/9789290618669, p. 7, 29.

[5] NASA Analysis Shows Irreversible Sea Level Rise for Pacific Islands, available at:https://www.nasa.gov/earth/climate-change/nasa-analysis-shows-irreversible-sea-level-rise-for-pacific-islands/, last accessed 14 January 2024.

Intergovernmental Panel on Climate Change [IPCC] predicts a 9 to 88 cm sea-level rise during the 21st century.[6] Moreover, Kiribati has already lost two islands: Tebua Tarawa and Abanuea to rising seas in 1999.[7]

Most fishing occurs in the EEZ of coastal States. If, due to sea-level rise, part of the EEZ would disappear, this could have economically disastrous effects on States' economies, resulting in the loss of the rights of the State in these maritime areas.[8]

In response, affected states are pursuing solutions: Kiribati's government purchased land in Fiji, the Maldives began relocating populations from vulnerable islands[9] and Japan fortified Okino-tori-shima reefs with seawalls to preserve fishing rights over 150,000 square miles of waters.[10]

3. Legal Basis For The Freezing of Baselines

As coastlines recede due to rising sea levels, some coastal states have advocated for domestic measures aimed at "freezing" existing maritime baselines. While this concept is not yet an established norm in international law, several legal arguments support its validity

3.1. Interpretation of UNCLOS Article 5 in Light of the VCLT

Article 5 of the United Nations Convention on the Law of the Sea [UNCLOS], when interpreted in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties [VCLT], does not explicitly prescribe an ambulatory baseline system.

Rather, it states that baselines should be determined "as marked on large-scale nautical charts", which indicates that the line is not the actual low-water. Consequently, there is no clear obligation for states to update charts or coordinates as the physical coastline shifts. The International Law Association [ILA] has noted that an ambulatory approach would be impractical, requiring continuous monitoring and notification of baseline

[6] Climate Change, Verheyen, citing the Third Assessment Report of IPCC, p. 193.

[7]Chang, M.: Exclusive Economic Zones, Department of Geography, Butte College (California), available at: http://www.geography.about.com/library/misc/uceez.htm, last accessed 14 January 2024.

[8] Ibid., p. 197.

[9] The human right to a healthy environment, John H, Knox, Ramin Pejan, p. 221.

[10]Geographica, "Lonely Rocks Important to Japan," National Geographic Magazine, November, 1988 (Vol. 174, No. 5).

changes, complicating legal and maritime governance.[11] Moreover, the "ambulatory" approach is impractical because it would require states "to provide real-time notification of changing baselines through continuous detection, depiction, and dissemination of the physical and legal geography."[12]

3.2. The Lotus Principle as a Legal Basis for Freezing Baselines[13]

UNCLOS provides that matters not regulated by the Convention are governed by the rules and principles of general international law.[14] Under the well-established *Lotus* principle, states are permitted to undertake actions unless explicitly prohibited by international law.[15] The Lotus Principle, upheld by the ICJ in its jurisprudence, was reaffirmed in the *Nicaragua* case, where it was stated that the only prohibitive rule applicable to a State is that laid down in rules accepted by that State.[16] The 2019 International Law Commission [ILC] Study Group on sea-level rise affirmed the legitimacy of fixed baselines considering that the UNCLOS does not prohibit this option and stated that if there was an obligation to update baselines, it would have been expressly mentioned in the Convention.[17] The absence of a prohibition on fixed baselines reinforces the legality of the "Freezing Law."[18]

3.3. The Principle of Legal Stability as a justification for fixing the baselines

The principles of legal stability, recognized by both the the ICJ and the Permanent Court of Arbitration [PCA],[19] reflects customary international

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[11] Resolution 01/2024, Committee on International Law and sea-level Rise, The 81st Conference of the International Law Association.

[12] Coalter Lathorp, 'Baselines', in Donald Rothwell et al, The Oxford Handbook on the Law of the Sea, OUP 2015, pp. 69-90, pp. 77-78.

[13] Derived from *SS Lotus* (France v. Turkey) (Judgment) PCIJ Rep Series A No 10 [1927], [*Lotus*]; Julius Stone, *Non Liquet and the Function of Law in the International Community*, p. 135.

[14] UNCLOS, Preamble, p. 25

[15] *Lotus*, pp. 10-13, Judge Loder; *Legality of the Use by a State of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [*Nuclear Weapons*], para. 226, 238-239, Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana-Roxana Oltean, "Drept Internațional Public", Ed. Hamangiu, 2018, p. 27.

[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] Rep 14, para 269.

[17] *'Sea-level rise in relation to International law',* Study Group, ILC Report, 2019, p. 93.

[18] Nicaragua v. United States, para. 269; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), para. 56, 84.

[19] *Aegean Sea Continental Shelf, Judgment,* ICJ Reports 1978, [*Aegean Sea*] p. 3, pp. 35–36, para. 8 85; *Bay of Bengal Maritime Boundary Arbitration* (Bangladesh v. India), Case No. 2010-16, PCA, Award,

law.[20] Constantly shifting baselines could lead to significant sovereignty and jurisdictional losses for coastal states, diminish resources,[21] cause the loss of land territory, leading to catastrophic consequences for states.[22] Many coastal states rely heavily on fisheries within their EEZ, and any contraction of these zones due to rising sea levels could have severe economic and environmental consequences.[23]

In response, states linked legal stability to fixing the baselines as they were before the effects of sea-level rise.[24] The EU expressed that the UNCLOS allows this measure to ensure legal stability[25] and over 100 geographically diverse states chose not to update their baselines, reinforcing the importance of this principle.[26]

Ambulatory baselines would create constant uncertainty, increasing disputes and complicating maritime governance. Article 5 aims to ensure stability—this purpose would be defeated if baselines shifted inland with rising seas. In conclusion, the Freezing Law is supported by the principle of legal stability.

3.4. The Land Dominates the Sea Principle

The ICJ has affirmed that maritime entitlements are derived from land territory, which is considered permanent, while the sea remains an accessory to the land.[27] This principle supports the argument that maritime zones should be determined based on stable territorial features rather than constantly shifting coastlines. If land is the primary determinant of maritime claims, fixing baselines provides a logical and legally sound solution to the challenges posed by sea-level rise.

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7 July 2014, [*Bay of Bengal*], p. 63, para. 216–217; *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), Judgment, ICJ Reports 2021, pp. 206, 263, para. 158.

[20] *Sea-level rise, 2019,* p. 92.

[21] *Sea-level rise in relation to International law,* Study Group, ILC Report, 2018, p. 171.

[22] *Sea-level rise, 2019*, p. 103.

[23] Ibid., p. 197.

[24] Bogdan Aurescu and Nilüfer Oral, *Sea-level Rise in Relation to International Law: Additional Paper to the First Issues Paper* (2020), UN Doc A/CN.4/76, para. 83, 86.

[25] Statement of the EU and its Member States, *Sea-level Rise in Relation to International Law*, Sixth Committee,78th session, 23rd meeting, 23 October 2023.

[26] Statement by New Zealand, UNGA: Sixth Committee 79th session, Report of the ILC 25th meeting, 25 October 2023.

[27] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, para. 80

3.5. Customary International Law and State Practice

Under Article 38(1)(b) of the ICJ Statute, the formation of customary international law requires both State practice and opinio juris. The consistent and unopposed practice of specially affected States demonstrates a growing acceptance of fixed baselines. According to Conclusions 6(1) and 10(3) of the 2018 ILC Conclusions on the Identification of Customary International Law, the inaction of States—or their failure to protest—may serve as evidence for the formation of custom. Even if some States have not actively endorsed fixed baselines, their silence does not prevent the emergence of a customary rule. The EU expressed that the UNCLOS allows this measure to ensure legal stability[28] and over 100 geographically diverse states chose not to update their baselines, reinforcing the importance of this principle.[29]

3.6. Treaty Interpretation and Subsequent State Practice

According to Articles 31(3)(b) and 32 of the Vienna Convention on the Law of Treaties [VCLT], subsequent practice in the application of a treaty that establishes the agreement of the parties must be taken into account in its interpretation. As affirmed in Conclusion 3 of the ILC Draft, subsequent agreements and practice serve as authentic means of interpretation, providing objective evidence of how the parties understand the treaty. Conclusion 4 further clarifies that such practice must demonstrate a common understanding among the parties regarding the treaty's meaning. Even if the strict threshold of Article 31(3)(b) is not fully met—such as in the absence of unanimous agreement—Article 32 allows for the consideration of State practice as a supplementary means of interpretation. Conclusion 7(2) explicitly states that subsequent practice under Article 32 may contribute to clarifying the meaning of a treaty.

The drafting history confirms that the drafters intended a stable and identifiable reference point for the normal baseline. In 1930, States proposed a charted low-water line for clarity, later adopted by Subcommittee II. In 1953, the ILC Special Rapporteur suggested the high-water line as a tangible reference. The deletion of Article 5's "proviso" further rejects the shifting low-water line as the normal baseline. A fixed baseline ensures legal certainty and prevents boundary disputes caused by natural coastal changes.

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[28] Statement of the EU and its Member States, *Sea-level Rise in Relation to International Law*, Sixth Committee, 78th session, 23rd meeting, 23 October 2023.

[29] Statement by New Zealand, UNGA: Sixth Committee 79th session, Report of the ILC 25th meeting, 25 October 2023.

3.7. Freezes baselines as a response to Fundamental Change of Circumstances (Rebus Sic Stantibus).[30]

The principle *rebus sic stantibus*[31] enshrined in the VCLT, provides that a fundamental and unforeseen change in circumstances may justify the modification of treaty obligations. Sea-level rise, an accelerating and unpredictable phenomenon, was not fully anticipated at the time of UNCLOS ratification. Given the growing scientific evidence and economic consequences, states may invoke this principle to justify maintaining pre-existing baselines to preserve their maritime entitlements.

The VCLT outlines the cumulative conditions under which a fundamental change of circumstances may be invoked[32]: the circumstances must not have been foreseen by the Parties at the moment of conclusion of the treaty, the change is fundamental and its effects radically transforms the extent of the obligations to be performed and the circumstances represent an essential basis of the Parties' consent to be bound by the treaty.

Unforeseen Nature of Sea-Level Rise

Sea-level rise represents a fundamental change of circumstances, affecting nearly one billion people living in low-lying coastal zones, posing an "urgent and escalating threat".[33]

The degree of sea-level rise effects could not have been anticipated at the ratification of the UNCLOS. IPCC noted that there is insufficient evidence to evaluate the degree of the sea-level rise.[34] The actual change is uncertain and unpredictable.[35]Additionally, previous reports concerning the degree of these effects were found inaccurate.[36] Whilst sea-level rising was anticipated, the accelerated degree with which the sea has risen could not have been foreseen

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[30] VCLT, article 52; *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), [1974], [*UK v. Iceland*] para. 40, 49.

[31]*Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, [1997] [1997] ICJ Rep 7, [Gabcikovo-Nagymoros Project],* para. 38.

[32] Malcolm N. Shaw, *International Law* (8th edn, 2017, p. 720, [*Shaw*]; Snjolaug Arnadottir, *Climate Change and Maritime Boundaries: Legal Consequences of sea-level Rise* (2024), p. 224; VCLT, article 62.

[33] UNGA, High-level plenary meeting, *Addressing the existential threats posed by Sea-level rise*.

[34] IPCC, Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policy Makers, p.18.

[35] *Bay of Bengal*, para. 399.

[36] Benjamin P. Horton and others, *Expert Assessment of Sea-Level Rise by AD 2100 and AD 2300,* (2013) Quaternary Science Reviews, https://doi.org/10.1016/j.quascirev.2013.11.002.

by no one, not even by the Parties.

Fundamental Impact on State Obligations[37]

Firstly, a change is fundamental[38] if the value to be gained by further performance is diminished[39] or if it changes the availability of natural resources.[40]

Secondly, the change must increase the burden of obligations. Sea-level rise transforms the obligation to respect the 200 nm of the EEZ,[41] making state's performance essentially different from that originally undertaken[42] and transforming this obligation under the UNCLOS.

Basis of Consent to the Treaty

The UNCLOS was primarily designed to regulate maritime jurisdiction rather than address climate change-induced shifts in coastal geography.[43] As sea-level rise was not a major concern at the time of its drafting, it did not constitute a basis for states' consent to be bound by the treaty. Consequently, the principle of *rebus sic stantibus* may justify adjustments to baseline policies.

4. The Evolution of Treaties Through Customary Practice

Treaties evolve over time with state practice.[44] This is supported by VCLT, article 31(3) and Conclusion 8 of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Subsequent development of law,[45] including newly developed environmental norms,[46] has the power to modify treaty obligations, as seen from delimitation

[37] *UK v. Iceland*, 1973, para. 36.

[38] *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), 1974, para. 49.

[39] Oliver Dörr and Kirsten Schmalenbach, *VCLT: A Commentary*, (2012), p. 1089.

[40] Ibid, p.1081.

[41] UNCLOS, article 57.

[42] *UK v. Iceland*, para. 43.

[43] UNCLOS, Preamble, p. 25.

[44] VCLT, article 31(3).

[45] *Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution 276,* (1971), para. 53.

[46] *Gabčíkovo-Nagymaros Project*, para. 112.

treaties modified in such manner.[47] A state's reliance on a novel right, if shared by other states, modifies customary international law.[48]

For instance, the predecessor of UNCLOS did not address the concept of EEZ, but state practice established it at 200 nautical miles [nm].[49] This new custom, though contradicting the norm in force at that moment, was later codified in the UNCLOS.[50]

Fixed baselines can be acknowledged as modifying customary practice.

5. States Respecting the Equity principle

Sea-level rise disproportionately impacts low-lying developing states, exacerbating economic and environmental vulnerabilities. Many States highlighted the disproportionate impacts of sea-level rise on low-lying developing States and called for resource redistribution among all nations.[51]

The *Gulf of Maine* case established that equitable criteria should be applied, taking into account geographic and environmental factors.[52]

ICJ has affirmed that fixed maritime boundaries can be adjusted based on environmental circumstances to maintain equitable access to fisheries.[53] Delimitation must be both equitable and satisfactory, achieving a stable legal outcome[54] and baselines should be established on long-standing economic interests specific to the region.[55]

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[47] Convention for the Construction of a Ship Canal to Correct the Waters of the Atlantic and Pacific Oceans, 1903; Act of Rabat on the Spanish-Moroccan Negotiations Concerning Maritime Fisheries, Morocco-Spain, 1973.

[48] *Nicaragua v. US*, para. 109, 207.

[49] *Continental Shelf* (Libya v. Malta), [1985], ICJ, (Judgment), para. 36;

[50] Food and Agriculture Organization (FAO), *The EEZ: A Historical Perspective*.

[51] Report on the work of the UN Open-Ended Informal Consultative Process on Ocean and the Law of the Sea (16 July 2021); UN Doc A/76/171, p.15.

[52] *Gulf of Maine (Canada v. US)*, [1984] ICJ 265 (Judgment) , para. 112.

[53] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment, ICJ Reports [1993] para. 76, [UK v. Norway]

[54] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the EEZ and the continental shelf* (Award) [2006] 27 RIAA 147, para. 244.

[55] *UK v. Norway*, pp.116,133.

Equity has constantly been applied as a guiding principle[56] in international maritime law by deriving fair and balanced solutions from the law.[57] In previous cases, the ICJ ensured that maritime boundaries were drawn in a manner that allowed equitable access to fishery resources, even though fish stocks are migratory and not guaranteed to remain within specific territorial waters,[58] even though no delimitation can guarantee specific quantities of fish to each State due to its migratory nature.

6. The Future of Maritime Baselines in a Changing Climate

The ongoing rise in sea levels will continue to challenge existing legal frameworks governing maritime boundaries. Without a uniform approach, disputes between states over shifting maritime boundaries are likely to increase, necessitating arbitration or adjudication by international courts. As such, several potential future developments must be considered. For instance, a solution could be the codification of Fixed Baselines in International Law – as more states adopt a fixed baseline approach, there may be efforts to codify this practice in a future amendment to UNCLOS or through a new international treaty.

Another solution could be recognition of climate-induced statelessness. Low-lying island nations facing total submersion may seek international recognition of their existing maritime claims despite the loss of physical territory. Furthermore, Regional organizations may play an increasing role in coordinating responses to sea-level rise, developing frameworks that allow for cooperation among affected states. Moreover, States may explore hybrid approaches that incorporate both fixed and flexible baseline methodologies to balance legal stability with environmental realities.

7. Ambulatory baselines as the solution

Even if there are many arguments in favour of freezing the baselines, there are scholars that consider that ambulatory baselines would be the solution, if interpreting the UNCLOS correctly and that consider that there are certain legal rules that would not allow for the endorsement of freezed baselines.

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[56] *North Sea Continental Shelf* (Germany v Denmark; Germany v. Netherlands), Judgment, [1969] ICJ Rep 3, [*North Sea*], para. 53; *Barcelona Traction, Light & Power Co.* (Belgium. v. Spain), [1970] ICJ, para. 3.

[57] *North Sea*, para. 47.

[58] *UK v. Norway,* para. 75.

7.1. Interpretation of UNCLOS against freezed baselines

Baselines are measured from the low-water line along the coast.[59] In other words, this provision establishes that baselines are ambulatory, as, in accordance with the ordinary meaning of the terms,[60] it establishes the dynamic nature of baselines, considering the low-water line at all times. Furthermore, no reservations or exceptions may be made to this Convention unless expressly permitted by other provisions of the UNCLOS.[61] Thus, the adoption of the fixed baselines approach can be considered as a violation of the UNCLOS.[62]

There are, however, multiple exceptions from this rule. For example, states with irregular coastlines are allowed to draw straight baselines.[63] Moreover, fixed baselines are allowed where deeply indented coasts, deltas or other natural conditions make the coastline highly unstable.[64] Taking these provisions into consideration, baselines are dynamic and subject to change based on coastal geography.[65]

What is more, geography may change due to erosion, sedimentation and sea-level rise among other causes and the UNCLOS accommodates these changes through the dynamic nature of the baselines. This illustrates the principle "the land dominates the sea", which states that any change in the coastal geography must be reflected in the delimitation of maritime zones.[66]

Due to these considerations, the possibility of freezing the baselines through national legislation is contradictory to the scope of the UNCLOS.

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[59] UNCLOS, article 5.

[60] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) *(Judgment)* [1992] ICJ Rep 351, para. 373.

[61] UNCLOS, article 309.

[62] Opinio Juris, Tanishk Goyal, Dhruv Gupta, *Sea-level Rise and Its Implications in International Law* (2020) , available at: https://opiniojuris.org/2020/09/04/sea-level-rise-and-its-implications-in-international-law/, last accessed 14 January 2024.

[63] *Fisheries case* (United Kingdom v. Norway) (Judgment) [1951] ICJ Rep 116, paras. 129,130.

[64] UNCLOS, article 7.

[65] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean* (Costa Rica v. Nicaragua); *Land Boundary in the Northern Part of Isla Portillos* [2009] ICJ Reports, p. 139.

[66] *North Sea*, para. 96.

7.2. Freezed baselines are not permitted by virtue of a fundamental change of circumstances.

According to the principle of *rebus sic stantibus,*[67] a party could withdraw or terminate an agreement if a fundamental change of circumstances has occurred since the agreement was concluded.[68]

The ILC has expressed its opinion on the matter, considering that the principle of fundamental change of circumstances was not applicable when it comes to maritime boundaries, as it involves the same level of stability as land boundaries.[69] Thus, maritime boundaries are subject to the exception instituted by the VCLT regarding the plea of a fundamental change when it comes to boundaries,[70] since the treaty does not make any distinction between the two.[71]

Additionally, in the context of ambulatory baselines, sea-level rise would not be a cause in disrupting the balance created by the UNCLOS. As an effect of the rise of sea levels, maritime zones move landward, but their size remains the same.[72] The loss suffered by states is limited to land territory, thus infirming the hypothesis of a fundamental change of circumstances relating to the loss of maritime jurisdiction.[73]

In this matter, in the *Gabcíkovo-Nagymaros Project* case, new developments in environmental law cannot be said to have been completely unforeseen.[74]

As such, a fundamental change of circumstance cannot be invoked by states that wish to freeze their baselines.

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[67] VCLT, article 62.

[68] *Shaw*, p. 720.

[69] *Report of the ILC on the Work of its 78th Session* (A/78/10) Ch VIII, p. 96.

[70] VCLT, article 62(2)(a).

[71] *Report of the ILC on the Work of its 76th Session* (A/76/10), p. 167.

[72] *Report of the ILC on the Work of its 78th Session* (A/78/10), p. 103.

[73] Ibid.

[74] *Gabcíkovo-Nagymaros Project,* para. 104.

8. Conclusion

Sea level rise is not solely an environmental phenomenon; it is a complex challenge that intertwines scientific, legal, and geopolitical issues. The rapid pace of climate change demands both immediate adaptation measures and innovative legal responses. Although domestic measures of freezing the baselines are not yet part of established international law, they reflect a growing recognition that traditional legal frameworks must evolve in response to new environmental realities. In safeguarding their coastal rights, states are not only protecting their economic and territorial interests but may also be paving the way for the development of new customary international law.

The Freezing Law is legally justified based on multiple principles, including treaty interpretation, legal stability, customary international law, and the fundamental change of circumstances doctrine. Given the absence of an explicit prohibition in UNCLOS, the increasing reliance on fixed baselines, and the necessity of maintaining sovereignty in the face of climate change, the adoption of a Freezing Law aligns with international legal principles and evolving state practice.

Future success will depend on integrated approaches that combine scientific research, engineering innovation, and legal reform to address the multifaceted impacts of a warming world.

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