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# LAND TERRITORY ISSUE IN THE LIGHT OF UNCLOS JURISDICTION: UKRAINE V. RUSSIA

Master thesis

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Vilnius, 2019

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# INTRODUCTION

In 2014, Russian armed forces entered Ukraine's Crimea, and subsequently annexed it in less than a month. After that, a series of violations of Ukraine's rights in maritime zones adjacent to Crimea has commenced. On 16 September 2016, Ukraine instituted arbitral proceedings against Russia under the UNCLOS dispute settlement system.[1] Since the Convention contains different provisions on rights of Coastal State in its adjacent maritime zones these claims are related to the interpretation and application of UNCLOS.

On 21 May 2018, Russia submitted to the Tribunal its Preliminary Objections dated 19 May 2018 requesting the Tribunal "to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine". [2]

The topic of this thesis concerns only principal objection raised by Russia according to which "the Parties' dispute in reality concerns Ukraine's 'claim to sovereignty over Crimea' and is therefore not a 'dispute concerning the interpretation or application of the Convention' as required by Article 288, paragraph 1, of the Convention".[3] Inasmuch as main jurisdictional objection of Russia is related to the question of sovereignty over Crimea, the question of the Crimean legal status is of particular importance. Russia's objection is based on the premise that legal status of Crimea has changed. It implies that Ukraine and Russia have unsettled dispute over sovereignty. However, for decades Crimea was recognized as a part of Ukraine's territory by international community, including Russia. The frontier between Ukraine and Russia was already settled and it is reflected in a number of treaties. Therefore, it has to be determined whether any lawful process could have changed the existed legal status of Crimea and whether a lawful transfer of Ukrainian territory to the Russian Federation has been conducted. After that, it shall be defined whether arbitral tribunal constituted under Annex VII UNCLOS may proceed with Ukraine's claims.

This dispute raises intricate legal questions both with regard to substantive law and the arbitral tribunal's jurisdiction. UNCLOS case law is inconsistent when it comes to land territory

[1] "Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)", Permanent Court of Arbitration, PCA Case Repository, accessed 2019 November 28, https://pcacases.com/web/view/149.
[2] "Regarding Bifurcation of the Proceedings." Permanent Court of Arbitration, Procedural Order No. 3, August 20, 2018. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation),* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.
[3] Ibid.

issue. It is important to define what are the reasons for such ambiguity and whether there is a way to deal with this issue in a coordinated and consistent fashion.

**Researched problems:**

1. Whether any lawful process has changed the status of the Autonomous Republic of Crimea and the City of Sevastopol and whether its legal status is under question? What consequences of the finding that legal status of Crimea as a part of territory of Ukraine is an established fact?

2. Whether land territory issue as a result of the use of force is excluded from UNCLOS jurisdiction? Whether current situation in Crimea (occupation, annexation) may affect the decision on jurisdiction?

3. Whether objection of the Russian Federation may impede jurisdiction of arbitral tribunal under Annex VII UNCLOS?

**Relevance of the final thesis**

A lot of legal debate have surrounded land territory issue within UNCLOS jurisdiction. This is so, because it is a sensitive legal question in international law where careful consideration is needed. Case law is inconsistent when it comes to this topic. At this point, there is case brought before arbitral tribunal under Annex VII UNCLOS where principal objection of the respondent Party concerns land territory issue. In this regard it is necessary to assess intricate legal questions associated with the present case in order to invent a coherent approach so future courts and tribunals may exercise jurisdiction in consistent manner.

**Novelty of the final thesis**

The topic of the final thesis is at intersection of two subjects: land territory issue within UNCLOS jurisdiction in general and the *Ukraine v. Russia* case with Russia's principal objection.

Land territory issue in light of jurisdiction was explored from different angles. While some scholars tried to analyze particular issue in question, such as the land territory issue, Peter Tzeng tried to compile a list of cases where implicated issue problem was addressed.[4] However, a

[4] Peter Tzeng. "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics,* Vol. 50, No. 2 (2018): 447-507.

little attention was paid to a situation where land territory issue mixed with the use of force. While, a widespread position was to exclude land territory issue from the tribunal's jurisdiction and give an exceptional treatment to a situations where threat or use of force has taken place, no substantial study was conducted with respect to the mix of these two issues: land territory issue as a result of the use of force. The main question which is to be addressed is how this complex issue has to be treated within UNCLOS jurisprudence.

When it comes to the principal objection of the Russian Federation, literature review allows to conclude that this question usually was raised as an incidental matter, e.g. within such topics as limits of UNCLOS jurisdiction[5] or the implicated issue problem[6]. It is worth noting that there is a tendency to compare the *Ukraine v. Russia* case with other cases such as the *Philippines v. China* case or the *Mauritius v. United Kingdom* case.[7] However, the author believes that the *Ukraine v. Russia* case is distinct from other cases because unlike them, there is no disputed land sovereignty in the *Ukraine v. Russia* case.

**Significance of the final thesis**

The study could be useful for Ukrainian governmental institutions while arguing the *Ukraine v. Russia* case before the arbitral tribunal. Furthermore, the arbitral tribunal in the *Ukraine v. Russia* case may find that considerations presented in the present research are useful in adjudicating this case.

On the basis of this study scholars and commentators may continue to explore the topic of land territory issue resulted from the use of force within UNCLOS jurisdiction.

**Aim and objectives of the thesis**

The aim of the research is to determine whether principal objection of the Russian Federation in the *Ukraine v. Russia* case may impede jurisdiction of the arbitral tribunal constituted under Annex VII UNCLOS.

In pursuance of the identified aim the following objectives are established:

[5] Alexander Proelss. "The Limits of Jurisdiction *ratione materiae* of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics*, Vol. 46 (2018): 47-60.
[6] Peter Tzeng. "Jurisdiction and Applicable Law Under UNCLOS", *Yale L.J.*, Vol. 126 (2016): 242-260.
[7] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015): 217. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.

- to determine legal status of the Autonomous Republic of Crimea and the City of Sevastopol and to assess whether alteration of legal status is possible and under what conditions;
- to assess whether invasion of Russian forces constitutes the use of force under international law;
- to assess whether Russian use of force may be justified under international law;
- to determine consequences which emerge as a result of the violation of the prohibition of the threat or use of force;
- to determine whether land territory issue between Ukraine and Russia constitutes a dispute over land sovereignty;
- to determine whether land territory issue resulted from the use of force is excluded from the tribunal's jurisdiction and assess respective case law;
- to consider whether Russia's objection may impede the tribunal's jurisdiction.

**Research methodology**

To achieve the aim of the thesis, the following methods were used:

- Description method was used for providing the general overview of the *Ukraine v. Russia* case, its contextual background. It was also employed for determination of the opinion of international community with respect to the issue. It was used to define notions of sovereignty, the prohibition of the use of force and occupation.
- Systematic method was used to clarify legal documents and publications of scholars. It is also used to assess and systematize different sources of information in order to identify the most relevant problems. It was employed for analyzing approaches for characterizing disputes and determining whether land territory issue in the *Ukraine v. Russia* case constitutes a dispute over sovereignty.
- Comparative method was used when different approaches and tests for characterizing disputes were analyzed. It was employed in order to compare the opinions of different authors regarding the same subjects and issues.
- Linguistic method was used in interpreting the provisions of UNCLOS, case law and bilateral agreements between Ukraine and Russia so as to understand the meaning of the legal concepts and their definitions.

- Critical method was used in order to identify whether on the basis of conducted research principal objection of the Russian Federation may impede jurisdiction of arbitral tribunal.

**Structure of the research**

The thesis is divided into the following parts: introduction and three substantial parts that are divided into smaller sections, conclusions, recommendations, bibliography, summary.

Chapter 1 will provide general information on the *Ukraine v. Russia* case. The Chapter which is split into three subchapters describes the general overview of the dispute, its background and determination of the legal status of Crimea. Legal status of Crimea needs to be addressed because Russia's principal objection is based on the premise that legal status of Crimea has been altered.

Chapter 2 which is split into four subchapters will be devoted to relevant questions of jurisdiction under UNCLOS dispute settlement procedures. The Chapter contains a basis for UNCLOS jurisdiction and its scope, problems arising within different categories of jurisdiction with close consideration to the implicated issue problem, approaches which are developed to solve the problems of jurisdiction. Specific types of issues which may question jurisdiction of the tribunal and which are relevant for the purposes of this study are described.

Chapter 3 will critically examine principal objection of the Russian Federation taking into account contextual and legal background of the dispute. It will be assessed whether land territory issue as a result of the violation of the prohibition of the use of force may constitute an objection to jurisdiction of arbitral tribunal. The way of treating principal objection of the Russian Federation by the tribunal will be proposed. Question of whether *de facto* situation of Crimea as being under occupation and annexation by the Russian Federation may affect the decision on jurisdiction will be addressed.

**Defence statement**

Land territory issue as a result of the use of force is not considered as a disputed land sovereignty and, consequently, cannot impede jurisdiction of the arbitral tribunal over the *Ukraine v. Russia* case.

# 1. UKRAINE V. RUSSIA CASE

## Initiating of Arbitral Proceedings in the Ukraine v. Russia case

On 16 September 2016, Ukraine instituted arbitral proceedings against Russia under the UNCLOS dispute settlement system. Ukraine served Russia with a Notification and Statement of Claim under Annex VII to the UNCLOS referring to a dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait. The Permanent Court of Arbitration acts as Registry in this arbitration.[8]

The five-member Tribunal is chaired by Judge Jin-Hyun Paik as President (a national of Korea). The other members are Judge Boualem Bouguetaia (Algeria), Judge Alonso Gómez-Robledo (Mexico), Judge Vladimir Vladimirovich Golitsyn (Russian Federation), and Professor Vaughan Lowe QC (United Kingdom). Professor Lowe was appointed by Ukraine. Judge Golitsyn was appointed by the Russian Federation. Judges Paik, Bouguetaia, and Gómez-Robledo were appointed in accordance with the procedure set out in UNCLOS Annex VII, article 3 (2).

According to the Statement of the Ministry of Foreign Affairs of Ukraine "since the Russian Federation's illegal acts of aggression in Crimea, Russia has usurped and interfered with Ukraine's maritime rights in these zones. Ukraine seeks to end the Russian Federation's violations of UNCLOS and vindicate Ukraine's rights in the Black Sea, Sea of Azov, and Kerch Strait, including Ukraine's rights to the natural resources offshore Crimea which belong to the Ukrainian people."[9]

On 19 February 2018, Ukraine filed its Memorial in arbitration proceedings against Russia. The Memorial establishes that Russia has violated (i) "Ukraine's rights to hydrocarbon resources in the Black Sea and Sea of Azov," (ii) "Ukraine's rights to living resources in the Black Sea, Sea of Azov, and Kerch Strait," (iii) "Ukraine's rights by embarking on a campaign of illegal construction in the Kerch Strait that threatens navigation and the marine environment," (iv) "its duty to cooperate with Ukraine to address pollution at sea," and (v) "Ukraine's UNCLOS rights and [its] own duties in relation to underwater cultural heritage."[10] Ukraine's claims are focused on

[8] "Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)", Permanent Court of Arbitration, PCA Case Repository, accessed 2019 November 28, https://pcacases.com/web/view/149.

[9] "Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea." Ministry of Foreign Affairs of Ukraine, Press Center, September 14, 2016, accessed 2019 November 28, https://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadzhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava.

[10] "Tribunal to Hear Preliminary Objections Raised by Russian Federation in Preliminary Phase." Permanent Court of Arbitration, Press Release, August 31, 2018. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation).* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.

Russia's actions in the maritime zones bordering Crimea, in particular "Russia's theft of billions of dollars' worth of sub-soil resources, its usurpation of fishing rights that once supported hundreds of artisanal and industrial fishing enterprises, and its interference with transit through an international strait frequented by almost 20,000 vessels each year."[11]

According to the Statement of the Ministry of Foreign Affairs of Ukraine "Ukraine has asked the arbitral tribunal to enforce its maritime rights by ordering the Russian Federation to cease its internationally wrongful actions in the relevant waters, to provide Ukraine with appropriate guarantees that it will respect Ukraine's rights under UNCLOS, and to make full reparation to Ukraine for the injuries the Russian Federation has caused."[12]

On 21 May 2018, Russia submitted to the Tribunal its Preliminary Objections dated 19 May 2018 in accordance with article 10(2) of the Rules of Procedure, requesting the Tribunal "to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine". [13] Six objections raised by Russia are listed in the Procedural Order No. 3 regarding Bifurcation of the Proceedings. Each objection questions jurisdiction of the Tribunal on particular ground such as land territory issue, the regime of internal waters, exclusions made under article 298 (1) UNCLOS, living resources within the exclusive economic zone and so on.

Due to complexity and limitation of the present research, the topic of this thesis concerns only the first objection raised by Russia with regard to the land territory issue. The principal objection of Russia is that the Tribunal lacks jurisdiction because "the Parties' dispute in reality concerns Ukraine's 'claim to sovereignty over Crimea' and is therefore not a 'dispute concerning the interpretation or application of the Convention' as required by Article 288, paragraph 1, of the Convention".[14]

In its comments on the Russian Federation's request to deal with the Preliminary Objections in a preliminary phase, Ukraine stated that "Russia's principal jurisdictional objection rests on the remarkable premise that it has a legal claim to sovereignty over the Crimean

[11] *In the Matter of a Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v The Russian Federation),* PCA Case No 2017-06, Rejoinder of Ukraine on Jurisdiction (28 March 19): 71, para 8, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation),* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.

[12] "Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea." Ministry of Foreign Affairs of Ukraine, Press Center, September 14, 2016, accessed 2019 November 28, https://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadzhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava.

[13] "Regarding Bifurcation of the Proceedings." Permanent Court of Arbitration, Procedural Order No. 3, August 20, 2018. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation),* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.

[14] Ibid.

Peninsula".[15] According to Ukraine, "Russia has no plausible legal claim to sovereignty over Crimea."[16] Therefore, due to "the *prima facie* implausibility of Russia's principal jurisdictional objection" the arbitral tribunal "cannot recognize such a claim as a basis to defeat its jurisdiction (or otherwise)."[17] In its reply, the Russia Federation noted that "Ukraine appears to misunderstand the role that the plausibility standard plays and how it fits alongside the basic rule that jurisdiction in international law cases is dependent upon consent".[18] These comments may help to understand the Parties' positions with regard to the land territory issue as an objection to the UNCLOS jurisdiction.

Inasmuch as main jurisdictional objection of Russia is related to the question of sovereignty over Crimea, the question of the Crimean legal status is of particular importance. It seems necessary to examine contextual background of the dispute brought by Ukraine in accordance with Annex VII with particular attention to the nature of jurisdictional objection raised by Russia and its historical grounds. After that, it is reasonable to describe the position of Ukraine and of Russia with respect to 2014 events. Afterwards, position of international community is to be assessed. This analysis will help to define whether the 2014 events should have any legal implications and alter the existed legal status of Crimea.

The abovementioned arbitral proceedings instituted under Annex VII of UNCLOS in the *Ukraine v. Russia* case should not be confused with the proceedings that Ukraine has filed against Russia before other international judicial bodies.

In 2017, Ukraine has instituted proceedings before the ICJ against Russia claiming that Russia has violated the International Convention for the Suppression of the Financing of Terrorism (ICSFT) in eastern Ukraine and of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Crimea.[19]

In 2018, Ukraine has instituted further Annex VII proceedings against Russia in a dispute concerning "the immunity of three Ukrainian naval vessels and the twenty-four servicemen on

[15] "Tribunal to Hear Preliminary Objections Raised by Russian Federation in Preliminary Phase." Permanent Court of Arbitration, Press Release, August 31, 2018. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation).* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.
[16] "Regarding Bifurcation of the Proceedings." Permanent Court of Arbitration, Procedural Order No. 3, August 20, 2018. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation),* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.
[17] Ibid.
[18] Ibid.
[19] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary objections, Judgement (November 8, 2019): 48. https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-00-EN.pdf.

board". In 2019, in relation to the dispute Ukraine requested the Tribunal to prescribe provisional measures under article 290(5) UNCLOS. The Tribunal prescribed provisional measures ordering the Russian Federation to release three Ukrainian naval vessels and their 24 servicemen.[20]

At the time of writing, the European Court of Human Rights is considering five inter-state cases filed by against Russia after the beginning of Russia's armed aggression. In addition, approximately 5 000 individual applications related to the events in Crimea and eastern Ukraine were registered.[21]

There are cases under the WTO dispute settlement system[22] which, however, do not concern claims arising directly from the dispute over Crimea or eastern Ukraine.

Under the 1998 bilateral investment treaty between Ukraine and Russia Ukrainian investors instituted individual investment arbitrations against Russia claiming that Russia violated the provisions of the bilateral investment treaty.

With respect to international criminal proceedings, it is worth noting that the situation in Ukraine has been under the International Criminal Court (ICC) preliminary examination since 25 April 2014 on the basis of a declaration lodged by the Government of Ukraine on 17 April 2014 under article 12(3) of the ICC Statute.[23] The Office of the Prosecutor has collected information on crimes within the Court's jurisdiction allegedly committed in Crimea and eastern Ukraine[24] in order to determine whether the cumulative requirements of jurisdiction, admissibility and the interests of justice are met and whether an investigation may be opened.[25] However, it is important to note that the nature of these proceedings under the ICC Statute is one concerning individual criminal responsibility.

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[20]Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation), Case No. 26 (ITLOS), Request for the Prescription of Provisional Measures (Order) (25 May 2019): 32. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf.

[21] "Armed Conflicts." European Court of Human Rights, Press Unit (May 2018), https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf.

[22] "Ukraine–Measures Relating to Trade in Goods and Services (Russia), DS525, World Trade Organization (19 May 2017). https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds525_e.htm; "Russia–Measures Concerning the Importation and Transit of Certain Ukrainian Products (Ukraine)", DS532, World Trade Organization (13 October 2017). https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm.

[23] "Постанова Верховной Ради від 04.02.2015 Про Заяву Верховної Ради України Про визнання Україною юрисдикції Міжнародного кримінального суду щодо скоєння злочинів проти людяності та воєнних злочинів вищими посадовими особами Російської Федерації та керівниками терористичних організацій "ДНР" та "ЛНР", які призвели до особливо тяжких наслідків та масового вбивства українських громадян", Відомості Верховної Ради (ВВР), 2015, № 12, ст.77. Accessed 2019 November 28 https://zakon.rada.gov.ua/laws/main/145-19.

[24] "Report on Preliminary Examination Activities (2018)", The Office of the Prosecutor (8 December 2018): 76. https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

[25] Article 53(1) of the Rome Statute. Rome Statute of the International Criminal Court of 17 July 1998, United Nations, Treaty Series, vol. 2187, No. 38544. https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx.

**The General Overview of the Dispute**

In this subchapter general information on the Parties of the dispute is given, relations between them are described and events of 2014 and after are mentioned.

Crimea is a peninsula located on the northern coast of the Black Sea in Eastern Europe that is almost completely surrounded by both the Black Sea and the smaller Sea of Azov to the northeast.

In 1783, Crimea was annexed by the Russian Empire as the result of the Russo-Turkish War. Crimea was part of the Russian Empire from 1783 to 1917. Following the Russian Revolution of 1917, Crimea became an autonomous republic within the Russian Soviet Federative Socialist Republic in 1921 as the Crimean Autonomous Soviet Socialist Republic. The Russian SFSR, in its turn, became part of the Soviet Union in 1922. During World War II, Crimea was downgraded to the Crimean Oblast. The Crimean Autonomous Soviet Socialist Republic was dissolved in 1945, and the Crimea became a region. During the period of the Soviet Union, the Crimean Oblast was a subdivision of the Russian SFSR until the transfer of Crimea from the Russian SFSR into the Ukrainian SSR in 1954. The transfer of the Crimean region in 1954 was an administrative action of the Presidium of the Supreme Soviet of the Soviet Union which transferred the government of the Crimean Peninsula from the Russian SFSR to the Ukrainian SSR. On 19 February 1954, the Presidium of the Supreme Soviet of the USSR issued a decree on the transfer of the Crimean region. With the collapse of the Soviet Union, Ukraine was reestablished as an independent state in 1991, and most of the peninsula was reorganized as the Autonomous Republic of Crimea, while the city of Sevastopol retained its special status within Ukraine. On 16 July 1990, the Declaration of State Sovereignty of Ukraine was adopted. The principles of the self-determination, democracy, independence were established. In 1991, Ukraine gained its independence from the Soviet Union. Following its independence, Ukraine formed a limited military partnership with Russia. The first Ukrainian census which was carried out by State Statistics Committee of Ukraine in 2001 established that in Crimea ethnic Russians make up 58% of the population, ethnic Ukrainians make up 24% and Crimean Tatars - 12% of the population.[26] The Crimea is the only region of Ukraine where ethnic Russians are in the majority. It shall be mentioned that Ukraine's sovereignty was accepted by the Russian authorities in a number of agreements which are listed in Chapter 1.3.

[26] "About number and composition population of UKRAINE by data All-Ukrainian Population Census '2001", State Statistics Committee of Ukraine. Accessed 2019 November 28 https://web.archive.org/web/20080105092251/http://www.ukrcensus.gov.ua/eng/results/general/estimate/.

It is time to describe the preconditions of the 2014 events. Due to complexity of the issue the author refers to highly-respected and reliable sources in order to describe factual background of the dispute such as the Parliamentary Assembly of the Council of Europe Report on Recent developments in Ukraine: threats to the functioning of democratic institutions 2014[27] and the International Criminal Court Report on Preliminary Examination Activities 2016.[28] It should be mentioned that the findings of the ICC Report are "preliminary in nature and may be reconsidered in the light of new facts or evidence."[29]

On 21 November 2013, the Ukrainian Government decided not to sign an Association Agreement with the European Union. The Parliamentary Assembly of the Council of Europe pointed out the fact that this decision was also taken as the result of heavy pressure from the Russian authorities, including threats of economic and political sanctions.[30] Following this decision mass protests began in Independence Square, Kyiv known as Maidan protests or Euromaidan. It appears that some people within the protest movement demanded removal of the President at the time, Viktor Yanukovych from office. Euromaidan originally started as a protest against the decision to cancel the signature of the association agreement with the European Union and then transformed itself into a general protest movement against the authority's perceived corruption and mismanagement.[31] At some point Maidan clashes between the authorities and protestors became violent, which "was largely the result of the hard-handed approach of the authorities, including their decision to break up the Euromaidan protests by force."[32] Agreement of 21 February on the Settlement of Crisis in Ukraine between the authorities and opposition that was brokered by the European Union had been signed by President Yanukovych as President on behalf of his administration. He left Kyiv immediately following the signing of the agreement. In

[27] "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[28] "Report on Preliminary Examination Activities (2016)", The Office of the Prosecutor (14 November 2016): 73. https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

[29] Ibid., para 11.

[30] "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014: para 4. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[31] Ibid., para 31.

[32] Ibid., para 19.

spite of the unexpected departure of President Yanukovych, both the opposition and ruling majority in the Verkhovna Rada decided some issues that were part of the agreement, namely they agreed to re-enact the 2004 amendments to the Ukrainian Constitution, agreed on an early presidential election for May 2014, and formed a new government on the basis of a consensus in the Verkhovna Rada.[33] However, the implementation of the 21 February agreement was impeded by the unexpected flight of President Yanukovych due to the necessity to sign different decisions. It appears that the impeachment of President Yanukovych was necessary for the subsequent implementation of the 21 February agreement. Therefore, the Verkhovna Rada in near consensus voted for the President's impeachment.

Afterwards, protests against the new Kyiv Government have been made in eastern regions of the country and in Simferopol, the capital of the Autonomous Republic of Crimea.[34] The clear support of the Russian authorities for any attempts by Crimea to change its relationship with the rest of Ukraine or possible requests to join the Russian Federation was expressed by the members of the State Duma and Council of the Federation of Russia during their visit to Crimea.[35] It may be concluded that the drive for secession of Crimea and its integration into the Russian Federation was largely incited by the Russian authorities.[36]

According to reports on 27 February 2014, armed and mostly uniformed individuals wearing no identifying insignia – which is in contravention to international law – seized control of the regional government buildings in Simferopol, the Crimean Parliament and transport hubs such as the airport, and blockaded Ukrainian military bases.[37]

According to paragraph 155 of the ICC Report:

> The same day, in the presence of armed men, the Crimean regional parliament reportedly decided to appoint a new prime minister and hold a referendum on the status of Crimea. The Russian Federation later admitted that its military personnel had been involved in taking control of the Crimean peninsula, justifying the intervention inter alia on the basis of alleged threats to citizens of the Russian Federation, the alleged decision of residents of Crimea to join the Russian Federation and an alleged request for Russian intervention by (former) President

[33] Ibid., para 26.
[34] "Report on Preliminary Examination Activities (2016)", The Office of the Prosecutor (14 November 2016): 73, para. 155. https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.
[35] "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014: para 76. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.
[36] Ibid., para 76.
[37] Ibid., para 78.

Yanukovych, whom the Russian Federation considered to remain the legitimate leader of Ukraine.

It is worth mentioning that the proceedings and vote during the extraordinary session of the Crimean regional parliament where new prime minister Sergey Aksyonov was appointed and the government was dismissed, are widely questioned also because in the 2010 regional elections his political party (the radical pro-Russian party, Russian Unity) gained only 4% of the votes in the elections to the Crimean Verkhovna Rada.[38] On 1 March 2014, the use of military force in Crimea was authorized by Council of the Federation of the Russian Parliament. The attempts to entice Ukrainian military battalions to defect and switch sides by Russian forces took place, which were largely unsuccessful.[39]

On 6 March 2014, Verkhovna Rada of the Autonomous Republic of Crimea by the Resolution "On holding of the all-Crimean referendum" decided to accede to the Russian Federation as a subject of Russian Federation and to hold on March 16, 2014, the all-Crimean Referendum. Instead of asking a polar question there were two alternative questions submitted to this referendum: "1) Do you support the reunification of Crimea with Russia with all the rights of the federal subject of the Russian Federation? Do you support the restoration of the Constitution of the Republic of Crimea in 1992 and the status of the Crimea as part of Ukraine?"[40] It worth noting that there were no option to maintain the *status quo* of Crimea and Sevastopol which is the Constitution of the Autonomous Republic of Crimea of 1998. The 1992 constitution accords greater powers to the Crimean parliament including full sovereign powers to establish relations with other states. It means that both referendum choices would result in *de facto* separation from Ukraine. By the time of the referendum Crimea was under the effective control of the Russian armed forces. In response, the Ukrainian Prosecutor indicted the Crimean leadership for illegal secession and high treason.

On 17 March 2014, the Crimean Parliament declared that it seceded from Ukraine and was a new independent nation while making a request to join the Russian Federation. This referendum was the political instrument to annex Crimea into the Russian Federation. On 18 March 2014, the incorporation of Republic of Crimea and the city of Sevastopol, an area of Ukraine, into

[38] Ibid., para 80.
[39] Ibid., para 81.
[40] "Рішення Конституційного Суду України від 14.03.2014 по справі про проведення місцевого референдуму в Автономній Республіці Крим." Accessed 2019 November 28 https://zakon.rada.gov.ua/laws/show/v002p710-14.

Russia was enacted by municipal law. The act of annexation came after a republican (local) referendum in the Autonomous Republic of Crimea held two days earlier, the results of which purportedly indicated a preference for separation from Ukraine and annexation by Russia.

On 19 March, the treaty by which Crimea and Sevastopol joined the Russian Federation as two new entities was accepted by the Russian Constitutional Court. The treaty was ratified on 21 March, after which the illegal annexation of Crimea by the Russian Federation was a fact.[41] On 20 March 2014, the Russian State Duma passed a law "On the Acceptance of the Republic of Crimea into the Russian Federation and the Creation of New Federal Subjects".

Following the annexation, Russian forces occupied the military bases of Ukraine and confiscated its navy ships and airplanes. According to the Ukrainian authorities, the value of military assets confiscated by the Russian Federation exceeds US$20 billion.[42]

On 15 April 2014 law of Ukraine "On ensuring civil rights and freedoms, and the legal regime on the temporarily occupied territory of Ukraine" was adopted. According to this law the official date of the Russian temporary occupation of Crimea is 20 February, 2014.[43] Article 3 of this law establishes that the temporarily occupied territory of Ukraine are land territory of the Republic of Crimea and the city of Sevastopol, its inland waters, internal waters and territorial sea of Ukraine around the Crimean peninsula, the area of the exclusive economic zone of Ukraine along the coast of the Crimean peninsula and the continental shelf of Ukraine, which are under the jurisdiction of the government of Ukraine in accordance with international law, the Constitution and laws of Ukraine, the subsoil and the airspace above those territories.[44] One may say that by adopting this law Ukraine confirms that the territory of the Autonomous Republic of Crimea and the City of Sevastopol is an integral part of the territory of Ukraine.

It seems useful to be familiar with Russia's position with respect to its activities in Crimea. For instance, the Resolution of Verkhovna Rada of the Autonomous Republic of Crimea "On holding of the all-Crimean referendum" where it was decided to accede to the Russian

[41] Assembly 85 "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014: para 85. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[42] Ibid., para 85.

[43] "Закон України від 27.04. 2014 Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України", Відомості Верховної Ради (ВВР), 2014, № 26, ст.892. Accessed 2019 November 28. https://zakon.rada.gov.ua/laws/show/1207-18.

[44] "Закон України від 27.04. 2014 Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України", Відомості Верховної Ради (ВВР), 2014, № 26, ст.892. Accessed 2019 November 28: article 3. https://zakon.rada.gov.ua/laws/show/1207-18.

Federation and to hold the all-Crimean Referendum shed some light on the matter. In particular, Verkhovna Rada of the Autonomous Republic of Crimea decided to adopt the Resolution while "expressing tremendous anxiety with respect to the socio-political situation around Crimea, confirming the priority of human values, its adherence to universally recognized principles and norms of international law, in order to realize the will of the population of Crimea and in the absence of legitimate public authorities in Ukraine". The Russian Ministry of Foreign Affairs raised "the issue of the legality of the coup d'état in Ukraine, the current Kiev regime and the legality of its actions."[45] In Russia's view, after the President at the time, Viktor Yanukovych left the country, legitimate authorities ceased to exist in Kiev.[46] Instead, the center of Kiev and many other west Ukrainian cities were occupied by armed national radicals, having "racist, anti-Semitic and xenophobic views."[47] Moreover, it appears from some of the statements of the Russian representatives[48] that one of the reasons to occupy and annex Crimea is dated back to 1954 when Crimea was transferred to the Ukrainian SSR. A term often used by Russia to describe these events is "reunification" to highlight the fact that Crimea was part of Russian Empire and later Russian SSR.[49] In this regard, it is crucial to note that Russia has committed in a number of instruments to respect Ukraine's territorial integrity within its borders, including with respect to Crimea. Therefore, in Russia's view this was not an annexation but an accession to the Russian Federation of a state that had just declared independence from Ukraine following a referendum.

The Russian Ministry of Foreign Affairs while referring to the CSCE's Helsinki Final Act of 1975[50] stated that "Russia is absolutely convinced that the Crimean referendum is absolutely legitimate and fully corresponds with the will of the Crimean people."[51] In view of Russia, people of Crimea exercised their right to self-determination and their free choice shall be respected.[52]

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[45] "Comment by the Russian Ministry of Foreign Affairs regarding statements by the OSCE Chair-in-Office about the Referendum in Crimea on the 16 March 2014", The Ministry of Foreign Affairs of the Russian Federation. Accessed 2019 November 28. https://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/70498.

[46] "Speech by Russia's Permanent Representative to the United Nations, Vitaly Churkin, at the session of the UN General Assembly, New York, 27 March 2014", The Ministry of Foreign Affairs of the Russian Federation. Accessed 2019 November 28. https://www.mid.ru/en/general_assembly/-/asset_publisher/lrzZMhfoyRUj/content/id/68754.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] According to the CSCE's Helsinki Final Act of 1975, "all people always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference". Helsinki Final Act of 1 August 1975, Organization for Security and Co-operation in Europe. https://www.osce.org/helsinki-final-act?download=true.

[51] "Comment by the Russian Ministry of Foreign Affairs regarding statements by the OSCE Chair-in-Office about the Referendum in Crimea on the 16 March 2014", The Ministry of Foreign Affairs of the Russian Federation. Accessed 2019 November 28. https://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/70498.

[52] "Speech by Russia's Permanent Representative to the United Nations, Vitaly Churkin, at the session of the UN General Assembly, New York, 27 March 2014", The Ministry of Foreign Affairs of the Russian Federation. Accessed 2019 November 28. https://www.mid.ru/en/general_assembly/-/asset_publisher/lrzZMhfoyRUj/content/id/68754.

"The threat to the lives of Russian nationals, our compatriots and staff of Russia's Black Sea Fleet in Ukraine" made Russia use Russian Armed Forces in the territory of Ukraine.[53] The Russian Foreign Minister specified that it was made "in full compliance with Russian law".[54] In this regard, it should be mentioned that according to O. Luchterhandt, during the process of Crimea's accession to the Russian Federation Russian constitutional law was violated.[55] For instance, when on 17 March 2014, the Crimean Parliament declaring that it was a new independent nation, made a request to join the Russian Federation, the Russian constitutional requirement that the country to whom it pertained should be in agreement was bypassed.[56]

Now it is important to understand what legal consequences arise with respect to these events.

**Legal Status of Crimea**

The contextual background was illustrated in the previous subchapter. It is necessary to assess the above mentioned events in order to understand whether they affect the existed legal status of Crimea.

Before going in deep with the 2014 events it should be noted a few facts on the legal status of Crimea. Ukraine has its boundaries as internationally recognized at the time of independence in 1991. The fixing of the boundaries between Ukraine and the Russian Federation is reflected in a number of bilateral agreements. They are the Agreement between Ukraine and the Russian Federation on Further Development of Interstate Legal Relations (1992)[57], the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (1997)[58], the Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border

[53] "Speech by the Russian Foreign Minister, Sergey Lavrov, during the high-level segment of the 25th session of the United Nations Human Rights Council, Geneva, 3 March 2014", The Ministry of Foreign Affairs of the Russian Federation. Accessed 2019 November 28. https://www.mid.ru/en/foreign_policy/un/-/asset_publisher/U1StPbE8y3al/content/id/72642.

[54] Ibid.

[55] Otto Luchterhandt, "Annexion der Krim – Putin verstößt gegen russische Verfassung," *Frankfurter Allgemeine Zeitung*, April 18, 2014, quoted in Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014): 367-391.

[56] "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014: para 84. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[57] "Угода між Україною і Російською Федерацією про подальший розвиток міждержавних відносин від 23.06.1992." Accessed 2019 November 28. https://zakon.rada.gov.ua/laws/main/643_018.

[58] "Договір про дружбу, співробітництво і партнерство між Україною і Російською Федерацією від 14.01.98." (expired 01.04.2019). Accessed 2019 November 28. https://zakon.rada.gov.ua/laws/main/643_006.

(2003).[59] In the 1997 Cooperation Treaty Russia recognized Ukraine's borders, and accepted Ukraine's sovereignty over Crimea.[60]

It is clear that up until 2014 the Russian Federation recognized Ukrainian boundaries. The frontier between Ukraine and the Russian Federation was already settled and it is reflected in a number of treaties.

The obligations between Russia and Ukraine with regard to territorial integrity and the prohibition of the use of force are contained in a number of agreements among which the UN Charter, the Final Act of the Conference on Security and Cooperation in Europe of 1975, the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons of 1994, the Agreement Establishing the Commonwealth of Independent States etc. Under all these agreements Russia is bound by its repeated and specific commitments to respect Ukraine's borders.

With regard to the Russia's continuing treaty commitments, it shall be mentioned that Vladimir Putin, the President of the Russian Federation, stated that bilateral treaties between the countries are no longer binding because a revolution in Ukraine has changed the existed regime out of which a new state had emerged with no binding agreements concluded between the states.[61] There is no question on state succession with respect to Ukraine because a revolutionary regime change does not lead to a discontinuity of statehood on a given territory. Therefore, this statement has no basis in the current doctrine of international law.

Another fact that shall be mentioned is that in 2009 Ukrainian boundaries were internationally recognized by the ICJ, the highest judicial organ of the United Nations system, by a binding judgment in the *Romania v. Ukraine* case with respect to the maritime delimitation in the Black Sea.[62] The Court recognized that Ukraine is the only state having maritime entitlements and responsible for the maritime area between the Crimean west-facing coast and the maritime boundary indicated in the ICJ Judgment. As Thomas D. Grant pointed out in his work "this proposition is indispensable and essential to the ICJ's reasoning, for, if any state besides Ukraine or Romania held maritime entitlements in that area, the ICJ would have lacked jurisdiction to

[59] "Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003". Accessed 2019 November 28. http://zakon1.rada.gov.ua/laws/show/643_157.
[60] "Договір про дружбу, співробітництво і партнерство між Україною і Російською Федерацією від 14.01.98." (expired 01.04.2019): article 2. Accessed 2019 November 28. https://zakon.rada.gov.ua/laws/main/643_006.
[61] "Vladimir Putin answered journalists' questions on the situation in Ukraine", *Kremlin Press Conference*, 4.3.2014, Accessed 2019 November 28. http://en.kremlin.ru/events/president/news/20366.
[62] Maritime Delimitation in the Black Sea (Romania v. Ukraine). Judgment, I.C.J. Reports (2009): 61. https://www.icj-cij.org/files/case-related/132/132-20090203-JUD-01-00-EN.pdf.

decide the case."[63] It means that the ICJ judgment in the *Romania v. Ukraine* case necessarily entails non-recognition of other claims in the maritime area in question. It is cleat that there were no question of sovereignty over Crimean territory. Therefore, it is a maritime area off the west coast in which maritime rights are definitely allocated to Ukraine and a matter of judicial notice.

It may be concluded that up until 2014 the legal status of Crimea as a part of Ukrainian territory was clearly recognized by all the international community, including the Russian Federation. Therefore, the question is whether any lawful process has changed the existed legal status of Crimea and whether a lawful transfer of Ukrainian territory to the Russian Federation has been conducted. For this purposes positions of Ukraine, Russia and of international organizations which in most way reflect the opinion of international community in this regard are specified in this subchapter.

First of all, it seems reasonable to assess Russia's position on whether there were legal justifications for the actions carried out with respect to the territory of Ukraine, among which its military operations and subsequent annexation of the Crimea and Sevastopol regions. Russian arguments defending its position were described in the previous subchapter. Assessment of these arguments is important because an international court or tribunal is called to define the positions of both parties of the dispute. Therefore, it is useful to find out whether those arguments are reasonable and are capable of being invoked in order to object the tribunal's jurisdiction.

One of the arguments invoked by the Russian authorities are related to the impeachment process of former President Yanukovych. It should be mentioned that the legitimacy of the Verkhovna Rada, which was elected in 2012 is not questioned. Its composition did not change as a result of the events of February 2014. There can therefore be no question with regard to the legitimacy of the new authorities and their decisions. The decision to impeach the President was taken in near consensus. It may be concluded that the argument invoked by Russia on the legitimacy of the new authorities in Kyiv and the legality of their decisions lacks any reasonable basis. In respect of the nature of Euromaidan protest movement, there were allegations that this movement was in essence an extremist, fascist and anti-Semitic movement. This was promoted in the Russian media[64] and, as it appears from the statement of Russia's Permanent Representative to

[63] Grant, Thomas D. "International Dispute Settlement in Response to an Unlawful Seizure of Territory: Three Mechanisms", *Chicago journal of International law,* Vol. 16, No. 1 (2015): 24.

[64] "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014: para 30. http://semantic-

the United Nations[65] this position reflects the official view of the Russian Government. In respect of the alleged anti-Semitic nature of Euromaidan it is worth noting that several Jewish organizations were actively involved in the protests and that all Jewish organizations in Ukraine, including those in Crimea, have expressed their support for Ukraine's sovereignty. In respect of the alleged extremist nature of Euromaidan, reference is made to a nationalist and right-wing political party called Svoboda, however, "classifying it as fascist or extremist would be an incorrect exaggeration."[66]

One of the arguments to justify a military intervention in Crimea was the protection of nationals abroad, specifically the protection of the Russian minority that lives on Ukrainian territory, non-citizens, but "ethnic" Russians. This idea itself is quite controversial in terms of international law. This may be partly regarded as self-defense under article 51 UN Charter or as an unwritten customary exemption of the prohibition of the use of force under article 2(4) UN Charter. With respect to the Crimean intervention the right to self-defense cannot be invoked because a necessary link to the state's territory, its positions, or vessels abroad and an ongoing armed attack against a state or the threat of it are required.[67] Although an unwritten customary exemption of the prohibition of the use of force is not widely accepted, one may say that rescue operations are justified under international law. However, there is a high threshold for this justification. There shall be evidence that the life of a state's citizens is in danger on the territory of another state, unwillingness or incapability to protect and the absence of any other reliable means to rescue the person in danger.[68] There were no concrete evidence of such violations, consequently, this argument of the Russian authorities is irrelevant in terms of international law. One more argument concerns an intervention upon invitation. It was stated that after Yanukovych had fled the country on 22 February he had issued a letter in which Russia was invited to intervene

pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[65] "Speech by Russia's Permanent Representative to the United Nations, Vitaly Churkin, at the session of the UN General Assembly, New York, 27 March 2014", *The Ministry of Foreign Affairs of the Russian Federation*. Accessed 2019 November 28. https://www.mid.ru/en/general_assembly/-/asset_publisher/lrzZMhfoyRUj/content/id/68754.

[66] "Recent developments in Ukraine: threats to the functioning of democratic institutions", Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014: para 37. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[67] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014): 373.

[68] Ibid., 374.

on the territory of Ukraine. Christian Marxsen in his work pointed out that "Russia's intervention was primarily directed at preparing the secession of a part of the state's territory. Even without knowledge of the content of Yanukovych's invitation it is hardly imaginable that the disaggregation of Ukraine's territory would have been covered by his invitation and, even if, the respective invitation would constitute treason and would arguably therefore be illegal anyway."[69]

Argument related to the right to self-determination of Crimean people as a foundation for Crimea's secession from Ukraine was also raised by the Russian authorities.

The 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (Friendly Relations Declaration) proclaimed "by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[70]

However, it is generally accepted that the concept of self-determination may not be used to disaggregate the territory of existing nation-states.[71] Moreover, the Venice Commission concluded that self-determination is understood primarily as internal self-determination within the framework of the existing borders and not as external self-determination through secession.[72] In general, self-determination is linked with the protection of the rights of the minority. If these rights of the minority are protected in practice there is no reason and justification for external self-determination.[73] With respect to Crimea, the status of an autonomous republic gives a relatively comprehensive degree of political autonomy under the constitution of Ukraine, therefore "the institutional arrangements for implementing internal self-determination were in place."[74] Due to the fact that there were no serious violations of the rights of minorities the Crimean declaration of independence cannot be a result of expression of its population's right of self-determination.

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[69] Ibid., 379.

[70] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration) of 1979, United Nations. https://www.un.org/ruleoflaw/files/3dda1f104.pdf

[71] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014): 385.

[72] Opinion on "Whether the Decision Taken By the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," European Commission for Democracy Through Law (Venice Commission), Opinion No. 762/2014 (March 21, 2014): para 18. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e.

[73] Yaraslau Kryvoi and Maria Tsarova, "Protecting Foreign Investors in Crimea: Is Investment Arbitration an Option?", CIS Arbitration Forum, (July 29, 2014), Accessed 2019 November 28. http://www.cisarbitration.com/2014/07/29/protecting-foreign-investors-in-crimea-is-investment-arbitration-an-option/

[74] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014): 387.

President of Russia Vladimir Putin relied on the precedent set by Kosovo in the ICJ's advisory opinion on Kosovo's declaration of independence[75] while maintaining that the Crimean referendum is in accordance with the principles of international law.[76] Christian Marxsen in his work on "The Crimea crisis: An International Law Perspective" deeply assessed the argument of applying the Kosovo opinion to the present case and of treating the Kosovo incident as a precedent for further cases of secession.[77] He made several important conclusions in this regard. Applying the principles of the Kosovo opinion leads to an illegality of the Crimean declaration of independence. This is because the Crimean declaration of independence is based on the referendum which is illegal. The referendum, in its turn, is relied on Russia's threat to use force. It may be concluded that the declaration of independence cannot be regarded in isolation of that illegality.[78]

The Crimean referendum of 16 March 2014 in view of Russia formed a basis for the alteration of the legal status of Crimea and incorporation of Crimea and the city of Sevastopol into the Russian Federation. The main question concerns the validity of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14 "On holding of the all-Crimean referendum" dated March 6, 2014.

According to opinion of OSCE Chair Didier Burkhalter, "[i]n its current form the referendum regarding Crimea scheduled for March 16, 2014, is in contradiction with the Ukrainian Constitution and must be considered illegal."[79] NATO Secretary-General Anders Fogh Rasmussen stated that a referendum in Ukraine's Crimea region is in violation of international law and there is no legitimacy.[80]

In this respect, the judgement of the Constitutional Court of Ukraine on all-Crimean referendum shall be mentioned. On 14 March 2014, the Constitutional Court of Ukraine in the case on the all-Crimean referendum in the Autonomous Republic of Crimea[81] declared that the

[75] Accordance with international law of the unilateral declaration of independence in respect of Kosovo. The International Court of Justice, Advisory Opinion of 22 July 2010. https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.
[76] "Putin: referendum in Crimea fully complied with international law norms." *Russian News Agency*, March 16, 2014. Accessed 2019 November 28. https://tass.com/russia/723846.
[77] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014), 367-391.
[78] Ibid., 384.
[79] "OSCE Chair says Crimean referendum in its current form is illegal and calls for alternative ways to address the Crimean issue." OSCE Press Release, 11 March 2014. https://www.osce.org/cio/116313.
[80] "NATO says Crimea referendum would break international law." *Reuters*, March 14, 2014. Accessed 2019 November 28. https://www.reuters.com/article/us-ukraine-crisis-nato/nato-says-crimea-referendum-would-break-international-law-idUSBREA2D1NI20140314.
[81] "Рішення Конституційного Суду України від 14.03.2014 по справі про проведення місцевого референдуму в Автономній Республіці Крим." Accessed 28 November 2019. https://zakon.rada.gov.ua/laws/show/v002p710-14.

Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14 "On holding of the all-Crimean referendum" dated March 6, 2014 is non-conforming with the Constitution of Ukraine (unconstitutional) and shall be voided on the day of rendering by the Constitutional Court of Ukraine of this decision. In this judgement the Constitutional Court of Ukraine recalled the principles of integrity and territorial inviolability of Ukraine established by the Constitution of Ukraine.[82] According to the judgement of the Constitutional Court of Ukraine on all-Crimean referendum "reduction of the existing borders of Ukraine, withdrawal of any subject of the administrative and territorial structure of Ukraine from its body, changing of the constitutional status of administrative units, in particular of the Autonomous Republic of Crimea and the City of Sevastopol as an integral part of Ukraine, within holding of a local referendum contradicts the above-mentioned constitutional principles".[83]

In simple words, the Constitution of Ukraine prohibits any local referendum which would alter the territory of Ukraine. Only a consultative referendum on increased autonomy could be permissible under the Constitution of Ukraine. Accordingly, the decision to conduct a referendum on the territory of Crimea is unconstitutional under the Ukrainian and Crimean constitutions.

On 21 March 2014, the Venice Commission at its 98th Plenary session in Venice adopted an opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles." The Venice Commission concluded that the Constitution of Ukraine does not allow the holding of any local referendum on secession from Ukraine[84] and that "holding a referendum which is unconstitutional in any case contradicts European standards".[85] The Venice Commission also listed a number of circumstances which allow to assume that the referendum of 16 March 2014 could not be held in compliance with international standards, among which the massive public presence of (para)military forces, concerns with respect to the freedom of expression in Crimea, the excessively short period of only 10 days between the decision to call the referendum and the

[82] Constitution of Ukraine, articles …"Конституція України від 28.06.1996" (Відомості Верховної Ради України (ВВР), 1996, № 30, ст. 141): article 2. Accessed 28 November 2019. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.
[83] "Рішення Конституційного Суду України від 14.03.2014 по справі про проведення місцевого референдуму в Автономній Республіці Крим", para 4.3. Accessed 28 November 2019. https://zakon.rada.gov.ua/laws/show/v002p710-14.
[84] Opinion on "Whether the Decision Taken By the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," European Commission for Democracy Through Law (Venice Commission), Opinion No. 762/2014 (March 21, 2014): para 27. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e.
[85] Ibid., para 24.

referendum itself, doubt with respect to the legal effects of the referendum and the neutrality of the authorities and the fact that the referendum question is not worded neutrally.[86] Moreover, it was pointed out that any referendum on the status of a territory should have been preceded by serious negotiations among all interested parties, and there were not such negotiations. Therefore, circumstances in Crimea did not allow the holding of a referendum in line with European democratic standards.[87]

On 27 March 2014, General Assembly of the United Nations adopted Resolution 68/262 on the territorial integrity of Ukraine.[88] Although resolution of General Assembly has no binding effect it plays important role in understanding of dominant point of view across the international community with regard to a particular situation. This Resolution was supported by 100 United Nations member states. Eleven nations voted against the resolution, while 58 abstained, and a further 24 states were absent when the vote took place. According to this Resolution the General Assembly "[a]ffirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders".[89]

Furthermore, the General Assembly "[n]oting that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine, <…> [u]nderscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol" and "[c]alls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status".[90]

It may be concluded that a referendum held in Crimea was declared invalid by the interim Ukrainian Government and by a majority of States of the UN General Assembly.

On 9 April 2014, the Parliamentary Assembly of the Council of Europe adopted Resolution 1988 on the recent developments in Ukraine: threats to the functioning of democratic

[86] Ibid., paras 22, 23.
[87] Ibid., para 28.
[88] Resolution 68/262 'Territorial integrity of Ukraine.' General Assembly, 27 March 2014. https://undocs.org/A/RES/68/262.
[89] Ibid., para 1.

[90] Ibid., paras 5,6.

institutions.[91] The Assembly assessed Russian arguments with respect to the 2014 events and stated that:

> […] none of the arguments used by the Russian Federation to justify its actions hold true. There was no ultra-right wing takeover of the central government in Kyiv, nor was there any imminent threat to the rights of the ethnic Russian minority in the country, including, or especially, in Crimea where they are in the majority. In addition, neither secessionism, nor integration with the Russian Federation was prevalent on the political agenda of the Crimean population prior to Russian military intervention, nor could these issues count on the support of more than a small percentage of the population. The drive for secession and integration into the Russian Federation was instigated and incited by the Russian authorities and mostly implemented by Russian military forces with the assistance of some small civil organizations aligned with it. The referendum was neither legal, nor, as we outlined, was its outcome plausible. In short, it was a classic case of unprovoked military aggression resulting in the annexation/occupation of the territory of a neighbouring country. [92]

Moreover, in its Resolution the Assembly "strongly condemns the authorisation of the Parliament of the Russian Federation to use military force in Ukraine, the Russian military aggression and the subsequent annexation of Crimea, which is in clear violation of international law, including the Charter of the United Nations, the Helsinki Final Act of the OSCE and the Statute and basic principles of the Council of Europe."

General Assembly of the United Nations adopted series of documents on the situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, namely 71/205 of 19 December 2016, 72/190 of 19 December 2017 and 73/263 of 22 December 2018. Resolution 71/205 of 2016 condemns the temporary occupation of Crimea by Russia, reaffirms "the non -recognition of its annexation" and urges the Russian Federation "to uphold all of its obligations under applicable international law as an occupying Power".[93] Resolution 72/190 of 2017 additionally supports "the commitment by Ukraine to adhere to international law in its efforts to put an end to the Russian occupation of Crimea" and condemns "the unlawful imposition of laws, jurisdiction and administration in the occupied Crimea by the Russian Federation, and

[91] "Recent developments in Ukraine: threats to the functioning of democratic institutions." Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly of the Council of Europe, 08 April 2014. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDcxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwNzEy.

[92] Ibid., para 97.

[93] Resolution 71/205 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine).' General Assembly, 19 December 2016. https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/205

demands that the Russian Federation respect obligations under international law with regard to respecting the laws in force in Crimea prior to occupation".[94] Resolution 73/263 of 2018 affirms that "the seizure of Crimea by force is illegal and a violation of international law" and asserts "that those territories must be returned".[95] It also condemns "all attempts by the Russian Federation to legitimize or normalize its attempted annexation of Crimea".[96] However, what is most important is that General Assembly "[c]alls upon all international organizations and specialized agencies of the United Nations system, when referring to Crimea in their official documents, communications and publications, including with regard to statistical data of the Russian Federation, to refer to 'the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, temporarily occupied by the Russian Federation', and encourages all States and other international organizations to do the same".

Obviously it does not mean that this document may directly influence international court or tribunal rendering decision, nonetheless, according to opinion of Oleksandr Khara "it makes it impossible for some international institution to oppose the position of most countries."[97] Thus, in some way it may serve as a certain marker in understanding on how to react on the issue.

Notwithstanding that the findings of the ICC Report are "preliminary in nature and may be reconsidered in the light of new facts or evidence"[98] the ICC Report on Preliminary Examination Activities 2016 stated:

> "The information available suggests that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation. This international armed conflict began at the latest on 26 February when the Russian Federation deployed members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government. The law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an on-going state of occupation. A determination of whether or not the initial intervention which led to the occupation is considered lawful or not is not required. For purposes of the Rome Statute an armed conflict may be international in nature if one or more States partially or

[94] Resolution 72/190 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine).' General Assembly, 19 January 2018. https://undocs.org/A/RES/72/190.
[95] Resolution 73/263 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine).' General Assembly, 21 January 2019. https://undocs.org/A/RES/73/263.
[96] Ibid.
[97] Oleksandr Khara, "How is the new UN General Assembly resolution on Crimea important for Ukraine." UNIAN, 19 November 2018. Accessed 2019 November 28. https://www.unian.info/politics/10342497-how-is-the-new-un-general-assembly-resolution-on-crimea-important-for-ukraine.html.
[98] "Report on Preliminary Examination Activities (2016)", The Office of the Prosecutor (14 November 2016): 73, para 11. https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

> totally occupies the territory of another State, whether or not the occupation meets with armed resistance."[99]

Although, it is not clear when exactly Russian intervention in Crimea took place, Russia has used the threat of force, clearly expressed in the authorization to use military force on Ukrainian territory made by the Council of the Federation of the Russian Parliament. Under international law such actions are internationally wrongful acts. Arguments proposed by Russia so as to defend its position and actions are groundless. Crimea has also not become an independent state, therefore, it cannot adopt an internationally binding treaty on the accession to the Russian Federation. It cannot have legal effect under international law which means that "from the perspective of international law Crimea still belongs to Ukraine, whatever the *de facto* situation may look like."[100]

In this subchapter different sources were used in order to assess the events happened with respect to Crimea. Facts were described in this subchapter and they may constitute a firm basis for any subsequent determinations. It is possible to make some conclusions. Firstly, it is an international armed conflict between Ukraine and Russia and the law of international armed conflict shall apply. The territory of Crimea is under Russian occupation. Crimean referendum of 16 March 2014 is unconstitutional, it contradicts to European standards and has no validity. Therefore, it cannot form a basis for changing the legal status of Crimea which leads to the conclusion that subsequent annexation is illegal.

[99] Ibid., para 158.
[100] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014), 390.

## 2. LAND TERRITORY ISSUE IN THE LIGHT OF JURISDICTION RATIONE MATERIAE

### Article 288 UNCLOS as a Basis for Jurisdiction

It is necessary to understand main principles if it comes to jurisdiction of international courts and tribunals. Contrary to the domestic legal systems there is no compulsory jurisdiction within the international legal order.

Under international law each state is sovereign and cannot be brought under any dispute settlements procedures unless it agrees to it. States are equal within the international legal system. In the international society there is no a vertically structured relationship for States.[101] However, international agreements may establish the compulsory dispute settlement procedure. Practically it means that when signing, ratifying or acceding to an international treaty a State expresses consent to be bound by this treaty, including a dispute settlement mechanism provided that it is embodied in this treaty. In UNCLOS the procedure of dispute settlement has been built into the treaty and constitutes its indispensable part. UNCLOS in Section 5 provides for compulsory and binding dispute settlement procedure with respect to disputes concerning the law of the sea. After a State becomes a Party of UNCLOS it is bound by the compulsory dispute settlement procedure entailing binding decisions. In simple words, the formal consent to UNCLOS jurisdiction is enshrined in the act of ratification of, or adherence to, the Convention by States.

In order to adjudicate the case international court or tribunal shall have jurisdiction over the dispute. Jurisdiction may be described as "the competence of a court or tribunal to settle a dispute between two or more States by way of a binding decision".[102] It means that the main question is "whether the court or tribunal seized of a case can entertain that case and render a decision that is binding on the parties".[103] With regard to this, it is important to point out that "a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon".[104] There are different categories of jurisdiction, however, for the purposes of the

[101] Yuki Morimasa, "How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?" Dissertation, World Maritime University, 2017, 14. Accessed 2019 November 28. http://commons.wmu.se/all_dissertations/572.

[102] Alexander Proelss, "The Limits of Jurisdiction *ratione materiae* of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics,* Vol. 46 (2018): 47.

[103] Shabtai Rosenne, International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications, *Max Planck Encyclopedia of Public International Law*, March 2006, para. 2, quoted in Alexander Proelss, "The Limits of Jurisdiction *ratione materiae* of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics,* Vol. 46 (2018), 47.

[104] ICSID Case No. ARB/07/5, Abaclat and others v. Argentina, Decision on Jurisdiction and Admissibility of 4 Aug. 2011, para. 247. https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf.

present research attention is drawn to such categories as jurisdiction *ratione personae* and jurisdiction *ratione materiae*. They are needed so as to exercise jurisdiction over the dispute. However, while jurisdiction *ratione materiae* necessarily relates to the topic of this thesis, jurisdiction *ratione personae* needs to be described in this study because the question of analogy between these two categories of jurisdiction arises.

Jurisdiction *ratione personae* otherwise known as personal jurisdiction addresses the question of whether the tribunal has the power to decide the case with respect to the respondent Party of the dispute. It means that the focus is on the party which is to be bound by way of a binding decision.

Second category of jurisdiction is jurisdiction *ratione materiae* otherwise known as subject-matter jurisdiction. To establish jurisdiction *ratione materiae* an international court or tribunal is focused on the specific kind of claim that is brought to that judicial body. Therefore, in order to decide whether it has jurisdiction over the dispute the subject-matter of the dispute should be identified. This is general approach of international courts and tribunals with regard to their jurisdiction *ratione materiae*.[105] It is important to describe subject-matter jurisdiction within the UNCLOS dispute settlement procedures.

Article 288 UNCLOS serves as the legal basis of jurisdiction *ratione materiae* of UNCLOS Tribunals. According to article 288 UNCLOS, "a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part" as well as "the interpretation or application of an international agreement related to the purpose of the Convention."[106] It means that any dispute related to the interpretation or application of UNCLOS is subject to the jurisdiction of UNCLOS tribunals. In addition, it also means that jurisdiction of UNCLOS tribunals is limited to "disputes concerning the interpretation or application of this Convention". The Court has jurisdiction to declare whether a State Party has breached the Convention and has no jurisdiction to declare whether it has breached a rule of international law outside the Convention. In general terms, exercising of jurisdiction over an issue means making legal determinations through the

[105] *See, e.g.*, Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction, Judgment, 1998 I.C.J. Rep. 432. https://www.icj-cij.org/files/case-related/55/055-19730202-JUD-01-00-EN.pdf; Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, 2015 I.C.J. Rep. 592. https://www.icj-cij.org/files/case-related/153/153-20150924-JUD-01-00-EN.pdf.

[106] United Nations Convention on the Law of the Sea of 10 December 1982. http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

application of primary rules of international law. International court or tribunal can decide a case only if both jurisdiction *ratione personae* and jurisdiction *ratione materiae* are present.

Attention shall be paid to written optional exceptions to jurisdiction of an international court or tribunal provided for in article 298(1) UNCLOS. According to this provision a State may by means of a written declaration announce that it does not accept compulsory procedures under section 2 UNCLOS with respect to one or more of the categories of disputes, which are specified in this article. The effect of such declaration is an absolute exclusion from compulsory procedures of all claims noted in the declaration.

It is worth mentioning that article 288 UNCLOS forms the only basis for UNCLOS jurisdiction and defines its scope. There were cases within the international framework where courts attempted to use the applicable law of a treaty as a justification to expand its jurisdiction. This alternative way of dealing with the question of jurisdiction which concerns applicable law of a treaty was raised in some cases of the UNCLOS tribunals. Following this expanded approach an international court or tribunal may exercise jurisdiction over an issue which falls outside its jurisdiction by relying on article 293(1) UNCLOS, according to which "a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".[107] However, from the wording of this provision it is clear that it does not form a basis for jurisdiction. The wording of article 293(1) UNCLOS suggests a two-step process according to which the tribunal may apply "this Convention and other rules of international law" only after determination that it has jurisdiction over the dispute under article 288 was made.[108] In other words, article 293 UNCLOS cannot form a basis for the tribunal's jurisdiction due to the fact that the dispute before it would be the one concerning other rules of international law which is contrary to article 288 UNCLOS according to which the dispute shall concern the interpretation or application of this Convention. According to Peter Tzeng the correct interpretation of the "other rules of international law" within the meaning of article 293(1) is the one which refers to such rules of international law that "help UNCLOS tribunals exercise their jurisdiction over UNCLOS claims".[109] It means, this is a legal error to treat article 293(1) as one which can grant UNCLOS tribunals a power to declare whether states have violated "other rules

[107] United Nations Convention on the Law of the Sea of 10 December 1982, article 293. http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.
[108] Peter Tzeng, "Jurisdiction and Applicable Law Under UNCLOS", *Yale L.J.*, Vol. 126 (2016): 247.

[109] Ibid.

of international law", for instance the rules on the use of force, the rules on the acquisition of territory or the rules of international human rights law. At the same time, to interpret the applicable law provision this way may lead to a situation where jurisdiction *ratione materiae* has no limits and an international court or tribunal may decide any dispute if it is sufficiently extensive to concern among other things law of the sea.[110]

In spite of this, UNCLOS jurisprudence has no consistent approach with respect to this matter. UNCLOS tribunals in the *Saint Vincent and the Grenadines v. Guinea*[111], *Guyana v. Suriname*[112] and *Panama/Guinea-Bissau*[113] cases invoked Article 293(1) to expand their jurisdiction explicitly or implicitly, while in the *Ireland v. United Kingdom*[114], *Mauritius v. United Kingdom*[115], *Netherlands v. Russia*[116] and *Malta v. São Tomé and Príncipe*[117] cases this interpretation that allows the expansion of jurisdiction was rejected. Therefore, there are two lines of UNCOS jurisprudence that treated article 293 differently. However, none of the tribunals clearly explained this inconsistency. Possible reasons which may explain the Tribunals' reasoning are described in Chapter 2.4.

After general observations on the UNCLOS dispute settlement mechanism were made it is relevant to analyze the content of article 288 UNCLOS by assessing crucial elements of the provision's wording. Article 288 UNCLOS states that "a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention". In assessing the wording of article 288 it is important to rely on article 31(1) of the Vienna Convention on the Law of Treaties, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[118]

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[110] The OSPAR tribunal in the *MOX Plant* case pointed out with respect to an analogous provision in the OSPAR Convention that it "would transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention." Ireland v. United Kingdom (OSPAR Arbitration), Final Award, 2 July 2003, para 85. https://pcacases.com/web/sendAttach/121.

[111] M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.

[112] Guyana v. Suriname, PCA Case No. 2000-04, Award, 2007. https://pcacases.com/web/sendAttach/902.

[113] M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment_published/C19_judgment_140414.pdf.

[114] MOX Plant (Irelandv. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-3_dec_01.pdf.

[115] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015): 217. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.

[116]The Arctic Sunrise Arbitration (Netherlands v. Russia), PCA Case No. 2014-02, Award on the Merits, 2015. https://pcacases.com/web/sendAttach/1438.

[117] The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), PCA Case No. 2014-07, Award, 2016. https://pcacases.com/web/sendAttach/1915.

[118] Vienna Convention on the law of treaties (with annex). Vienna, May 23, 1969. https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

In the *Greece v. Britain* case the Permanent Court defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons".[119] The concept of a dispute is well-established in international law and, as the tribunal in the *Philippines v. China* case noted, the term "dispute" within Article 288 "constitutes a threshold requirement for the exercise of the Tribunal's jurisdiction."[120] It means that in order to comply with this provision and establish jurisdiction over the case the tribunal shall conclude that a disagreement between the States is actually a dispute. After that, it is necessary to identify and characterize the dispute due to the fact that "the nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable."[121]

In order to determine on an objective basis the dispute brought before it the tribunal is bound to examine the position of both parties, to interpret their submissions, "while giving particular attention to the formulation of the dispute chosen by the Applicant".[122] Such a determination is to be based also on "diplomatic exchanges, public statements and other pertinent evidence"[123] for the reason that "the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter."[124] However, it is important to make a distinction "between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute."[125] Moreover, the tribunal is required to "isolate the real issue in the case and to identify the object of the claim"[126] as well as "to determine the real dispute that has been submitted to it"[127].

In *Georgia v. Russian Federation* case the court clarified that:

"While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military*

[119] Mavrommatis Palestine Concessions, Jurisdiction, Judgment of 30 August 1924, PCIJ. https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf.
[120] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015, 148. https://www.pcacases.com/web/sendAttach/1506.
[121] Ibid., 150.
[122] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015), 208. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.
[123] Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction, Judgment, 1998 I.C.J. Rep. 432 at p. 449, para. 31. https://www.icj-cij.org/files/case-related/55/055-19730202-JUD-01-00-EN.pdf.
[124] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, at pp. 84-85, para. 30. https://www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-EN.pdf.
[125] Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction, Judgment, 1998 I.C.J. Rep. 432 at p. 449, para. 32. https://www.icj-cij.org/files/case-related/55/055-19730202-JUD-01-00-EN.pdf.
[126] Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974, p. 457 at p. 466, para. 30. https://www.icj-cij.org/files/case-related/59/059-19741220-JUD-01-00-EN.pdf.
[127] Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction, Judgment, 1998 I.C.J. Rep. 432 at p. 449, para. 31. https://www.icj-cij.org/files/case-related/55/055-19730202-JUD-01-00-EN.pdf.

*and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice."[128]

Whether an international dispute exists is "a matter for objective determination".[129] A mere assertion that a dispute exists with the other party "is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."[130]

Another important condition embodied in article 288 UNCLOS is that a dispute in order to fall under jurisdiction of the Tribunal must be the one "concerning the interpretation or application of this Convention". Apparently, the term "concerning" suggests broader meaning than the content of "interpretation or application of this Convention". This interpretation of the term "concerning" is not limited to this provision. Generally, other provisions also may contribute from this expensive interpretation. This is also evident in the case law. For instance, in the *Saint Vincent and the Grenadines v. Kingdom of Spain* case the question has appeared with respect to a declaration made by Saint Vincent and the Grenadines under article 287 of the Convention where reference was made to disputes concerning the arrest or detention of its vessels. In this regard, it is necessary to find out whether the use of the term "concerning" in the declaration means that it does not extend only to provisions which expressly contain the word "arrest" or "detention" but to any provision of the Convention where it may be implied in order to cover all claims which are related to the arrest or detention of vessels. The ITLOS followed the expensive interpretation of the term "concerning" by pointing out that "the expression 'concerning' in its declaration clearly indicates that its declaration extends to all articles of the Convention which have a bearing on the

[128] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, at pp. 84-85, para. 30. https://www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-EN.pdf.

[129] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74. https://www.icj-cij.org/files/case-related/8/008-19500330-ADV-01-00-EN.pdf.

[130] South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, ICJ Reports 1962, p. 319 at p. 328. https://www.icj-cij.org/files/case-related/47/047-19621221-JUD-01-00-EN.pdf.

arrest or detention of its vessels."[131] Xiaoyi Zhang pointed out that the Tribunal made a few inconsistent findings in the *Republic of Philippines v. The People's Republic of China* case.[132] On the one hand, the Tribunal with respect to the Philippines' submissions adopted an expansive interpretation of the word "concerning". It was pointed out that China's claimed entitlements in the South China Sea are based on an understanding of historic rights. However, it is not about the existence of specific historic rights, but rather a dispute about historic rights within the UNCLOS framework which falls under jurisdiction of an arbitral tribunal.[133] Therefore, the Philippines' submissions related to the validity of China's "nine-dash line" and claims to "historic rights" concern the interpretation or application of the Convention. On the other hand, the tribunal narrowed the scope of the word "concerning" when addressing the question of whether China's declaration under Article 298(1)(a) with respect to the disputes relating to sea boundary delimitations excludes the tribunal's jurisdiction. It was decided that jurisdiction is present, which in view of Xiaoyi Zhang, indicates that the Tribunal has applied a double standard to secure its jurisdiction.[134]

It may be concluded that the word "concerning" plays a vital role in shaping the scope of jurisdiction and exclusions to jurisdiction. Moreover, it appears that courts and tribunals may choose which interpretation to follow: narrow or extensive. Another important remark relates to the necessary link with specific treaty's provisions. In simple terms, disputes concerning violations of any other treaty or customary law fall outside UNCLOS jurisdiction. It means that environmental, human rights or land territory disputes are not "concerning the interpretation or application of this Convention", therefore, they cannot be brought under UNCLOS dispute settlement procedures. While this kind of situation looks quite obvious in terms of jurisdiction the problem arises in cases where dispute submitted to the Tribunal concerns issues that have arisen in the context of various grounds. It happens when States have extensive relationships in different spheres of law. It becomes harder to detect the true reason of the claim and the question arises of whether the tribunal has jurisdiction over the dispute where different treaties are involved. This kind of situation where nature of the dispute is controversial is analyzed in Chapter 2.2.

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[131] The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, para 78. https://www.itlos.org/cases/list-of-cases/case-no-18/#c2124.
[132] Xiaoyi Zhang, "Problematic Expansion on jurisdiction: Some Observation on the South China Sea Arbitration", IX J EAI L 2 (2016): 449-465.
[133] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015, 168. https://www.pcacases.com/web/sendAttach/1506.

[134] Xiaoyi Zhang, "Problematic Expansion on jurisdiction: Some Observation on the South China Sea Arbitration", IX J EAI L 2 (2016), 457.

Important elements related to article 288 UNCLOS as a basis for jurisdiction were described above. It seems necessary to consider the Applicant's claims in *Ukraine v. Russia* case in order to see whether these potential claims could fall within the jurisdiction of the arbitral tribunal.

According to Ukraine's claims, as described in its Memorial filed on 19 February 2018, Russia has violated (i) "Ukraine's rights to hydrocarbon resources in the Black Sea and Sea of Azov," (ii) "Ukraine's rights to living resources in the Black Sea, Sea of Azov, and Kerch Strait," (iii) "Ukraine's rights by embarking on a campaign of illegal construction in the Kerch Strait that threatens navigation and the marine environment," (iv) "its duty to cooperate with Ukraine to address pollution at sea," and (v) "Ukraine's UNCLOS rights and [its] own duties in relation to underwater cultural heritage."[135]

A few conclusions may be drawn here. First of all, Ukraine has framed the dispute as one concerning rights in maritime zones adjacent to Crimea. Since the Convention contains different provisions on rights of State in its adjacent maritime zones these claims are related to the interpretation and application of UNCLOS. In general, each State has sovereignty and it exercises it over its land territory and its territorial sea and sovereign rights and jurisdiction in adjacent maritime zones. Sovereign rights at sea entail exclusiveness as to the exploration and exploitation of resources, thereby preventing other States from exercising such activities. Therefore, if a State acts on the territory or in the maritime zones of another State without the latter's permission, it violates the latter's territorial sovereignty or its exclusive rights.[136]

Second, Ukraine asks the tribunal to declare that Russia has violated its rights under the Convention and to determine the legal consequences of Russia's maritime conduct. It should be noted that the power to declare whether a State party to the treaty has violated the treaty is within the jurisdiction of international courts and tribunals and, particularly, within the jurisdiction over disputes "concerning the interpretation or application" of a treaty.[137] However, it is related to particular treaty in question and "does not include the jurisdiction to declare whether a State Party

[135] "Tribunal to Hear Preliminary Objections Raised by Russian Federation in Preliminary Phase." Permanent Court of Arbitration, Press Release, 31 August 2018. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation).* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.

[136] Enrico Milano and Irini Papanicolopulu, "Territorial Disputes and State Responsibility on Land and at Sea", paper presented at the 20th anniversary conference of the IBRU "The State of Sovereignty", Durham University, 1-3 April 2009.

[137] Robert Kolb, "La cour internationale de justice [The International Court of Justice]", 454-56 (2013) quoted in Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018), 449.

has breached a rule of international law outside the treaty".[138] It follows from the *Bosnia and Herzegovina v. Serbia and Montenegro* case where ICJ held that "it has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*."[139] It is relevant to the present research inasmuch as it reveals the tendency in ICJ jurisprudence with respect to this question.

In light of recent events with respect to Crimean territory and taking into account the assessment of these events in the subchapter relating to the legal status of Crimea, the dispute brought by Ukraine may implicate issues which do not concern the interpretation or application of UNCLOS such as those relating to land territory or the use-of-force. The questions, then are how to measure those issues, how they affect the presence of jurisdiction and whether they may constitute exceptions under which the UNCLOS tribunal may still exercise jurisdiction over the dispute.

### Limits of Jurisdiction *ratione materiae.* Problems of Jurisdiction

This subchapter is called to define limits of jurisdiction *ratione materiae* by analyzing the wording of article 288 UNCLOS and describing what problems may arise with respect to different categories of jurisdiction. It should not be confused with article 297 UNCLOS which sets out the automatic exceptions to the compulsory procedures contained in section 2.

While addressing the question of jurisdiction different problems may arise. The problem itself and way of dealing with it depends on the category of jurisdiction in question. As it was described in the previous subchapter two categories of jurisdiction are important to the present research: jurisdiction *ratione personae* and jurisdiction *ratione materiae*. Each of them has a respective problem. Although, a focus is on the subject matter jurisdiction due to the fact that the very topic of the research concerns a specific kind of dispute before an international court or tribunal, there is point of view in literature that suggests that these two categories of jurisdiction are so interrelated that may in some way affect each other. This position shall be described as well.

[138] Peter Tzeng, "Supplemental jurisdiction under UNCLOS", Houston Journal of International Law, Vol. 38 No. 2, 2017: 499-575, 505.
[139] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, 147. https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf

As it was mentioned in the previous subchapter, article 288 UNCLOS forms the legal basis of the jurisdiction *ratione materiae* or subject matter jurisdiction. Due to the fact that this provision defines the scope of UNCLOS jurisdiction it is possible to say that it limits subject-matter jurisdiction "to disputes concerning the interpretation or application of this Convention". In this category of jurisdiction the problem arises when the tribunal in order to make a decision over the dispute which concerns the interpretation or application of UNCLOS has to rule on other issues that are not governed by UNCLOS. Peter Tzeng has considerable amount of articles where the problems of jurisdiction are analyzed. It was pointed out in his works that some disputes raise the very same jurisdictional problem but not always it was spotted by other commentators.[140] The term "implicated issue problem" was used by Peter Tzeng to describe the phenomenon mentioned above.[141] According to this author the problem arises when "an international court or tribunal has jurisdiction *ratione materiae* over an issue, but the exercise of such jurisdiction would necessarily implicate the exercise of jurisdiction over an issue outside the court or tribunal's jurisdiction *ratione materiae*."[142] The question is "whether an international court or tribunal may exercise jurisdiction over a dispute if doing so implicates an outside issue over which the court or tribunal does not have jurisdiction *ratione materiae*."[143] For better understanding, the issue over which an international court or tribunal has jurisdiction *ratione materiae* is to be called the "inside issue" and an issue outside the court or tribunal's jurisdiction *ratione materiae* is the "outside issue".[144]

The "implicated issue problem" as a problem of jurisdiction *ratione materiae* was mentioned above. It is time to describe a problem which may arise with respect to jurisdiction *ratione personae*. As it was mentioned in the previous subchapter jurisdiction *ratione personae* or personal jurisdiction asks the question of whether the tribunal has the power to decide the case with respect to the respondent Party of the dispute. Within jurisdiction *ratione personae* the question is "whether an international court or tribunal may exercise jurisdiction over a dispute if

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[140] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 452.

[141] Ibid. *See also* Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond." EJL:TALK! (Oct. 14, 2016). http://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-vchina-ukraine-v-russia-and-beyond/.

[142] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 451.

[143] Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond." EJL:TALK! (Oct. 14, 2016). http://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-vchina-ukraine-v-russia-and-beyond/.

[144] The author finds these terms invented by Peter Tzeng to be of particular use for the purposes of this thesis, therefore, they are to be used throughout the study.

doing so implicates an absent State over which the court or tribunal does not have jurisdiction *ratione personae*."[145] Contrary to the problem of jurisdiction *ratione materiae* the problem with respect to jurisdiction *ratione personae* was deeply analyzed in literature and is called "indispensable party problem", "necessary party problem" or "implicated party problem". The last term was introduced by Peter Tzeng. The present research will refer to this problem as to the "implicated party problem".

Peter Tzeng in his work pointed out that these two problems are analogous.[146] It is important to note that in respect of both categories of jurisdiction the principal question is whether the court or tribunal has jurisdiction over the dispute notwithstanding the necessity to deal with the outside issue. In order to answer this question approaches were invented within the case law which are to be described in the Chapter 2.3. An international court or tribunal in its assessment have to go beyond the Applicant's claim and assess the actual situation and preconditions of initiation of the proceedings. This will help to understand the real issue of the dispute. It is important because sometimes the issue which falls under the jurisdiction of the tribunal may be linked with those which are outside the jurisdiction. In this kind of situation although the Applicant's claims from the first sight are about the interpretation or application of UNCLOS the tribunal may still find itself out of jurisdiction. Therefore, the question on the scope of the jurisdiction of UNCLOS tribunals arises.

Courts, tribunals, and commentators use various terms to describe jurisdiction of an international court or tribunal over an issue that would otherwise be outside the court or tribunal's jurisdiction *ratione materiae*, but that falls within the court or tribunal's jurisdiction *ratione materiae* because it is incidental to the dispute. In general, the terms "incidental jurisdiction"[147] and "supplemental jurisdiction"[148] are used for this kind of situation where substantive, not procedural matters are in question. Jurisdiction over procedural matters is called "inherent" or "ancillary". For the purposes of the present research only jurisdiction over substantive matters plays role. According to Peter Tzeng it may be said that if an international court or tribunal decides not to exercise jurisdiction over the dispute it effectively means that it does not have incidental

[145] Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond." EJL:TALK! (Oct. 14, 2016). http://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-vchina-ukraine-v-russia-and-beyond/.
[146] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 455.
[147] Ibid., 454.
[148] Peter Tzeng, "Supplemental jurisdiction under UNCLOS", Houston Journal of International Law, Vol. 38 No. 2, 2017: 499-575.

jurisdiction over the outside issue.[149] From the wording it seems that an international court or tribunal having jurisdiction *ratione materiae* provided by a specific treaty provision may also have incidental or supplemental jurisdiction over other issues. In the author's view, there is no need to separate jurisdiction this way even for theoretical or studying purposes. If the tribunal decides that jurisdiction *ratione materiae* over dispute is present it means, first, that jurisdiction *ratione materiae* is present over the whole dispute with all the issues which are necessary to decide and, second, that the implicated issue problem was effectively resolved by applying a respective approach. Therefore, the approach does not address the question of whether an international court or tribunal may still exercise jurisdiction notwithstanding the outside issue. The question the approach is called to answer is whether an international court or tribunal has jurisdiction *ratione materiae* over the dispute taking into account all the relevant issues. Article 288 UNCLOS requires the tribunal to identify the subject-matter of the dispute. This is done via approaches for characterizing disputes. In the author's opinion, an approach shall be regarded as way to characterize the dispute, not as an exception or way to circumvent a provision on jurisdiction by asking "whether a court or tribunal may still exercise jurisdiction". It is worth noting that although lots of commentators argued that approaches address this very question, the present research focuses on the presence of jurisdiction *ratione materiae* and does not separate incidental or supplemental jurisdiction from it. Analysis of the approaches invented by courts and tribunals so as to deal with the implicated issue problem is conducted in Chapter 2.3.

A few important observations in respect of the implicated issue problem must be made.

First, it should be noted that the implicated issue problem may arise in different fields of international law with different judicial forums and basis of jurisdiction. Taking into account that international dispute settlement mechanism varies being compulsory and not, it becomes clear why the result achieved by one judicial forum may be completely different from the other one. Not to mention the exclusions which are specific for the sphere concerned. Therefore, it is necessary to take into consideration that the implicated issue problem is the question of jurisdiction in general rather than the UNCLOS dispute settlement system. It is an open question of whether specific framework (UNCLOS in our case) shall be solely examined or it is necessary to assess the question in a broader prospective with reference to other judicial forums such as the ICJ's.

[149] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 455.

Second, following the previous thinking, the author of the present research points out that under the UNCLOS dispute settlement mechanism four means for the settlement of disputes concerning the interpretation or application of this Convention are available for State Parties. They are the International Tribunal for the Law of the Sea established in accordance with Annex VI, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII and a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[150] It is worth mentioning that the cases brought before the arbitral tribunal and the cases brought before the ICJ may possess different jurisdictional preconditions. For instance, the ICJ constituted by the Statute of the ICJ has broader jurisdiction than an international court or tribunal under article 288 UNCLOS. If the ICJ decides a case related to the provisions of UNCLOS the applicable law under the ICJ statute is broader than the one under the UNCLOS and according to article 38(1) of the Statute of the ICJ it encompasses international conventions, international custom, general principles of law and judicial decisions and the teachings.[151] In conclusion, cases related to the international law of the sea may have different jurisdictional basis. It is important to distinguish cases instituted under the UNCLOS and those instituted under the ICJ Statute. Due to the fact that the last ones have nothing to do with the UNCLOS dispute settlement mechanism the arguments reflected in the respective decisions cannot possibly answer the questions arising with respect to the UNCLOS jurisdiction.

Third, nature of the issue which is outside the tribunal's jurisdiction may play crucial role. It depends on the relevance and significance of the issue concerned. For example, the prohibition on the use of force having a paramount importance for an international legal order as a whole may refrain the tribunal to put the question of violation of this prohibition outside its jurisdiction while some other questions such as the ones concerning human rights claims or environmental agreements may fall out of the tribunal's jurisdiction. Therefore, different principles may be applied to address different problems "depending on the exact issues in question."[152]

Forth, especially in respect of land territory issue as an outside issue, there is a view that the tribunal depending on the kind of dispute in question may apply tests of different strength. It

[150] United Nations Convention on the Law of the Sea of 10 December 1982, article 287. http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.
[151] Rome Statute of the International Criminal Court of 17 July 1998, United Nations, Treaty Series, vol. 2187, No. 38544. https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx.
[152] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 502.

concerns disputes on maritime delimitation known as "mixed disputes" where determination on the land territory issue is preliminary to the settlement of a maritime delimitation dispute and, as a result, may require more permissive test than a dispute related to land territory issue which is resulted from an unsolved decolonization where historically contested area is in question.

Fifth, issues which fall outside jurisdiction may vary on the basis of their exclusion from the tribunal's jurisdiction. In particular, it may be expressly excluded from the tribunal's jurisdiction by virtue of a Party's reservation or a treaty exclusion. Another possibility is the lack of a treaty provision that would allow the tribunal to exercise jurisdiction over the issue, such as an issue of land territory within the UNCLOS framework. In this kind of situation one may argue that this issue is impliedly excluded from the tribunal's jurisdiction.[153] Therefore, the question is whether the different basis of "exclusion" may be a reason for the tribunal to treat the issues differently.

All these different factors have to be taken into account when it comes to the characterization of the dispute brought before the tribunal. Main questions are whether UNCLOS jurisdiction is precluded by the fact that the dispute submitted to it implicates issues not concerning the interpretation or application of UNCLOS, whether it is rational for the approach to depend on the outside issue in question and whether it may explain why there is no consistent practice with respect to the implicated issue problem. While there is no clarity in the literature with respect to the questions mentioned above the author's considerations will be given in Chapter 2.3., where among other things attention is drawn to the nature of the outside issue and the ways of characterizing disputes which were developed by the international courts or tribunals.

**Approaches to the Problems of Jurisdiction: the Characterization Approach and the Logic-based Approach**

As has already been mentioned, in order to establish that jurisdiction under article 288 UNCLOS is present an international court or tribunal has to characterize a dispute brought before it. It is particularly helpful when there is no clarity of whether the dispute concerns only the "interpretation or application of UNCLOS" or some other issues not governed by UNCLOS are involved as well. It means that in the process of defining the subject-matter of the dispute the tribunal may find other issues relevant to this case. The question of jurisdiction over the outside

[153] Ibid., 505.

issue arises. It is important to consider whether the outside issue is present, and if so, whether the UNCLOS tribunal has the power to decide the outside issue alongside with the proper UNCLOS issue. In general, the tribunal examines the link between the issue which falls under the jurisdiction of the tribunal and those which are outside the jurisdiction. As a result of this assessment, the tribunal may find a lack of jurisdiction with respect to the dispute in question despite the fact that the Applicant's claims *per se* are about the interpretation or application of UNCLOS. It concerns the scope of UNCLOS jurisdiction.

The doctrines or approaches have been developed so as to deal with the problems of jurisdiction. It helps to ensure that international courts and tribunals do not exceed their jurisdiction. Practically speaking, an international court or tribunal defines whether the outside issue is present via approaches or tests invented in case law. These are ways of characterizing disputes brought before international courts and tribunals. UNCLOS Tribunals invented different tests in order to assess whether they have jurisdiction over the case. Each of the tests is trying to define the subject-matter of the dispute. In other words, the tests are methods for characterizing disputes. In the *Bolivia v. Chile* case the ICJ stated that "[i]t is for the Court itself ... to determine on an objective basis the subject-matter of the dispute".[154] Therefore, an international court or tribunal may decide whether to follow either test invented by the other tribunals or to define for itself new method for characterizing the dispute taking into account the specific case before it. In spite of this permissive rule international courts and tribunals usually attempt to keep consistency in the decisions. Although with respect to the implicated party problem a coherent theory known as the doctrine of indispensable parties was developed, there is no consistent practice to the implicated issue problem. Possible reasons for this inconsistent practice are described below. These problems of jurisdiction are analogous[155] and for each of them there are two approaches for determining whether the tribunal has jurisdiction over the dispute.

What is important is that the tribunal generally cannot resolve the dispute before it if the claim necessarily connects to the issue outside its jurisdiction unless some conditions embodied in different tests and approaches are met. The basic rule is that jurisdiction of an international court or tribunal is clearly limited and it rather will not have jurisdiction over the whole dispute, than it

[154] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, 2015 I.C.J. Rep. 592. https://www.icj-cij.org/files/case-related/153/153-20150924-JUD-01-00-EN.pdf.

[155] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 502.

makes legal determinations over issues which fall outside its competence. Jurisdiction may be found to be present or not on the basis of the test chosen by specific court or tribunal. In other words, the characterization of the dispute before the tribunal carries out through the application of some kind of test. Basically, tests adopted by international courts and tribunals so far may be grouped into two approaches: the logic-based approach and the characterization approach. The question of whether the court or tribunal has jurisdiction is addressed depending on the approach. Each problem of jurisdiction may be solved differently depending on the approach chosen in a particular case. Key features these approaches possess when it comes to the problems of jurisdiction are to be assessed. The author believes that it is important not to focus solely on particular framework but to start the research with international law in general by analyzing the methods of characterizing disputes which may be of any importance for the sphere concerned. However, before going in deep with the invented tests, it is necessary to understand their nature.

Implicated party problem as a problem of jurisdiction and its solution shall be described. In order to deal with the implicated party problem the characterization approach asks an international court or tribunal whether the dispute relates more to the participating State or the absent State.[156] It shall be related more to the participating State in order to exercise jurisdiction over the dispute. If it relates more to the absent State, then there is no jurisdiction. Within the logic-based approach, the logical relationship between the exercise of jurisdiction over the participating State and the exercise of jurisdiction over the absent State is to be determined.[157] The question is whether the exercise of jurisdiction over the participating State requires a prior determination on the legal responsibility of the absent State. In this case an international court or tribunal will not have jurisdiction over the dispute.

After theoretical framework was described, it is useful to mention the practice side of the question. A few cases which contributed to the development of a consistent approach as regards the implicated party problem are *Monetary Gold*[158], *Certain Phosphate Lands*[159] and *East Timor*[160] cases. It was stated in the *Monetary Gold* case that if the legal interests of an absent State would

[156] Ibid., 460.
[157] Ibid.
[158] Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment, I.C.J., 1954. https://www.icj-cij.org/files/case-related/19/019-19540615-JUD-01-00-EN.pdf.
[159] Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240. https://www.icj-cij.org/files/case-related/80/080-19920626-JUD-01-00-EN.pdf.
[160] East Timor (Portugal v. Australia) Judgment, I. C.J. Reports 1995, p. 90, para 28. https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf.

form the "very subject-matter" of the decision then the court cannot exercise jurisdiction.[161] There is a point of view in literature that the "very subject-matter" of the decision and characterization approach in general oversimplifies international legal disputes because legal interests of different States may form the "very subject-matter" of the decision. Plus, the wording is quite ambiguous and hard to be defined. This could be a reason why subsequent decisions have modified the test in respect of the implicated party problem. In the *Certain Phosphate Lands*[162] and the *East Timor*[163] cases it was stated that a logically prior determination of the legal responsibility of an absent State deprives a court from the ability to exercise jurisdiction. This is a logic-based approach through the adoption of "prerequisite determination" test. The modern approach to the implicated party problem is embodied in the doctrine of indispensable parties. International courts and tribunals today consistently apply a logic-based approach by adopting the "prerequisite determination" test within the framework of the "very subject-matter" test. It may be summarized as follows "an international court or tribunal may not exercise jurisdiction over a dispute if the legal interests of an absent State would form the "very subject-matter" of the decision, which is the case if and only if the decision requires a "prerequisite determination" on the legal responsibility of the absent State."[164]

This is the modern approach to deal with the implicated party problem of jurisdiction *ratione personae*. As regards the implicated issue problem of jurisdiction *ratione materiae* international courts and tribunals have adopted different tests with no consistency. According to the characterization approach within the implicated issue problem, the dispute shall be related more to the inside issue than to the outside issue in order for an international court or tribunal to have jurisdiction. In order to decide the case the dispute before the tribunal must be characterized in such a way as one relating to the UNCLOS issue more, than to the issue outside its jurisdiction. When it comes to the logic-based approach the tribunal shall determine the logical relationship between the issue over which it has jurisdiction and the one which falls outside the tribunal's jurisdiction. More specifically, the tribunal shall assess the consequences of its exercise the jurisdiction. As Peter Tzeng summed up, it should be determined whether the exercise of

[161] Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment, I.C.J., 1954. https://www.icj-cij.org/files/case-related/19/019-19540615-JUD-01-00-EN.pdf.
[162] Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, para 55. https://www.icj-cij.org/files/case-related/80/080-19920626-JUD-01-00-EN.pdf.
[163] East Timor (Portugal v. Australia) Judgment, I. C.J. Reports 1995, p. 90, para 28. https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf.
[164] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 470.

jurisdiction over the UNCLOS issue "requires a prior determination on the outside issue, implies a concurrent determination on the outside issue, or affects a future determination of the outside issue."[165] International courts or tribunals in their decisions while deciding whether they have jurisdiction over the dispute expressly or impliedly addressed one or more of the aforementioned questions. It is reasonable to analyze each of them with subsequent illustrations from the case law.

The most prominent is a "prior determination" test with respect to the implicated issue problem which is analogous to the "prerequisite determination" test as regards the implicated party problem. The "prior determination" test asks the tribunal to determine whether the exercise of jurisdiction over the UNCLOS issue requires a prior determination on the issue over which it does not have jurisdiction. If so, the tribunal shall refuse from the exercise of jurisdiction over the whole dispute. It means that a dispute where it is necessary to decide on the outside issue as a precondition of deciding the issue over which the tribunal has jurisdiction cannot be brought before this tribunal.

When the theoretical framework was examined, it is important to analyze jurisprudence with particular attention to the approaches chosen by international courts and tribunals and the reasoning. While the case law with respect to the implicated party problem was briefly discussed, some cases as regards the implicated issue problem are to be deeply analyzed due to its importance for the present research. It seems reasonable to discuss each of the approaches with close consideration on the cases. The logic-based approach through the application of the "prior determination" test was adopted in the *Greece v. Turkey* case[166], the *Malaysia/Singapore* case[167], the *Philippines v. China* case[168]. In some cases such as the *Germany v. Poland* case[169] and the *Mauritius v. United Kingdom* case[170] the "prior determination" test was impliedly rejected and international courts and tribunals decided to follow a characterization approach.[171] However, in regard to the implicated issue problem it may be concluded that international courts and tribunals

[165] Ibid., 473.
[166] Aegean Sea Continental Shelf (Greece v. Turkey) Judgment, I.C.J. Reports 1978, p. 3. https://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf.
[167] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p. 12. https://www.icj-cij.org/files/case-related/130/130-20080523-JUD-01-00-EN.pdf.
[168] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015: 151. https://www.pcacases.com/web/sendAttach/1506.
[169] Case concerning certain German interests in Polish Upper Silesia (The Merits), 1927. https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf.
[170] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015): 217. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.
[171] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 472-473.

have not followed a consistent approach and the modern trend is not clear. Possible explanation to be provided as well.

In a situation where a dispute relates to issues which are outside of the tribunal's jurisdiction the main question is whether the tribunal has jurisdiction over this dispute in spite of the presence of the outside issues. On the one hand, this is an open question for considerations due to the lack of consistent practice. On the other hand, case law provides us with different tests invented by the international courts and tribunals. Within the UNCLOS framework, the *Mauritius v. United Kingdom* case and the *Philippines v. China* case implicitly or explicitly have addressed the implicated issue problem via characterization approach and logic-based approach, respectively.

In 2010, the Republic of Mauritius instituted arbitral proceedings in the *Mauritius v. United Kingdom* case concerning the establishment by the United Kingdom of a Marine Protected Area around the Chagos Archipelago. The United Kingdom objected to the tribunal's jurisdiction on the basis that the issue of sovereignty over the Chagos Archipelago is a longstanding point of contention between the parties.[172] The tribunal stated that "for the purpose of characterizing the Parties' dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies".[173] With respect to this, the relevant question is whether the issue of sovereignty is just one aspect of a larger question on the interpretation and application of the term "coastal State" or whether the dispute between the Parties primarily concerns the issue of sovereignty, "with the United Kingdom's actions as a 'coastal State' merely representing a manifestation of that dispute".[174] In order to address the question the Tribunal has taken into account a historical record of the dispute between the Parties by stating that "there is an extensive record, extending across a range of fora and instruments, documenting the Parties' dispute over sovereignty" and consequences of its potential decision which "extend well beyond the question of the validity of the MPA".[175] As a matter of fact, it is hard to imagine a situation where land territory issues if addressed do in a less way affect the relationship between the Parties. In fact, any decision on sovereignty would have a wide variety of consequences just for the reason that it concerns such sensitive matter as land territory.

[172] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015): 217, para 172. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.
[173] Ibid., 211.
[174] Ibid.
[175] Ibid.

The Tribunal decided that "the Parties' differing views on the 'coastal State' for the purposes of the Convention are simply one aspect of this larger dispute"[176] which , at its core, relates to land sovereignty over the Chagos Archipelago. This finding, however, does not definitively answer the question of jurisdiction. The question of the "extent to which Article 288(1) accords the Tribunal jurisdiction in respect of a dispute over land territory when, as here, that dispute touches in some ancillary manner on matters regulated by the Convention"[177] remains. The tribunal in the *Mauritius v. United Kingdom* case held that the jurisdiction under Article 288(1) "extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it", however if the "real issue in the case" and the "object of the claim" do not relate to the interpretation or application of the Convention "an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)."[178] Interestingly, the Tribunal pointed out that it "does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."[179] Unfortunately, the Tribunal did not enter into details on the threshold and the point where a minor issue of sovereignty becomes the one which stops to be ancillary to the UNCLOS dispute.

In 2013, the Republic of the Philippines instituted the arbitral proceedings against the People's Republic of China under the UNCLOS dispute settlement procedures. Although, China adopted a position of non-acceptance and non-participation in this proceedings, it shall be mentioned that according to Article 9 of Annex VII UNCLOS absence of a party does not constitute a bar to the proceedings.[180] It is interesting to note that in the *Philippines v. China* case the tribunal mentioned that, first of all, it has to determine "whether there is a dispute between the Parties concerning the matters raised by the Philippines and, second, whether such a dispute concerns the interpretation or application of the Convention."[181] It means that the tribunal seeks for compatibility between a dispute itself and the Applicant's claims, on the one hand, and between this dispute and the basis for jurisdiction (article 288), on the other hand. Following this reasoning,

[176] Ibid, 212.
[177] Ibid., 213.
[178] Ibid., 220.
[179] Ibid., 211.
[180] UNCLOS Annex VII, Article 9. United Nations Convention on the Law of the Sea of 10 December 1982. http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.
[181] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015: 151, para 131. https://www.pcacases.com/web/sendAttach/1506.

the very first step is called to show all the matters and issues which may be summed up into the definition of a "dispute" between the Parties. Afterwards, all those matters and issues are verified on the "interpretation or application of the Convention" requirement. It is unclear, though, how closed and intertwined those matters shall be and whether all of them shall be taken into account.

China in its Position Paper argued that "the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention."[182] The arguments invoked by China imply that in order to decide upon any of the Philippines' claims, the tribunal would have to determine the sovereignty over relevant maritime features in the South China Sea.[183] In the *Philippines v. China* case the tribunal took a logic-based approach and held that "the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty."[184]

As already pointed out, in theory a logic-based approach determines whether the exercise of jurisdiction over the UNCLOS issue "requires a prior determination on the outside issue, implies a concurrent determination on the outside issue, or affects a future determination of the outside issue." [185] It seems that in the *Philippines v. China* case two disjunctive conditions were embodied. The first one reflects a "prior determination" test and the second one concerns "a future determination of the outside issue."

In the present case the tribunal decided that the Philippines' Submissions do not require a determination of sovereignty, neither expressly nor implicitly. [186] Plus, the Tribunal noted that it "does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims."[187] Consequently, the Tribunal decided that the issue of sovereignty between

[182] "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines", *Ministry of Foreign Affairs of China* (Dec. 7, 2014), para 4. https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm.

[183] Ibid., para 29.
[184] SCS 153 The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015: 151, para 153. https://www.pcacases.com/web/sendAttach/1506.
[185] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 473.
[186] SCS 153 The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015: 151, para 153. https://www.pcacases.com/web/sendAttach/1506.
[187] Ibid.

the parties is separate from the issues presented in the Philippines' claims. According to the Tribunal, that is why the *Philippines v. China* case is distinct from the *Mauritius v. United Kingdom* case where Mauritius' submissions "would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims".[188]

Nevertheless, it should be noted that there is a point of view in literature that "the issues of territorial sovereignty and maritime entitlements are so inextricably intertwined that the Tribunal could not logically consider one without considering the other."[189] As Xiaoyi Zhang pointed out in his work, the Tribunal in the *Philippines v. China* case has applied a double standard in characterizing the dispute by separating the legal status of the feature and entitlement claim from maritime delimitation disputes.[190] As a conclusion, the entitlement claim under the *Philippines v. China* case may be regarded as a distinct issue from maritime delimitation and it may constitute an independent dispute. One may say that as a result of the fragmentation of the maritime delimitation dispute, "the Tribunal regrettably expanded its competence and empowered itself to touch upon the issues of major significance even if they had been explicitly and admittedly excluded from any compulsory procedures provided for in Section 2 of Part XV of the UNCLOS."[191]

In general, it is not clear how the tribunals should proceed in future because there is no consistent approach and tribunals apply different tests in order to deal with the situation. It is worth mentioning that the characterization approach and the logic-based approach are fundamentally different in spite of the fact that in some cases they may lead to the same result.

It is noteworthy that the tribunals in the *Philippines v. China* case and the *Mauritius v. United Kingdom* case have adopted the tests that are quite similar to the doctrine of indispensable parties which was discussed above. However, it is questionable whether the implicated issue problem and the implicated party problem shall be treated in the same way. This question is relevant because two categories of jurisdiction where these problems arise, namely jurisdiction *ratione materiae* and jurisdiction *ratione personae*, have important differences, although their problems of jurisdiction are analogous. Jurisdiction *ratione personae* over persons resolves the

[188] Ibid.
[189] Joseph M. Isanga, "Philippines v. China Aftermath: Rule of Law and Legitimacy under Assault", 45 *Syracuse J. Int'l L. & Com.* 147 (2018): 147-213, 159.
[190] Xiaoyi Zhang, "Problematic Expansion on jurisdiction: Some Observation on the South China Sea Arbitration", IX J EAI L 2 (2016): 449-465, 457.
[191] Ibid., 451.

implicated party problem in spite of the identity of the absent State. This follows from the principle which provides that all States are sovereign and shall be treated equally. It is doubtful whether the implicated issue problem to be resolved bearing in mind the same principle. It seems reasonable to depend on the subject-matter of the dispute and the outside issue in question because every case is different. Following this reasoning, one may say that lack of consistency while dealing with the implicated issue problem is understandable, expected and efficient, especially taking into account that the tribunal is allowed to invent its own test depending on the circumstances of the particular case. On the other hand, this situation has made a contribution to the lack of legal certainty in the UNCLOS jurisprudence. Due to the fact that there is no consistent approach with respect to the implicated issue problem international courts and tribunals and, particularly, the UNCLOS tribunals invented different tests for dealing with the question. It was noted by some commentators that international courts and tribunals by establishing different standards without a particular "cause not to follow the reasoning and conclusions of earlier cases"[192] violate "the consistency and legal security principle as applied by courts and tribunals as well as required by the rule of law"[193], put the legitimacy of UNCLOS dispute settlement procedures under the question[194]. Plus, the requirement of the necessary legal certainty is of particular importance when the same system of dispute settlement is concerned.[195] Moreover, concerns were raised also with respect to non-parties of the Convention. There is a point of view that quite extensive interpretation of the scope of jurisdiction which is hard to predict makes the non-parties to abstain from signing, ratifying or acceding to the Convention. Therefore, while nature of the outside issue may play crucial role in deciding the case, which is to be described in the next subchapter, international courts and tribunals have to follow consistent approach and present strong arguments for any deviations.

**Implicated Issue Problem: Disputed Land Sovereignty. The Use of Force Issue**

As described above, the outside issue may play role when the implicated issue problem is addressed leading to diverse judicial decisions and some level of inconsistency in case law. An approach for characterizing a dispute may differ depending on the outside issue in question. It is

[192] Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998, p. 275, para 28. https://www.icj-cij.org/files/case-related/94/094-19980611-JUD-01-00-EN.pdf.
[193] Sienho Yee, "The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns." *Chinese Journal of International Law* (2016), 219–237, 231, para 26.
[194] Peter Tzeng, "Jurisdiction and Applicable Law Under UNCLOS", *Yale L.J.*, Vol. 126 (2016): 242-260, 259.
[195] Alexander Proelss, "The Limits of Jurisdiction *ratione materiae* of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics*, Vol. 46 (2018): 47-60, 60.

time to describe some types of the outside issue which may be of importance for the purposes of this thesis.

Apparently, land territory issue as a type of the outside issue shall be described. Courts and commentators have called this issue by different names, namely land sovereignty[196], territorial dispute[197], boundary dispute, territorial sovereignty issue[198], sovereignty dispute etc. It has significant meaning in the international society due to the fact that it concerns sovereignty which is the fundamental right of states and crucial for international peace. However, all these terms are mostly defined as "a conflict between two or more States regarding sovereignty over a certain maritime geographic feature, in other words, which State is entitled to possess the feature in question."[199] From the wording it seems that legal status is undetermined. The thing is that if it comes to the land territory different situations may arise which, at the same time, may not amount to a legal dispute over sovereignty. It is particularly important for the next chapter where situation in Crimea is subject to considerations. Therefore, the author prefers to use the term "land territory issue" which may also cover situations where, for instance, legal implications are not involved. One more advantage to use this term is that it will not prejudge any kind of situation with respect to specific land territory when it comes to its status. Plus, within the UNCLOS framework, a term "land territory" is used in article 2 UNCLOS on the legal status so as to describe a portion of land over which a coastal State has sovereignty.

It is clear from the previous subchapters that any dispute related to the interpretation or application of UNCLOS is subject to jurisdiction *ratione materiae*, while disputes solely related to a land territory issue are not covered by section 2 of Part XV UNCLOS because "there are no provisions to decide the sovereignty over a geographic feature."[200] Consequently, a land territory issue is not a dispute concerning the interpretation or application of the Convention, which, in its turn, is not subject to UNCLOS dispute settlement procedures. This conclusion is also follows from the idea that claims based on coastal State rights in maritime zones generally implicate matters of territorial sovereignty. This is because "maritime entitlements are generated by territory

[196] Yuki Morimasa, "How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?" Dissertation, World Maritime University, 2017. Accessed 2019 November 28. http://commons.wmu.se/all_dissertations/572.
[197] Enrico Milano and Irini Papanicolopulu, "Territorial Disputes and State Responsibility on Land and at Sea." Paper presented at the 20th anniversary conference of the IBRU "The State of Sovereignty", Durham University, 1-3 April 2009.
[198] Yuki Morimasa, "How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?" Dissertation, World Maritime University, 2017. Accessed 2019 November 28. http://commons.wmu.se/all_dissertations/572.
[199] Ibid., 31.
[200] Ibid., 18.

and thus belong to the State which has a valid title to sovereignty over the relevant territory."[201] The basis for it is the principle that "the land dominates the sea"[202] which, in simple words, provides that maritime entitlements derive from sovereignty over land. Therefore, sovereignty over maritime areas is determined by sovereignty over adjacent land. In *Federal Republic of Germany/Netherlands* case the ICJ stated that "since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions."[203] In the *Qatar v. Bahrain* case the ICJ pointed out that "it is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State."[204] On the one hand, in case of uncertainty over sovereignty the land territory issue within the implicated issue problem arises. As stated in the previous subchapter, this problem shall be decided by the tribunal via adopting a certain approach for characterizing a dispute. On the other hand, if the legal status of this territory is defined no implicated issue problem arises.

Moreover, existence of sovereignty dispute between States does not always become a reason for an international court or tribunal to find that it does not have jurisdiction over the case. The ICJ in the *United States v. Iran* case pointed out that there are no reasons to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[205] Following this thinking, the Tribunal in the *Philippines v. China* case decided that sovereignty issue between the Parties is not a main ground of the dispute in spite of the fact that it was not contested by them. Therefore, a dispute may be associated with different aspects which not necessarily impede jurisdiction of the tribunal.

Courts and tribunals have invented approaches for characterizing disputes. They are deeply analyzed in the previous subchapter. In simple words, there are steps required for the tribunal to reach a conclusion on whether an issue is one concerning "the interpretation or application of the Convention." The *Mauritius v. United Kingdom* case and the *Philippines v.*

[201] Valentin Schatz and Dmytro Koval "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS" EJL:TALK! (Oct. 14, 2016). https://www.ejiltalk.org/insights-from-the-bifurcation-order-in-the-ukraine-vs-russia-arbitration-under-annex-vii-of-unclos/.
[202] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 51, para. 96; Aegean Sea Continental Shelf (Greece v. Turkey) Judgment, I.C.J. Reports 1978, p. 3, para. 86. https://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf ; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 97, para. 185
[203] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 51, para. 96.
[204] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, 1. C. J. Reports 2001, p. 40, 185.
[205] United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, ICJ Reports 1980, at pp. 19-20, para. 36.

*China* case are of particular interest because the outside issue the tribunals were assessing is one relating to sovereignty.

In the *Mauritius v. United Kingdom* case main question is whether the issues raised in Mauritius' First Submission represent a dispute "concerning the interpretation or application" of the Convention. In turn, there are two parts of this question that need to be answered: the first one asks to define the nature of the dispute encompassed in Mauritius' First Submission and the second one asks "to the extent that the Tribunal finds the Parties' dispute to be, at its core, a matter of territorial sovereignty, to what extent does Article 288(1) permit a tribunal to determine issues of *disputed* land sovereignty as a necessary precondition to a determination of rights and duties in the adjacent sea?".[206] Logical sequence here allows to conclude what facts are crucial for defining the presence of jurisdiction when issues of "disputed" land sovereignty is concerned. Attention shall be paid for the word "disputed" as the wording clearly suggests that not every issue of land sovereignty plays role. In the *Nicaragua v. Honduras* case the ICJ held that "taking into account the principle that the 'land dominates the sea', the legal nature of the land features in the disputed area must be assessed at the outset."[207]

In the *Philippines v. China* case the first thing the tribunal had to establish is whether "a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea" exists.[208] Only after that, the tribunal in order to define whether the Philippines' Submissions relate to sovereignty shall answer two questions. As was mentioned in the previous subchapter, the tribunal adopted logic-based approach where the first question presents the "prior determination" test whereas the second one reflects a possibility of the "future determination of the outside issue" on the basis of the tribunal's decision.

In the author's view, it is crucial to understand that the only reason to apply either of the approaches arises only after issue of disputed land sovereignty were established. If the legal status of the territory is established there is no implicated issue problem. This is the most important finding which is to be addressed in the next chapter when the *Ukraine v. Russia* case is examined.

[206] (Chagos, 2015, para. 206) Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015): 217, para 206 [italics added]. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.
[207] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, p. 659 at p. 702, para. 135.
[208] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Award on Jurisdiction and Admissibility, October 29, 2015, para 152 "There is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea."

A few elements inherent in the notion of sovereignty which is a legal right to govern shall be described. In international law, the concept of sovereignty refers to the exercise of power by a State. State sovereignty and independence have distinct meanings. State sovereignty can be transferred as a legal right, it may be recognized even when State possesses no territory or its territory is under partial or total occupation. Independence can be suspended when a land territory becomes subject to the occupation and can be lost completely when sovereignty itself becomes the subject of the legal dispute. *De jure*, or legal, sovereignty concerns the expressed and institutionally recognized right to exercise control over a territory. *De facto*, or actual, sovereignty is concerned with whether control in fact exists.

It should be noted that sometimes land territory issue may be related to some crucial elements which affect the whole perception of the situation, e.g. the use of force. Territorial integrity is the principle under international law that prohibits states from the use of force against the "territorial integrity or political independence" of another state. It is enshrined in Article 2(4) of the UN Charter and has been recognized as customary international law. Article 2(4) of the UN Charter stated that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[209] This is a prohibition of the threat or use of force. It is appropriate to describe the notion of the use of force in contemporary international law. From the abovementioned information it is clear that the use of force against territorial integrity or political independence of any State is illegal. There is a point of view among commentators that the question of whether title or sovereignty can be transferred in such a situation is subject to legal debate. In the author's opinion, it is hard to agree with the statement because under the principle of *ex injuria jus non oritur* which was established in *Hungary/Slovakia* case, "facts which flow from wrongful conduct [cannot] determine the law."[210] This principle of international law means "unjust acts cannot create law." Its rival principle is *ex factis jus oritur*, in which the existence of facts creates law. It is based on the simple notion that certain legal consequences attach to particular facts. Therefore, illegal acts cannot create legal consequences. The violation of the prohibition of the threat or use of force which is being regarded as an illegal act cannot affect State sovereignty and change existed legal status of the territory. These

[209] Charter of the United Nations, San Francisco, 1945. https://www.un.org/en/charter-united-nations/.
[210] Gabcikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7, 133.

consequences related to the changing or transition of State sovereignty may follow only if acquisition of territory takes place. Acquisition of territory is defined as an establishment of sovereignty over a land territory. There are different means of acquiring territorial sovereignty known as "modes of acquisition of territory" which are or have been recognized by international law as lawful methods by which a state may acquire sovereignty over territory. There are acquisition of *terra nullius* by means of effective occupation, cession as a result of a treaty concluded between the States concerned, prescription and accretion. Consequently, for territories under State sovereignty, only consent can transfer the territorial title. The illegal character of acts carried out in violation of a State's territorial integrity cannot have this impact. In the law governing acquisition of territorial sovereignty a territory possessed as a result of a violation of the principle of territorial integrity cannot be considered as belonging to the possessor. The forcible acquisition of territory by one State at the expense of another State is not accepted as a method of territorial acquisition. This is called annexation which must not be recognized as legal due to the fact that it violates the prohibition of the threat or use of force.[211] Annexation as the term is used within and outside the context of armed conflicts. It may be regarded as the administrative action "when the occupying power decides to cement its physical control by asserting legal title."[212] It is worth mentioning that this attempt at producing a transfer of sovereignty through a unilateral decision adopted by a State in order to extent its sovereignty over a given territory is not generally recognized as valid, both in classical and in contemporary international law. Annexation usually follows a military occupation of a territory. It may be concluded that annexation is generally held as an illegal act which does not involve a change of sovereignty.

It is important to specify that States are under "a legal obligation to abide by the Stimson Doctrine" and not to recognize as lawful territorial changes effected by means of annexation.[213] The Stimson Doctrine is the policy of non-recognition of states created in violation of fundamental norms of international law. Generally, it concerns a violation of the prohibition of the use of force, a violation of the right to self-determination, or a violation of the prohibition of systematic racial

[211] Rainer Hofmann, "Annexation". Max Planck Encyclopedia of Public International Law. Oxford University Press. (2013). Accessed 2019 November 29. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376.
[212] Donald Rothwell, Stuart Kaye, Afshin Akhtarkhavari, Ruth Davis, *International Law: Cases and Materials with Australian Perspectives*, Cambridge University Press, 2014: 800, 360. https://books.google.com.ua/books?id=itxkAwAAQBAJ&pg=PA360&redir_esc=y#v=onepage&q&f=false.
[213] Rainer Hofmann, "Annexation". Max Planck Encyclopedia of Public International Law. Oxford University Press. (2013). Accessed 2019 November 29. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376.

discrimination.[214] The doctrine is regarded as an application of the principle of *ex injuria jus non oritur*. It aims at preventing a violation of international law from being validated by means of recognition. This is about "a continuous challenge to a legal wrong."[215] The existence of an obligation of non-recognition in response to serious violations finds support in international practice and in decisions of ICJ and is regarded as a norm of customary international law. The International Law Commission's article 41(2) of the Draft Articles on State Responsibility established that a State shall not recognize as lawful a situation created by a serious violation of peremptory norm of general international law.[216] The obligation of collective non-recognition by the international community as a whole of the legality of situations arises. It shall be mentioned that this obligation applies to all States, including the responsible and injured States.

Whereas theoretical framework on the international principles such as State sovereignty, territorial integrity and prohibition of the threat or use of force are described, it seems necessary to assess UNCLOS jurisprudence where issues on the use of force were raised. The *Mauritius v. United Kingdom* case and the *Philippines v. China* case are important for the present research because they were combined with disputed land sovereignty. On the other hand, these cases lack the use of force issue, therefore, it is possible that cases combined with the use of force are even more important for the purposes of the research. While it was established that disputed land sovereignty constitutes the outside issue within the implicated issue problem it is not clear how the use of force shall be considered.

The first case where the use of force issue was addressed is the *Saint Vincent and the Grenadines v. Guinea* case.[217] In 1997, Saint Vincent and the Grenadines (St. Vincent) instituted UNCLOS proceedings against Guinea for, inter alia, arresting and detaining the Saiga, a ship registered in St. Vincent, and its crew in violation of Articles 56(2) and 58 of UNCLOS. St. Vincent claimed that Guinea had violated the prohibition on the use of excessive force in the detention of ships when Guinean authorities arrested the ship. While there is no express provisions on the use of force in the arrest of ships in the Convention, the tribunal decided that jurisdiction

[214] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 74/2 (2014): 367-391, 391.
[215] H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1948, 431. https://books.google.com.ua/books?id=Cmw3AAAAIAAJ&printsec=frontcover&hl=ru&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.
[216] Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.
[217] M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.

over the dispute is present and held that Guinea had breached the prohibition on the use of excessive force.[218] A formal determination by an international court or tribunal that a State violated a rule amounts to an exercise of jurisdiction over the claim. The tribunal in this case has applied article 293(1) on the applicable law so as to expand UNCLOS jurisdiction.

In 2004, Guyana instituted arbitral proceedings against Suriname claiming that Suriname had violated the UN Charter and general international law in the use of armed force against a vessel licensed by Guyana.[219] The issue of the use of force existed in the *Guyana v. Suriname* case. It seems that the tribunal has supported the interpretation of article 293(1) given by the tribunal in the *Saint Vincent and the Grenadines v. Guinea* case which expands UNCLOS jurisdiction and gives it competence to apply not only the Convention, but also the norms of customary international law, including those relating to the use of force.

In 2011, Panama instituted arbitral proceedings against Guinea-Bissau for arresting an oil tanker registered in Panama claiming that Guinea-Bissau had violated the prohibition of the use of excessive force in detaining the vessel. The tribunal in the *Panama/Guinea-Bissau* case exercised jurisdiction over the claim by making a finding that there was no violation of the prohibition of the use of excessive force. The tribunal followed the approach of the *Saint Vincent and the Grenadines v. Guinea* case where a broad interpretation of article 293(1) UNCLOS was introduced.

It is clear from the conclusions made above that it is incorrect for courts and tribunals to expand jurisdiction via applicable law provision. Meanwhile, the tribunals in these cases may have actually been correct in exercising jurisdiction over the claims, even if article 293(1) was an incorrect basis for UNCLOS jurisdiction. As Peter Tzeng specified in his work, the tribunals in the abovementioned cases could have plausibly invoked Article 288(1) as the source of jurisdiction, characterizing the disputes as ones "concerning the interpretation or application of this Convention" under Articles 56(2), 58(l), 58(3), 87(1), and 301.[220] Therefore, it is better for courts and tribunals instead of relying on article 293(1) to maintain that all the issues which are going to be decided concern "the interpretation or application of this Convention." This, of course, may still be regarded by some commentators controversial but at the very least it may "serve as

[218] Ibid.
[219] Guyana v. Suriname, PCA Case No. 2000-04, Award, 2007. https://pcacases.com/web/sendAttach/902.
[220] Peter Tzeng, "Supplemental jurisdiction under UNCLOS", Houston Journal of International Law, Vol. 38 No. 2, 2017: 499-575, 256.

legitimate grounds for the tribunal to take into consideration non-UNCLOS rules on the use of force."[221]

Some observations have to be made. As can be seen, there are cases within UNCLOS jurisprudence where article 293(1) was invoked to expand jurisdiction of a court or tribunal. In these cases some "other rules of international law" were violated and decisions were made with respect to the violations. In these cases no approach was followed in order to check whether jurisdiction under article 288 UNCLOS is present. All the violations which were established under UNCLOS dispute settlement procedures were related to the prohibition of the threat or use of force. Although it seems from the conducted analysis that article 293(1) cannot grant jurisdiction to UNCLOS tribunals to make legal determinations on the issues which fall outside the "interpretation and application of the Convention" under article 288(1) the question is whether there are reasons which may justify or explain the reasoning the tribunals made in the *Saint Vincent and the Grenadines v. Guinea*[222], *Guyana v. Suriname*[223] and *Panama/Guinea-Bissau*[224] cases or whether it can be regarded as exception to general principle.[225]

One of the reasons which may explain the line of tribunals' decisions expanding jurisdiction under article 293(1) is sensitive subject-matter of non-UNCLOS claims. All the decisions where jurisdiction was expanded on the basis of article 293(1) contain claims related to the prohibition of the threat or use of force in international law. One may say that on the basis of case law it may be concluded that when the prohibition of the use of force is breached there is a trend to punish a State which violates international law and prevent "a strong maritime power from attempting to change the current situation around neighbouring territories and areas of the sea in the aggressive manner."[226] It is not clear, though, whether the reason behind it is that the prohibition of the use of force is a "cornerstone" of the UN Charter and a peremptory norm from which no derogation is permitted. Peter Tzeng pointed out that line of cases where the non-UNCLOS claims were related to the prohibition on the use of force in international law may be

[221] Peter Tzeng, "Supplemental jurisdiction under UNCLOS", Houston Journal of International Law, Vol. 38 No. 2, 2017: 499-575, 535.

[222] M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.
[223] Guyana v. Suriname, PCA Case No. 2000-04, Award, 2007. https://pcacases.com/web/sendAttach/902.
[224] M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment_published/C19_judgment_140414.pdf.
[225] For instance, according to Peter Tzeng, "the *Arctic Sunrise* and *Duzgit Integrity* tribunals attempted to fit *M/V Saiga (No. 2)* into an exception to the general principle". See., Peter Tzeng, "Jurisdiction and Applicable Law Under UNCLOS." *Yale L.J.*, Vol. 126 (2016): 242-260, 255-256.
[226] Yuki Morimasa, "How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?" Dissertation, World Maritime University, 2017, 30. Accessed 2019 November 28. http://commons.wmu.se/all_dissertations/572.

considered to be good public policy[227], therefore, it may seem to be exceptional in nature where careful consideration is needed. Although, it is still not clear whether this exceptional treatment is justified.

In contrast, four cases where the expansive interpretation of article 293(1) was rejected concern claims on the alleged violations of international environmental law in the *Ireland v. United Kingdom* case, land territory issue in the *Mauritius v. United Kingdom* case, violation of human rights law in the *Netherlands v. Russia* case and human rights obligations in *Malta v. São Tomé and Príncipe* case. Accordingly, the question arises of whether this sensitive subject-matter of a claim on the prohibition of the threat or use of force in international law may receive special treatment in the framework of UNCLOS dispute settlement mechanism.

It seems that the type of the issue in question, e.g. the violation of a prohibition of the threat or use of force may play crucial role in respect of jurisdiction. However, it is important to note that these considerations are based on case law where no consistent practice has been developed. Each case has its own factors to take into account. It appears that UNCLOS dispute settlement mechanism takes a case-by-case approach "having its sight on the maintenance of peace."[228] It can explain in a sense why there is no global uniformity when it comes to a decision on jurisdiction over a case. Besides, it is not clear, how a situation shall be considered when law of the sea issues are mixed with the prohibition of the use of force in respect of land territory. Furthermore, an answer may differ depending on whether the prohibition of the use of force was violated in respect of disputed land territory or defined land territory.

[227] Peter Tzeng, "Jurisdiction and Applicable Law Under UNCLOS." *Yale L.J.*, Vol. 126 (2016): 242-260, 256.
[228] Yuki Morimasa, "How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?" Dissertation, World Maritime University, 2017, 30. Accessed 2019 November 28. http://commons.wmu.se/all_dissertations/572.

# 3. PRINCIPAL OBJECTION OF THE RUSSIAN FEDERATION

This chapter is focused on land territory issue in relations between Ukraine and the Russian Federation and on disputed land sovereignty as principal objection of the Russian Federation in the *Ukraine v. Russia* case. Information from the previous chapters serves as a basis for considering this question and, therefore, shall be taken into account. In the first chapter a dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait was described and legal status of the Autonomous Republic of Crimea and the city of Sevastopol was considered. The second chapter touched upon some relevant issues with respect to the UNCLOS jurisdiction among which article 288 UNCLOS as a basis for jurisdiction, the scope of the arbitral tribunal's jurisdiction, the ways of characterizing the subject-matter of the dispute brought before the tribunal, the nature of the outside issue and the issues of land territory and use of force within the UNCLOS case law.

Russia's principal objection in the *Ukraine v. Russia* case shall be assessed on the basis of conducted research. It is worth noting that the aim of this chapter is not to predict a decision of the arbitral tribunal. There is a difference between the lawyer pleading as advocate whose task is to predict what a court will do and the lawyer writing as scholar who "may be expected to explore the bounds of what a court might do if, for some reason, it saw fit to interpret or apply a text in a new way."[229] The idea of the present research is to find out how a court or tribunal may proceed where a dispute before it concerns not only the law of the sea issues but also issues of land territory as a result of the use of force.

In Chapter 1 it was concluded that a situation with respect to Crimea amounts to an international armed conflict with temporary occupation of Crimea by the Russian Federation. The territory of Crimea has been subsequently annexed by the Russian Federation on the basis of the referendum held on March 16, 2014 which, however, was recognized as unconstitutional[230] and the one, which "having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol."[231]

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[229] Xiaoyi Zhang, "Problematic Expansion on jurisdiction: Some Observation on the South China Sea Arbitration", IX J EAI L 2 (2016): 449-465, 465.

[230] Opinion on "Whether the Decision Taken By the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," European Commission for Democracy Through Law (Venice Commission), Opinion No. 762/2014 (March 21, 2014). https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e; Рішення Конституційного Суду України від 14.03.2014 по справі про проведення місцевого референдуму в Автономній Республіці Крим." Accessed 28 November 2019. https://zakon.rada.gov.ua/laws/show/v002p710-14.

[231] Resolution 68/262 'Territorial integrity of Ukraine.' General Assembly, 27 March 2014, paras 5-6. https://undocs.org/A/RES/68/262.

Practical consequences for the territory of Crimea and Russia's actions shall be explained on the basis of the research carried out in Chapter 2.4. It was established that the violation of the prohibition of the use of force is an illegal act. The illegal character of acts carried out in violation of a State's territorial integrity cannot affect State sovereignty and change existed legal status of the territory. Annexation which is a forcible acquisition of territory by one State at the expense of another State is not a mode of territorial acquisition. It cannot possibly be recognized as legal due to the fact that it violates the prohibition of the threat or use of force.[232] Therefore, annexation is an illegal act which does not involve a change of sovereignty. One more consequence is that the obligation of collective non-recognition by the international community as a whole arises as a result of an application of the principle of *ex injuria jus non oritur*. It aims at preventing a violation of international law from being validated by means of recognition. This obligation applies to all States, including the respondent State which has to stop violating rules of international law.

It allows to conclude that unconstitutional referendum cannot form a basis for any changes in State's sovereignty. The process of the forcible acquisition of territory based on unconstitutional referendum is called annexation which *per se* is illegal. Illegal acts cannot have any legal implications. Therefore, the fact that no lawful transition of territory has been carried out means that the existed legal status of the Crimea as a part of territory of Ukraine is an established fact.

It is worth mentioning that most commentators[233] who had considered the *Ukraine v. Russia* case stated that in order to determine whether the arbitral tribunal has jurisdiction a prior determination on whether Ukraine has sovereignty over Crimea is needed. Some of them also mentioned that this follows from the "land dominates the sea" principle.[234] Consequently, there was a widespread suggestion that the arbitral tribunal most likely will find that it has no jurisdiction over Ukraine's claims if it follows either of the approaches under the *Mauritius v. United Kingdom* or the *Philippines v. China* cases.[235] Conducted analysis in Chapter 2 allows to suggest that

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[232] Rainer Hofmann, "Annexation". Max Planck Encyclopedia of Public International Law. Oxford University Press. (2013). Accessed 2019 November 29. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376.

[233]Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, Vol. 46, No. 1 (2017): 1-19 ; Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond." EJL:TALK! (Oct. 14, 2016), p. 5. http://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-vchina-ukraine-v-russia-and-beyond/.

[234] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 487 ; Valentin J. Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part III." Völkerrechtsblog, (January 15, 2018). http://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea- of-azov-3/.

[235] Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, Vol. 46, No. 1 (2017): 1-19, 5.

commentators have referred to a situation where the implicated issue problem is present and in order to decide a question on jurisdiction a court or tribunal shall apply approach for characterizing a dispute. However, so as to get to this conclusion, there has to be another fact which should be established. This is a disputed land sovereignty. Taking into account all the research conducted it becomes clear that the "land dominates the sea" principle requires that sovereignty over land shall be decided before addressing the question of its maritime entitlements. Therefore, this principle comes into play if there is a dispute over land sovereignty. In this case legal status of the territory is undefined. However, if the legal status is defined there is no reason to establish or reaffirm it one more time. Approaches for characterizing disputes are aiming at resolving the implicated issue problem. As a consequence, if there is no implicated issue problem, there is no reason to appeal to the approaches.

In this regard, it seems necessary to remind that not every land territory issue leads to uncertainty regarding its legal status. It is particularly the case when land territory issue resulted from the threat or use of force. It completely changes a situation due to its illegality. It cannot be regarded as a legal dispute over sovereignty. The term "land territory issue" is used in this study so as to encompass both situations where question on land territory arises: the one with disputed legal status and the one with defined legal status.

There is no open question with respect to sovereignty over Crimean peninsula. Therefore, a prior determination on whether Ukraine has sovereignty over Crimea is not needed because it is an established fact.

Russia pointed out that assertion that Crimea is part of Ukraine's territory means asking the arbitral tribunal "to assume in Ukraine's favour the issue that is of critical importance to the dispute (and to the Parties' relations more broadly)."[236] With respect to this, it is important to note that the arbitral tribunal is not going to make an assumption. The arbitral tribunal has facts to base its determinations.

Ukraine's claims are based on established facts. There is a number of bilateral and multilateral agreements listed in Chapter 1 in which Ukraine's borders are established and recognized by international community, including the Russian Federation. There is an international judicial decision adopted by the ICJ in 2009 in which Ukraine's boundaries were internationally

[236] "In the Matter of an Arbitration", PCA Case No 2017-06, Preliminary Objections of the Russian Federation (19 May 2018): 85, para 63, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation),* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.

recognized by a way of binding judgment in the *Romania v. Ukraine* case with respect to the maritime delimitation in the Black Sea.[237] This decision necessarily entails non-recognition of other claims in the maritime area in question. Therefore, the fact that the Court decided this case means that there were no dispute or claim over sovereignty in the Black Sea.

Furthermore, the violation of the prohibition of the use of force by Russia results in emerging of the obligation of the collective non-recognition by the international community of any attempt to validate the unlawful situation. Support is found in a number of resolutions of the UN General Assembly as well as other international organizations. Following the opinion of most of international community, the prohibition on the use of force was violated by Russia against territorial integrity and political independence of Ukraine. It is apparent that obligation of non-recognition arises because "the process in which Crimea was integrated into Russia relied on the use of force by Russian troops."[238] These rules are self-executory which means that "no particular determination is needed by an organ of the international legal system to implement the rule when a case of its breach arises."[239]

Whereas the claim which is behind Russia's objection was assessed in light of international law it is time to evaluate the objection within the UNCLOS framework. In the Rejoinder on Jurisdiction Ukraine pointed out that the Russian Federation introduced a claim that the legal status of Crimea has been altered which, in its view, on its own creates a legal dispute between the Parties.[240] Ukraine argued that not every claim may create a legal dispute, but the one which admissible and plausible in nature.[241]

It is apparent that the prohibition of the threat or use of force, as well as occupation which flows from this wrongful conduct and subsequent annexation of a part of the territory of another State are serious violations within international law framework that cannot put aside while responsible state justifies it by making up sovereignty claim. Therefore in order to ignore all these facts and Russia's numerous treaty commitments to respect Ukraine's territory, there has to be an objective basis. However, for some scholars it is debatable whether the tribunal may "decide on

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[237] Maritime Delimitation in the Black Sea (Romania v. Ukraine). Judgment, I.C.J. Reports (2009): 61. https://www.icj-cij.org/files/case-related/132/132-20090203-JUD-01-00-EN.pdf.

[238] Christian Marxsen. "The Crimea Crisis. An International Law Perspective", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law),* 74/2 (2014): 367-391, 390.

[239] Thomas D. Grant, "International Dispute Settlement in Response to an Unlawful Seizure of Territory: Three Mechanisms", *Chicago journal of International law,* Vol. 16, No. 1 (2015): 1-42, 3.

[240] "In the Matter of a Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v The Russian Federation)", PCA Case No 2017-06, Rejoinder of Ukraine on Jurisdiction (28 March 2019), para 2. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation),* PCA Case No 2017-06, Proceedings Commenced 16 September 2016.

[241] Ibid., para 3. "An inadmissible and implausible claim is incapable of creating a legitimate predicate legal dispute"

implicated sovereignty questions of particularly low weight such as, for example, manifestly implausible abusive objections to jurisdiction in order to safeguard the integrity and effectiveness of the dispute settlement mechanism."[242] In the author's opinion, there is no justified reason not to do this. Otherwise, States are allowed to impede jurisdiction of the tribunal by making up groundless objections and asserting that "a dispute as to whether a dispute exists is, just as much a dispute."[243] In this case a court or tribunal is left without power to assess those objections due to the necessity to look into the content of these objections. Therefore, some minimal assessment by the court or tribunal is clearly expected. Author believes that in the present case the tribunal is allowed to examine whether lawful transfer of territory could have taken place at all. Following this thinking, it is clear that groundless objection cannot be regarded on its own as the outside issue in the implicated issue problem and, more generally, cannot impede jurisdiction of the tribunal. A mere assertion of sovereignty over land territory is not able to create a legal dispute between States. There should be some reasonable basis for it.

In literature, there are different ways to describe a basic requirement that a claim, dispute or issue shall possess. A claim shall be legitimate[244], legal[245], *bona fide*[246] or made in good faith[247]. In the author's view, this is necessary requirement for a claim, dispute or issue to have legal effects. This requirement means the ability "to be disputed". Therefore, present research employs the term "disputed land sovereignty" in order to demonstrate the ability to have legal implications. The land territory issue for the purposes of jurisdictional objections is a disputed land sovereignty. Therefore, Russia's objection has to possess this criterion so as to be able to impede jurisdiction of the arbitral tribunal. However, if land territory issue is combined with the wrongful act, e.g. violation of the prohibition of the threat or use of force, then this wrongful act affect legitimacy of all actions resulted from this act. For instance, defined legal status of land territory cannot become

[242] Valentin Schatz and Dmytro Koval "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS" EJL:TALK! (Oct. 14, 2016). https://www.ejiltalk.org/insights-from-the-bifurcation-order-in-the-ukraine-vs-russia-arbitration-under-annex-vii-of-unclos/.

[243] Thomas D. mentioned it as an argument to be advanced by a respondent State. *See.*, Thomas D. Grant, "International Dispute Settlement in Response to an Unlawful Seizure of Territory: Three Mechanisms", *Chicago journal of International law*, Vol. 16, No. 1 (2015): 1-42, 4.

[244] Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond." EJL:TALK! (Oct. 14, 2016). http://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-vchina-ukraine-v-russia-and-beyond/. Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, Vol. 46, No. 1 (2017): 1-19, 7.

[245] Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", *New York University Journal of International Law and Politics*, Vol. 50, No. 2 (2018): 447-507, 490.

[246] Parties in the official records of the *Ukraine v. Russia* case which are publicly available now have referred to this term with respect to the dispute between them "*bona fide* dispute".

[247] Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/ Côte d'Ivoire), ITLOS Case No. 23, Judgment, 592. "In respect of an area of the continental shelf, the ITLOS established that one of the preconditions for maritime activities which were carried out on the territory of another State for not being as a violation of the sovereign rights of the latter is that the area concerned shall be subject of claims made in good faith by both States."

disputed as a result of the use of force. In this case sovereignty over this territory is still undisputed established fact.

Some conclusions may be drawn here. According to the position of Ukraine, as well as most of the international community, which is deeply discussed in the Chapter 1, Crimean referendum is considered to be invalid and its annexation by the Russian Federation is illegal act resulted from the violation of the prohibition of the use of force and the principle of territorial integrity of Ukraine by the Russian Federation. Accordingly, under the principle of *ex injuria jus non oritur* which was established in *Hungary/Slovakia* case, "facts which flow from wrongful conduct [cannot] determine the law."[248] In simple words, it means that claim resulted from illegal act cannot form the basis of jurisdictional objection, and, therefore, cannot affect the tribunal's jurisdiction. As a consequence, Ukraine's sovereignty over Crimea is an established fact and "the only relevant legal dispute for the UNCLOS tribunal is whether Russia interfered with its rights in the maritime zones adjacent to Crimea."[249] The fact that there is no disputed land sovereignty with respect to the Autonomous Republic of Crimea and the city of Sevastopol means that principal objection of the Russian Federation is groundless and cannot deprive the arbitral tribunal of jurisdiction.

At the same time, it is clear that *de facto* consequences of the occupation and annexation by the Russian Federation take place. The question arises whether current situation with respect to Crimean peninsula affects in any way the power of the arbitral tribunal to decide the case. In order to answer this, it is important to assess whether a situation of international armed conflict with a state of occupation and annexation of the Autonomous Republic of Crimea and the city of Sevastopol by the Russian Federation preclude the arbitral tribunal from exercising the jurisdiction under UNCLOS dispute settlement procedures.

First of all, it is necessary to describe what consequences follow from defining Crimea as the occupied annexed land territory. It seems reasonable to mention some important issues with respect to the concept of occupation as part of international humanitarian law and the law of war. Occupation does not involve neither transfer of sovereignty nor of sovereign rights over the territory in international law. Occupied State exercises residual sovereignty which is inherent in the concept of occupation. Therefore, as Naomi Burke noted "as far as possible, the legal *status*

[248] Gabcikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7, 133.
[249] Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, Vol. 46, No. 1 (2017): 1-19, 7.

*quo ante* is to be respected".[250] The occupying power substitutes its own authority for that of the occupied state, it exercises control over occupied territory. One may argue that occupied territory can be considered *de facto* part of the "territory" of the occupying power. However, mere control over the land by the occupying power does not allow for that land to be considered part of its "territory" and does not have any basis in the law-of-treaties concept of territory.

According to the ICC Report on Preliminary Examination Activities 2016, the international armed conflict between Ukraine and the Russian Federation "began at the latest on 26 February when the Russian Federation deployed members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government."[251] Crimea is under occupation by the Russian Federation. It follows that the Russian Federation is regarded as an occupying power. This is also evident from the Resolution 71/205 of 2016 of the UN General Assembly where attention was paid to Russia's obligations under international law as an occupying Power.[252] Although it is hard to predict future decision and it is not the aim of the present research, the tribunal in the *Mauritius v. United Kingdom* case[253] pointed out that there is no guidance as to how to solve the case under the UNCLOS dispute settlement mechanism in "circumstances of war or secession in which a coast might effectively be occupied by authorities exercising *de facto* governmental powers."[254] Again, following the opinion of most of international community, Russia is regarded as an occupying Power and *de facto* authorities exercising control over territory are in the very nature of the law of occupation. It seems that a dispute concerning State's rights as the coastal state in maritime zones adjacent to its territory is about determination of its legally asserted and pertained rights. In the author's view, the fact that the law of occupation is based on the premise that sovereignty is not transferred and it is not related to the acquisition of territory shows the importance of preserving *de jure* status of the occupied territory.

Plus, on the basis of conducted research the author believes that current situation in respect of Crimea involving occupation and annexation as a result of the violation of the prohibition of the use of force, although related to the land territory issue, cannot possibly affect

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[250] Burke, Naomi. "A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties", 41 N.*Y.U. J. Int'l L. & Pol.* 103 (2008) ): 103-129, 111.

[251] "Report on Preliminary Examination Activities (2016)", The Office of the Prosecutor (14 November 2016): 73, pp. 33-42, para 158. https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

[252] Resolution 71/205 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine).' General Assembly, 19 December 2016. https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/205

[253] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom). Award, (March 18, 2015): 217. https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf.

[254] Ibid., 203.

the existed legal status of Crimea. Therefore, current situation should not be an obstacle for the tribunal's jurisdiction. There is a point of view that international courts or tribunals may contribute to solidarity against the unlawful act[255] as injured State is seeking legal remedies against unlawful actions. The tribunal does not need to establish Ukraine's sovereignty. Such request which assumes that the legal status of Crimea is an open question would either be misleading or without object.[256] The tribunal is asked to consider whether Russia interfered with its rights in the maritime zones adjacent to Crimea.

Were the tribunal to nonetheless refuse to exercise jurisdiction based on Russia's principal objection, the tribunal would be the first international body to imply that Crimea's legal status has been altered, directly contradicting the UN General Assembly's resolutions on Crimea. In particular, the tribunal's decision could be perceived as according legal effect to the view that the status of Crimea has changed from what was previously unquestioned Ukrainian sovereignty to a situation of uncertainty, under which Crimea could be under either Ukrainian or Russian sovereignty. It seems that a decision on jurisdiction cannot be neutral because either way something to be implied. Consequently, any decision is going to meet legal debate due to the fact that sensitive legal questions are at stake.

In conclusion, claim resulted from illegal act cannot form the basis of jurisdictional objection, and, therefore, cannot impede the tribunal's jurisdiction. Objection of the Russian Federation is based on the premise that the legal status of Crimea has been altered as a result of the unconstitutional referendum and Russia's use of force against territory of Ukraine. However, "facts which flow from wrongful conduct [cannot] determine the law."[257] As a consequence, Ukraine's sovereignty over Crimea is an established fact. It means that there is no disputed land sovereignty with respect to Crimea and Russia's principal objection cannot deprive the arbitral tribunal of jurisdiction. One more question arises with respect to the current situation of Crimea as being occupied and annexed by the Russian Federation. Under the law of occupation, the occupied State loses control over territory, but not sovereignty. Annexation is not a mode of territorial acquisition because it violates the prohibition of the threat or use of force. It is clear, thus, that preserving *de jure* status of the occupied territory is of paramount importance. Ukraine's

[255] Thomas D. Grant, "International Dispute Settlement in Response to an Unlawful Seizure of Territory: Three Mechanisms", *Chicago journal of International law*, Vol. 16, No. 1 (2015): 1-42, 8.
[256] Ibid., 20.
[257] Gabcikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7, 133.

claim concern legally asserted and pertained rights as the coastal state in maritime zones adjacent to its territory and "the only relevant legal dispute for the UNCLOS tribunal is whether Russia interfered with its rights in the maritime zones adjacent to Crimea."[258] In the author's opinion, Russia's occupation and annexation of Crimea is not an obstacle for tribunal's jurisdiction.

[258] Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, Vol. 46, No. 1 (2017): 1-19, 7.

# CONCLUSIONS

1. The results of the final thesis allow to conclude that the aim of the research has been achieved, the objectives have been fulfilled and the defence statement formulated in the introduction of the final thesis has proven to be correct. This is substantiated by the conclusions and recommendations set out below.

2. Sometimes disputes concerning the interpretation or application of UNCLOS are related also to other issues, such as disputed land sovereignty, violation of peremptory norm, human rights etc. These disputes are not automatically precluded from UNCLOS jurisdiction. If the tribunal in order to make a decision over the dispute which concerns the interpretation or application of UNCLOS has to rule on other issues that are not governed by UNCLOS, then the implicated issue problem of jurisdiction *ratione materiae* arises. This problem shall be resolved by the tribunal via adopting a certain approach for characterizing a dispute. The question the approach is called to answer is whether the tribunal has jurisdiction over the dispute notwithstanding that there are other issues not governed by UNCLOS. Courts and tribunals invented different tests in order to solve the implicated issue problem, however, there is no uniformity in UNCLOS case law and modern trend is not clear.

3. Land territory issue may concern disputed land sovereignty and may not. In general, disputed land sovereignty is present when claims of both parties of the conflict are made in good faith. In this case the implicated issue problem arises which is to be resolved via adopting a certain approach for characterizing a dispute. However, there is no dispute over sovereignty, if claim of the party is based on the violation of peremptory norm. It is an established principle that facts which flow from wrongful conduct cannot determine the law. Therefore, if the legal status of the territory is defined, no implicated issue problem arises. Approaches for characterizing disputes are aiming at resolving the implicated issue problem. As a consequence, if there is no implicated issue problem, there is no reason to appeal to the approaches.

4. The Russian Federation violated the prohibition of the use of force by occupying and annexing Crimea in 2014. Russia's violation of peremptory norm of the non-use of force constitutes wrongful act, whereas occupation and subsequent annexation of Crimean territory are facts which cannot have legal impact upon Crimea's sovereignty. Also, the status of the Autonomous Republic of Crimea and the City of Sevastopol cannot be considered changed in a lawful process because annexation of Crimea by the Russian Federation is based on the

unconstitutional referendum, which was conducted as a result of the use of force. It means that legal status of Crimea as a sovereign part of Ukraine is an established fact. To assume that the legal status of Crimea is an open question would either be misleading or without object. Consequently, there is no disputed land sovereignty with respect to Crimea. Russia's principal objection is groundless and, therefore, cannot impede the tribunal's jurisdiction. Ukrainian claims could fall within UNCLOS jurisdiction.

5. In this regard, it may be questioned whether *de facto* situation in Crimea as being occupied and annexed by the Russian Federation may affect jurisdiction of the tribunal. Although, there is no clear answer, the author believes that the fact that neither occupation, nor annexation imply transfer of sovereignty indicates the importance of preserving *de jure* status of the occupied territory. Moreover, nature of Ukraine's claims concerns its legally asserted rights as the coastal state.

6. Principal objection of the Russian Federation is based on the premise that the legal status of Crimea has been altered as a result of the unconstitutional referendum and Russia's use of force against territory of Ukraine. Objection based on illegal acts cannot deprive arbitral tribunal from its jurisdiction. Ukrainian claims could fall within UNCLOS jurisdiction. However, it should be taken into account that UNCLOS case law is inconsistent with respect to these matters, therefore, arbitral tribunal in the *Ukraine v. Russia* case has to adhere to judicial principle of legal certainty and present strong arguments to substantiate its position.

# RECOMMENDATIONS

1. A question of land territory issue mixed with the use of force in the light of UNCLOS jurisdiction should be further analyzed by commentators. For instance, it may be done through the perspective of different categories of jurisdiction and their problems. The questions may be addressed of whether problems of different categories of jurisdiction shall be solved consistently or each category of jurisdiction is so distinct that uniformity is not reasonable or expected, whether there should be consistent approach in dealing with the particular problem of jurisdiction in international law irrespective of the sphere concerned, whether approaches invented within the UNCLOS dispute settlement system shall differ from other fields of international law.

2. Courts and tribunals shall safeguard the necessary legal certainty within the UNCLOS jurisprudence as regards the jurisdiction *ratione materiae* by following the line of argument in the established case law or presenting strong arguments for any deviation from it.

3. In order to contribute to the principle of legal certainty, the arbitral tribunal in the *Ukraine v. Russia* case has to decide sensitive legal issues concerning land territory, use of force etc. This research may help to avoid several legal errors. The first one is treating Crimea's situation as a disputed land sovereignty. In this case, arbitral tribunal may find itself out of jurisdiction while addressing the implicated issue problem via respective approach for characterizing a dispute. In contrast, the arbitral tribunal shall take into account the defined legal status of Crimea and some basics with respect to a state of occupation and annexation namely the importance to preserve *de jure* status of the territory concerned. The second error is applying an expansive interpretation of applicable law provision (article 293 UNCLOS) so as to expand the scope of tribunal's jurisdiction. It is incorrect because the only basis of tribunal's jurisdiction is article 288 UNCLOS.

4. Resolutions of the UN General Assembly shall be regarded not as politics at a particular moment of time but as a reflection of the legal obligation of collective non-recognition which arises due to a violation of a peremptory norm.

5. In case of the use of force against territorial integrity the injured State shall follow particular line of argument in its pleadings so as to avoid any assumption with respect to existence of the sovereignty dispute between the Parties.

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## ABSTRACT

Legal status of Crimea as a part of Ukraine is an established fact.

Under international law, neither occupation, nor annexation may on its own create a dispute over land sovereignty. On the contrary, sovereignty of the occupied State is preserved and cannot be transferred without its consent. In general, disputed land sovereignty takes place when claims of both parties of the conflict made in good faith. As a result, if a claim of the party is based on the violation of peremptory norm there is no dispute over sovereignty. Russia occupied and annexed Crimea on the basis of unconstitutional referendum. It means that Crimea's legal status is defined and no lawful process has changed it. As a consequence, Russia's principal objection is based on illegal acts and, therefore, cannot deprive arbitral tribunal from its jurisdiction.

UNCLOS case law is inconsistent when it comes to the issues of land territory or the use of force. It is even more unclear when it comes to the mix of these two issues: land territory issue as a result of the use of force. The main question is how this complex issue has to be treated within UNCLOS jurisprudence.



**Keywords:** land territory issue, disputed land sovereignty, preliminary objection, jurisdiction *ratione materiae*, use of force.

## SUMMARY

The topic of the thesis is "Land Territory Issue in the Light of UNCLOS Jurisdiction: Ukraine v. Russia". The *Ukraine v. Russia* case raises complex legal questions both with regard to substantive law and the arbitral tribunal's jurisdiction. The aim of the thesis is to consider whether Russia's principal objection on disputed land sovereignty may impede jurisdiction of the arbitral tribunal constituted under Annex VII UNCLOS.

Inasmuch as main jurisdictional objection of Russia is related to the question of sovereignty over Crimea, the question of Crimea's legal status is of particular importance. Russia's objection is based on the premise that legal status of Crimea has changed. Therefore, it has to be determined whether any lawful process could have changed the existed legal status of Crimea. All these issues are considered in Chapter 1. It was concluded that Ukraine's sovereignty over Crimea is an established fact and no lawful process has changed that. Russia's violation of the prohibition of the use of force constitutes wrongful act, whereas occupation and subsequent annexation of Crimean territory are facts which cannot have legal impact upon Crimea's sovereignty.

Chapter 2 is focused on jurisdictional matters, such as the scope of jurisdiction, problems of jurisdiction and approaches which are developed to solve those problems. This is important because sometimes disputes concerning the interpretation or application of UNCLOS are related also to other issues, such as disputed land sovereignty, violation of peremptory norm, human rights etc. Specific types of issues which may question jurisdiction of the tribunal and which are relevant for the purposes of this study are studied. Attention was paid to a situation where land territory issue is mixed with the use of force.

It was concluded in Chapter 3 that claim resulted from illegal act cannot form the basis of jurisdictional objection, and, therefore, cannot impede the tribunal's jurisdiction. It means that there is no disputed land sovereignty with respect to Crimea and Russia's principal objection cannot deprive the arbitral tribunal of jurisdiction. Ukrainian claims could fall within UNCLOS jurisdiction.

**HONESTY DECLARATION**

10/12/2019

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:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
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