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Olesia GORBUN

DOCTORAL DISSERTATION

THE CRIMEAN OCCUPATION AND DISPUTE RESOLUTION UNDER THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

SOCIAL SCIENCES,
LAW (S 001)
VILNIUS, 2024

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Mykolas Romeris University

MYKOLAS ROMERIS UNIVERSITY

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KRYMO OKUPACIJA IR GINČŲ SPRENDIMAS PAGAL 1982 METŲ JUNGTINIŲ TAUTŲ JŪRŲ TEISĖS KONVENCIJĄ

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"Nothing is more dangerous to peace than the existence of a conflict which is not settled and for the peaceful settlement of which no obligatory procedure is provided."

Hans Kelsen[1]

1 Hans Kelsen, "Compulsory Adjudication of International Disputes," *American Journal of International Law* 37, 3 (July 1943): 405.

ABBREVIATIONS

Additional Protocol I – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

ARC – Autonomous Republic of Crimea

CERD – International Convention on the Elimination of All Forms of Racial Discrimination

Coastal State Rights Dispute – Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait between Ukraine and the Russian Federation

COI – International Commission of Inquiry

Cooperation Agreement or the Azov/Kerch Cooperation Treaty – Agreement between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEZ – Exclusive Economic Zone

Fourth Geneva Convention – IV Geneva Convention relative to the Protection of Civilian Persons in Time of War

Genocide Convention – Convention on the Prevention and Punishment of the Crime of Genocide

ICJ – International Court of Justice

ICSFT – International Convention for the Suppression of the Financing of Terrorism

ITLOS – International Tribunal for the Law of the Sea

MPA – Marine Protected Area

PCA – Permanent Court of Arbitration

San Remo Manual – San Remo Manual on International Law Applicable to Armed Conflicts at Sea

UN – United Nations

UNCLOS – United Nations Convention on the Law of the Sea

UNESCO – United Nations Educational, Scientific, and Cultural Organization

VCLT – Vienna Convention on the Law of Treaties

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INTRODUCTION

The research problem

In 2014 the Russian Federation occupied and annexed a part of the sovereign territory of Ukraine – the Crimean Peninsula (Autonomous Republic of Crimea (ARC)). On September 16, 2016, Ukraine served the Russian Federation with a Notification and Statement of Claim under Annex VII UNCLOS[2] referring to the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (further, *Coastal State Rights Dispute)*. Later, on April 1, 2019, Ukraine served the Russian Federation with another dispute – *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*. And on April 16, 2019, Ukraine submitted the request for the prescription of provisional measures to International Tribunal for the Law of the Sea (ITLOS).

One of the main issues in the *Coastal State Rights Dispute* is conflicting views between Ukraine and the Russian Federation concerning the status of Crimea, starting from 2014. One view is that Crimea was annexed, while the other that it legally became a territory of the Russian Federation.[3] The Russian Federation objects to the jurisdiction of the tribunal under Annex VII UNCLOS and states that "the real issue in this case concerns sovereignty over land territory (i.e., sovereignty over Crimea)."[4] Even the name of the dispute itself – *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* – requires a tribunal's decision about which is the coastal state of the territory of Crimea. It should be noted that the majority of the breaches related to the coastal state rights were predetermined by the occupation of Crimea. It should also be kept in mind that according to Article 288(1) UNCLOS, the subject-matter jurisdiction granted by UNCLOS is "over any dispute concerning the interpretation or application of this Convention".

As a consequence of the Russian Federation's occupation of the ARC and the city of Sevastopol, Ukraine has lost control over a significant portion of its territorial sea and EEZ. In total, this loss amounts to approximately 100,000 square kilometres in both the Black and Azov seas, out of the 137,000 square kilometers of sea waters over which Ukraine exercises sovereignty or sovereign rights.[5]

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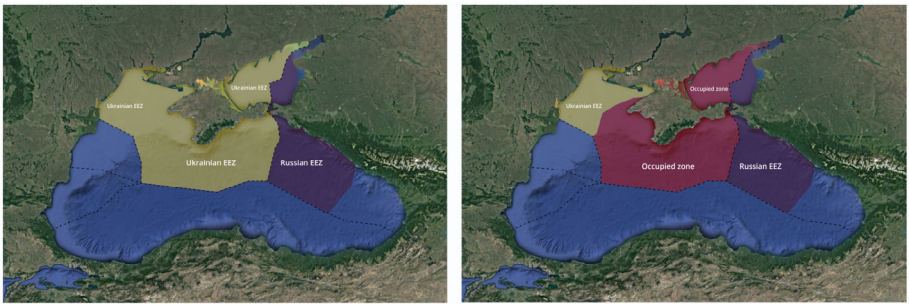
2 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982).

3 More detailed on this as well as for the detailed overview of the dispute see, Chapter I, Part 1.3.2., in particular part 1.3.2.1. *Coastal State Rights Dispute.*

4 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation (19 May 2018), para. 13, p. 5.

5 Bohdan Ustymenko, Tetiana Ustymenko, "Maritime Security of Ukraine. A Reference Work. (13) The Prohibition Against Vessels and Ships Entering the 12-Mile Zone of the Crimean Peninsula", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183694; Bohdan Ustymenko, "Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.



Picture 1. Map of Ukrainian EEZ before and after the Crimean occupation.[6]

UNCLOS preamble highlights that "all issues relating to the law of the sea"' need to be settled "in a spirit of mutual understanding and cooperation" which is "an important contribution to the maintenance of peace, justice and progress for all peoples of the world".[7] To give it practical implementation, UNCLOS includes dispute settlement procedure in Part XV.

When Ukraine submitted the application in the *Coastal State Rights Dispute,* the Russian Federation objected to the jurisdiction of an *ad hoc* tribunal instituted under Annex VII of UNCLOS.[8] One of the objections was that the dispute concerns Ukraine's "claim to sovereignty over Crimea".[9] In return, Ukraine replied that "under any proper interpretation of the Convention, a respondent State's mere assertion of a claim to land territory cannot automatically divest a tribunal of jurisdiction to resolve a maritime dispute".[10]

According to the view of Valentin Schatz and Dmytro Koval "it is far from clear that Russia's objection based on its claim to sovereignty over Crimea would fall into the category of abusive objections."[11] In this regard Peter Tzeng stated that "the validity

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6 Map is taken from Bohdan Ustymenko, "Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.
In particular: https://www.blackseanews.net/images/2022/01/14/2.jpg.

7 Preamble, UNCLOS.

8 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), Award on Preliminary Objections (21 February 2020), paras. 32-34. Further, *Coastal State Rights Dispute.*

9 *Ibid.*, para. 43.

10 *Coastal State Rights Dispute*, Written Observations and Submissions of Ukraine on Jurisdiction (27 November 2018), para. 19, pp. 8-9.

11 Valentin Schatz and Dmytro Koval, "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS", *EJIL: Talk! (blog)*, September 6, 2018. https://www.ejiltalk.org/insights-from-the-bifurcation-order-in-the-ukraine-vs-russia-arbitration-under-annex-vii-of-unclos/.

of this claim, however, depends on a Ukrainian claim of sovereignty over Crimea".[12] Gaiane Nuridzhanian similarly pointed out that "the jurisdictional challenge for the Ukrainian case arises from the fact that the dispute under the UNCLOS originates in the conflict between the parties concerning the annexation of Crimea".[13] According to the above-mentioned, the dispute can be seen as having matters falling outside the tribunal's jurisdiction.[14] Indeed, in its Award on Preliminary Objections the arbitral tribunal took the position that there is an existing sovereignty dispute over Crimea. Due to this position, Ukraine has to revise and resubmit its Memorial according to the established jurisdiction.[15]

The focus of this dissertation is the subject-matter jurisdiction of a court or a tribunal under provisions of UNCLOS. Therefore, it acknowledges the limits of such subject-matter jurisdiction without referring to possible ways of extending such jurisdiction by applying Article 293 UNCLOS regarding the applicable law. The subject-matter jurisdiction should also be differentiated from the concept of admissibility that could lead to the same result as lack of the jurisdiction but with respect to different reasons.

It should also be noted that the focus of this dissertation is not about the legal status of Crimea. The status of Crimea is regarded as occupied and illegally annexed territory based on the UN General Assembly Resolution 68/262 on March 27, 2014, on Territorial integrity of Ukraine. The status of Crimea as occupied and annexed was confirmed by various international authorities and organizations as well as a vast amount of scholars supporting this statement.[16] It is also based on the assumption that the occupation of Crimea by the Russian Federation is a violation of prohibition of the use of force[17] and therefore, the word "occupation" is used in this thesis to reflect the illegal change of the control over Crimea.

The Russian Federation did not agree with the status of Crimea as occupied and annexed.[18] In the *Coastal State Rights Dispute* the Russian Federation used the objection to the jurisdiction of the tribunal under Annex VII UNCLOS related to "the disputed

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12 Peter Tzeng, "Jurisdiction and Applicable Law under UNCLOS", *The Yale Law Journal* 126, 1 (October 2016): 242.

13 Gaiane Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction", *Max Planck Yearbook of United Nations Law* 21 (2017): 392.

14 *Ibid.*

15 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8*, paras. 197-198.

16 For the detailed overview, see Chapter I, part 1.1.2. Occupation of Crimea in 2014.

17 *Ibid.* But also see, Daniel Wisehart, "The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?", *EJIL: Talk!* (blog), March 4, 2014, https://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/. He makes a conclusion that the Russian use of force in Crimea is illegal under international law.

18 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation (19 May 2018), para. 10, p. 4.

territorial sovereignty issue" multiple times.[19] The Russian Federation brings analogical arguments as regards to Ukraine and its sovereignty in other disputes.[20]

In *Dispute Concerning the Immunity of Three Ukrainian Naval Vessels and the Twenty-Four Servicemen on Board* before ITLOS, the Russian Federation in the Note Verbale, on April 30, 2019 pointed out "its strong disagreement" with the qualification of the status of the Kerch Strait and territorial sea adjusted to Crimea.[21] The Russian Federation stated that as the qualification of the Kerch Strait and territorial sea was given by Ukraine "such issues of sovereignty over Crimea cannot be the subject of any proceeding before the Tribunal."[22] On the 25th of May 2019, ITLOS issued an order approving the immediate release of Ukrainian naval vessels and detained Ukrainian servicemen. In this order ITLOS outlined that "the rights claimed by Ukraine are rights to the immunity of warships and naval auxiliary vessels and their servicemen on board under the Convention and general international law".[23] It should be noted that as it was the provisional measures stage, ITLOS only checked for the *prima facie* jurisdiction, while the sovereignty issues are dealt with at the later stages. ITLOS could not have dealt with the jurisdictional issues at this stage. But even in the further stage, the arbitral tribunal instituted under Annex VII UNCLOS in the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* did not include the sovereignty issues over Crimea in its Award on the Preliminary Objections of the Russian Federation. The reason for this is that "Ukraine advances its case on the basis that there is no need for the Tribunal to take any position on the issue of territorial sovereignty over Crimea."[24] Therefore, the Russian Federation agrees that the issue of territorial sovereignty over Crimea is not part of the dispute as regardless of a coastal state, the Russian Federation's actions against Ukraine's naval vessels would still allegedly violate the relevant provisions of UNCLOS.[25]

Meanwhile, in the *Coastal State Rights Dispute,* the arbitral tribunal ruled that it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. As a

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19 *Ibid.,* para. 26, p. 10.

20 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation),* Preliminary objections of the Russian Federation (24 August 2020), 5, para. 23.

21 Note verbale from the Embassy of the Russian Federation in the Federal Republic of Germany of 30 April 2019.

22 *Ibid*.

23 *Detention of three Ukrainian naval vessels* (Ukraine v. Russian Federation), Provisional Measures, Order, 25 May 2019 ITLOS Reports 2018-2019 (further, *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS), para. 96, p. 306.

24 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen,* Preliminary objections of the Russian Federation, *op. cit. 20,* para. 23, p.5.

25 *Ibid.* For the detailed overview of the dispute see, Chapter I, Part 1.3.2., in particular part 1.3.2.2. *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*.

result, the Arbitral Tribunal cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea.[26]

Thus, while one of the disputes rejected in part because of the unclear coastal state, another one did not have this issue at all, as the dispute was more from the view that regardless of a coastal state issue the immunity of warships should not be violated. Therefore, it is possible to see that regardless of Crimea's sovereignty claim, there are still rights and obligations of states under UNCLOS that can be brought under jurisdiction of dispute settlement bodies under UNCLOS.

It should be noted that the level of uncertainty surrounding sovereignty disputes is clearly demonstrated in the decision in *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom).[27] It stated that "the Tribunal 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. That, however, is not this case, and the Tribunal therefore has no need to rule upon the issue."[28]

The question whether Crimean occupation can be considered as a minor issue of territorial sovereignty being additional to a dispute concerning the interpretation or application of the Convention was answered. In particular, in its Award on Preliminary Objections in the *Coastal State Rights Dispute,* the arbitral tribunal stated that Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the "coastal State" within the meaning of provisions of the Convention invoked by Ukraine.[29]

Thus, the question arises what rights and obligations provided by UNCLOS are influenced by the Crimean occupation? Why in one dispute the Crimean occupation is a prerequisite to the arbitral tribunal's decision under UNCLOS and in another it is not? Is there anything that can be done to bring to the jurisdiction of a court or a tribunal adjudicating on the basis of UNCLOS, a number of claims submitted by Ukraine that are affected by the question of Crimean occupation?

Thus, it is necessary to analyse to what extent the occupation of Crimea affects

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26 *Coastal State Rights Dispute,* Award on Preliminary Objections *op. cit. 8*, para. 197.

27 *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom) (further, *Chagos MPA Arbitration*), Award (18 March 2015). In a nutshell, the dispute involved Mauritius challenging the United Kingdom's establishment of a Marine Protected Area (MPA) around the Chagos Archipelago. Mauritius believed that this action breached UNCLOS and other laws. Mauritius argued that the UK, by declaring the MPA, infringed upon its rights as a coastal state and contended that the UK was not entitled to declare maritime zones unilaterally, especially against Mauritius' objections, considering the historical circumstances of detaching the Chagos Archipelago.

28 *Chagos MPA Arbitration*, Award, *op. cit. 27,* 90, para 221.

29 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 58-59, para. 195.

UNCLOS provisions. Moreover, it is crucial to analyse what issues related to the Crimean occupation can be decided by dispute settlement bodies adjudicating under Part XV of UNCLOS, what issues cannot be decided regardless of the Crimean occupation, and whether there are alternative ways to address the alleged violation of rights and obligations under UNCLOS, assuming *arguendo* the lack of jurisdiction *ratione materiae* established in the *Coastal State Rights Dispute*. Therefore, this dissertation focuses on the question of the subject matter jurisdiction of a court or tribunal under the provisions of UNCLOS and does not involve the questions of admissibility or usage of Article 293 UNCLOS, by interpreting applicable law to extend the jurisdiction of such a court or tribunal.

Relevance of the topic

The illegal occupation and further annexation of Crimea by the Russian Federation caused significant violations of the Ukrainian rights as a coastal state in the waters surrounding Crimea. Crimean occupation affects approximately 73% of the waters over which Ukraine exercises sovereignty or sovereign rights.[30]

It highlights a lot of uncertainties that existed even before the occupation of Crimea between Ukraine and the Russian Federation in respect of their rights and obligations as coastal states in the waters of the Azov Sea and the Kerch Strait.[31] These issues became even more urgent and critical after the occupation of Crimea and continue to exist. Ukraine's ability to defend its legitimate interests in the waters generated by Crimea depends on the interpretation and application of provisions of UNCLOS as well as on determination of the Crimea as occupied and annexed by the Russian Federation.

The relevance to find out the answers concerning the Crimean occupation and the dispute resolution under UNCLOS is significantly highlighted by the ongoing full-scale aggression of the Russian Federation against Ukraine. The international armed conflict is already having its impact. It is a belief that this ongoing conflict is accelerating an existing phase of significant changes in how states handle conflicts and strive for long-term peace in the international system.[32] The prohibition of the

30 "Percentage Calculator: 100000 Is What Percent of 137000? = 72.99", accessed 10 September 2023, https://www.percentagecal.com/answer/100000-is-what-percent-of-137000#. Numbers of square kilometres are based on information provided by Bohdan Ustymenko, "Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.

31 Such uncertainties were predominated by the lack of the maritime delimitation in the Azov Sea and the Kerch Strait, unclear status of the Azov Sea and the Kerch Strait and its regulation by UNCLOS provisions.

32 Anna Geis and Ursula Schröder, "Global Consequences of the War in Ukraine: The Last Straw for (Liberal) Interventionism?" *Zeitschrift Für Friedens- Und Konfliktforschung* 11, 2 (1 October 2022): 296-297. On a more practical level, see, Richard Higgott and Simon Reich, "It's bifurcation, not bipolarity: understanding world order after the Ukraine invasion," Policy brief, vol. 16. Brussels: CSDS (2022), https://brussels-school.be/sites/default/files/CSDS%20Policy%20brief_2216.pdf.

use of force, as codified in Article 2(4) of the UN Charter, was historically seen as the most important provision in the Charter.[33] Moreover, it is widely accepted today that states should resolve their disputes peacefully using the methods outlined in Article 33 of the Charter until the Security Council makes a determination under Article 39.[34] In the current global crisis, characterised by a significant breakdown of the international collective security system and a crisis of values, it is essential to emphasise the supremacy of international law over the use of military force.[35] The compulsory dispute settlement procedures under UNCLOS could serve as indicators of the supremacy of international law.

The International Court of Justice (hereinafter ICJ) in *the Continental Shelf* case submitted to it in 1982 by Special Agreement between Libya and Malta stated "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[36] Despite the fact that this proceeding was not decided on the basis of UNCLOS, it illustrates the approach that can be used by a court or a tribunal that is granted its jurisdiction by provisions of UNCLOS. Thus, it is relevant to establish how the provisions of UNCLOS can be exercised to its fullest.

UNCLOS offers an ideal framework where it can show the flexibility in adapting to the changing requirements of States without the need to be amended.[37] At the same time, a state that became a party to the treaty may reconsider and try to reclaim powers it previously delegated.[38] Therefore, it is important to keep a balance between the granted jurisdiction and exercise it to the fullest without expanding or limiting.

Therefore, the relevance of this doctoral dissertation is predetermined by the occupation of Crimea, the loss of control over nearly 73% of the waters over which Ukraine exercises sovereignty or sovereign rights and necessity of the responsibility over the violations of UNCLOS that requires a dispute settlement body under UNCLOS to decide, expressly or implicitly, on the sovereignty of Ukraine over Crimea.[39]

Before the full-scale invasion of Ukraine by the Russian Federation on

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33 Antônio Augusto Cançado Trindade, "The Primacy of International Law over Force" in *Promoting Justice, Human Rights and Conflict Resolution through International Law / La Promotion de La Justice, Des Droits de l'homme et Du Règlement Des Conflits Par Le Droit International* (Leiden: Brill Nijhoff, 2007), 1039.

34 *Ibid.*

35 *Ibid*., 1055.

36 *Continental Shelf (Libyan Arab Jamahiriya/Malta),* (Judgment), 3 June 1985, ICJ. Rep 13, para 19.

37 Hayley Keen and Charlotte Nichol, "Sea level rise: The primary challenge to effective implementation of UNCLOS, Written evidence (UNC0038)," *UK Parliament International Relations and Defence Committee Inquiry UNCLOS: fit for purpose in the 21st Century?* (12 November 2021): 3. Original reference was made to the impacts of climate change. However, the author of this dissertation believes that it could be applied not only to the climate change.

38 José E. Alvarez, "State Sovereignty Is Not Withering Away: A Few Lessons for the Future," in *Realizing Utopia: The Future of International Law*, edited by The Late Antonio Cassese (Oxford University Press, 2012), 31.

39 It should be noted that none of the disputes are solved.

February 24, 2022, Ukraine and Russia included in their negotiation process only Donetsk and the Luhansk region. Thus, in their negotiations during 2014–2015[40], these two countries were talking about ceasing fire in the Donetsk and Luhansk regions. No question of Crimea has been raised in those agreements. Reality tells that before the new wave of the Russian aggression, Crimea had all chances to become and to remain as a frozen conflict between Ukraine and the Russian Federation. It did not happen as the conversation of the legality of the occupation of Crimea became vivid on February 24, 2022. Thus, such circumstances could serve as another reason for the relevance of this topic.

The aim and research objectives

To solve the research problem, the **aim** is to find out what are the matters that fall within the subject-matter jurisdiction of a court or a tribunal under UNCLOS taking into consideration the Crimean occupation and how the matters that affected by the fact of the Crimean occupation could be still solved according to UNCLOS provisions.

To achieve the aims of the research, the following **research objectives** are established:

1) to assess the Crimean occupation by examining its historical and legal context, defining key legal terms and concepts related to it and UNCLOS dispute resolution, and analysing its representation in international disputes;
2) to determine the jurisdictional scope of UNCLOS dispute settlement bodies concerning the rights and obligations of Ukraine and the Russian Federation in the maritime zones generated by Crimea in the Black Sea, the Azov Sea, and the Kerch Strait and to identify the limitations and exceptions to compulsory dispute settlement under UNCLOS due to the Crimean occupation;
3) to analyse and provide options to solve the question of Crimean occupation as a potential sovereignty dispute between Ukraine and the Russian Federation so the compulsory dispute settlement under provisions of UNCLOS could be applicable as well as to examine the question of how the violation of the provisions related to Ukraine as a coastal state over Crimea can be addressed within UNCLOS.

Defence Statement:

The dispute resolution under UNCLOS can be applied only to a certain extent in solving the disputes between Ukraine and the Russian Federation concerning the waters around occupied Crimea.

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40 See, Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk Agreement), *United Nations Peacemaker*, 5 September 2014, https://peacemaker.un.org/UA-ceasefire-2014; Memorandum on the Implementation of the Provisions of the Protocol on the Outcome of Consultations of the Trilateral Contact Group on Joint Steps Aimed at the Implementation of the Peace Plan (Implementation of the Minsk Agreement), *United Nations Peacemaker*, 19 September 2014. https://peacemaker.un.org/implementation-minsk-19Sept2014; Package of Measures for the Implementation of the Minsk Agreements, *United Nations Peacemaker*, 12 February 2015, https://peacemaker.un.org/ukraine-minsk-implementation15.

Novelty of the doctoral dissertation

There is a quite some number of legal writings available on the issue of "mixed disputes",[41] but this doctoral dissertation presents new arguments that could be invoked in a mixed law of the sea dispute where there is no determination of a coastal state is possible. Some authors focused on jurisdiction under UNCLOS while others focused on the status of Crimea. There is currently no in-depth research combining the two topics. Although the legal scholarship has started to address the law of the sea matters regarding the mixed disputes with specific respect to Crimea[42], there is still a lack of the comprehensive analysis which also includes in depth assessment of the provisions of UNCLOS which have not been sufficiently taken into account yet with respect to the law of the dispute between Ukraine and the Russian Federation. For example, Articles 58, 59, and 74(3) UNCLOS. Thus, this doctoral dissertation provides a comprehensive study which combines the question of Crimean occupation and dispute settlement under UNCLOS, evaluates rights and obligations of the coastal states in the waters generated by Crimea, provides legal interpretation of the provisions of UNCLOS applicable regardless of the determination of Crimea as well as proposes options how to determine the status of the Crimean occupation to resolve the matters related to it by the provisions of UNCLOS. Additionally, this doctoral dissertation is novel because it proposes options on how Ukrainian submissions that were rejected in the *Coastal State Rights Dispute* can still be decided by applying UNCLOS provisions.

Theoretical and practical significance

The theoretical significance of this doctoral dissertation is the evaluation of significance of the dispute over sovereignty between coastal states on the resolution of disputes over the law of the sea by using the example of the Crimean occupation. It proposes an interpretation of some provisions of UNCLOS in the light of their applicability regardless of the existing sovereignty dispute between parties. Therefore, the contribution of this dissertation can be seen as to offer new arguments that could be invoked in a mixed law of the sea dispute where there is no determination of a coastal state is possible.

Considering the relevance of this research in the theoretical and scientific sphere, its practical significance should be noted.

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41 See detailed further in the part of Introduction concerning the Research review on the topic of the doctoral dissertation.

42 Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *EJIL: Talk! (blog)*, October 14, 2016. https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/; Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *Denver Journal of International Law & Policy* 46, 1 (2017), https://digitalcommons.du.edu/djilp/vol46/iss1/3; Robert Volterra, et al., "The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait," *The International Journal of Marine and Coastal Law* 33, 3 (2018): 614–622, and others. See more examples further in the part of Introduction concerning the Research review on the topic of the doctoral dissertation.

To begin with, the results of this research would be useful for the arbitral tribunal in the ongoing *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* and/or future decisions in other similar cases.

Secondly, the analysis presented in this research and the conclusions that will be drawn could prove helpful to invoke the responsibility over the violations of UNCLOS that requires a dispute settlement body under UNCLOS to decide, expressly or implicitly, on the sovereignty of Ukraine over Crimea.

Thirdly, the doctoral dissertation can help to determine what options could be the most effective for invoking the state responsibility as well as providing another perspective on the importance of justice and peaceful dispute settlement between states.

Furthermore, such research could be useful for further academic examinations related to the effectiveness of UNCLOS dispute settlements as well as the role of occupation in various international law of the sea disputes. It might also be interesting for further research involving deeper and comprehensive examination of interpretation and application of certain articles of UNCLOS and mechanism to bring the Russian Federation to responsibility for its violations of international law and in particular, international law of the sea. The results of the research could be used for academic lecturing and preparing future educational materials in the topics related the international law of the sea and law of the state responsibility.

Structure of the doctoral dissertation

The doctoral dissertation is divided into an introduction and three substantial parts that are divided into smaller sections, conclusions and recommendations, bibliography, summary. This structure has been chosen to provide a systematic analysis of different aspects related to the Crimean occupation and resolution of disputes under UNCLOS provisions.

The general part of the thesis is included in Chapter I. This chapter provides an understanding of the Crimean occupation and disputes settlement procedures under UNCLOS. It explores the historical background of the Crimean occupation, tracing its origins from events that occurred before the occupation to following events after, including events after February 24, 2022. Additionally, it provides legal peculiarities of the main concepts relevant to seeing the occupation through the lens of international humanitarian law and international law of the sea and analysing the dispute settlement mechanism of UNCLOS and Ukraine and the Russian Federation as state parties to it. Chapter I also establishes how the issue of Crimea's occupation is presented in international disputes, including cases brought before the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and investment tribunals. This chapter concludes by examining specific disputes between Ukraine and the Russian Federation under UNCLOS, in particular the *Coastal State Rights Dispute* and the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen.*

Chapter II takes to the core of the matter by answering the question what matters are covered by the jurisdiction of the UNCLOS dispute settlement bodies between

Ukraine and the Russian Federation in the light of the Crimean occupation. It clarifies the rights and duties of coastal states in the Black Sea, the Azov Sea, and the Kerch Strait. This comprehensive analysis covers the territorial sea, contiguous zone, exclusive economic zone (EEZ), and continental shelf. It provides analysis of the complex legal framework governing the Sea of Azov and the Kerch Strait, manoeuvring through difficulties of identifying relevant legal regimes that govern the waters of the Azov Sea and the Kerch Strait. Furthermore, it scrutinises the limitations and exceptions to compulsory dispute resolution under UNCLOS and provides a clear picture that not all aspects of the law of the sea dispute are excluded from the dispute settlement under UNCLOS because of the existence of the occupation of Crimea.

The concluding chapter, Chapter III provides an analysis of options on how it is possible to remove the barrier to jurisdiction under UNCLOS arising from the occupation of the Crimean Peninsula. It examines the potential resolution of the occupation dispute through conditional decisions and Article 288(2) of UNCLOS. Moreover, it provides additional options by evaluating the possibility to determine the occupation of Crimea by using the alternative mechanisms outside the provisions of UNCLOS. It involves the evaluation of the possibility of the determination of the occupation through bilateral agreements and the roles that could be played to determine the status of the occupation by international institutions such as the UN Security Council, UN General Assembly, ICJ, ICC, and the establishment of a special tribunal in confirming the factuality of the Crimean occupation. This chapter provides insights into how jurisdiction under UNCLOS can be maintained and how to determine the Crimean occupation from various legal perspectives.

Research review of the relevant resources

While the occupation of Crimea arose as an issue for legal research only in 2014, the dispute settlement under UNCLOS started its research history as early as 1984. However, there is a possibility to use the negotiation drafts and papers that were written even before 1984 as those that are related to the adopted Part XV UNCLOS. Thus, the general topic of the resolution of disputes under provisions of UNCLOS is widely researched and has been a subject of legal scholarship a lot of times. There are widely-cited works of distinguished scholars such as Alan Boyle[43], Yoshifumi Tanaka[44],

43 Alan Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", *International & Comparative Law Quarterly* 46, 1 (1997); Alan Boyle, "Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea" in *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford: Hart Publishing, 2003); Alan Boyle and Christine Chinkin, *The Making of International Law*, (Oxford, New York: Oxford University Press, 2007); Alan Boyle, "The International Tribunal for the Law of the Sea and the Settlement of Disputes," in *The Changing World of International Law in the Twenty-First Century:A Tribute to the Late Kenneth R. Simmonds* Joseph Jude Norton, Mads Tønnesson Adenæs and Mary Footer (The Hague, Kluwer Law International, 1998): 99–134; Alan Boyle, "Problems of compulsory jurisdiction and the settlement of disputes relating to straddling fish stocks," *International Journal of Marine and Coastal Law*, 14, 1 (1999): 1–25.

44 Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (Cambridge: Cambridge University Press, 2019); Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press, 2018).

Natalie Klein[45], Igor Karaman[46], Louis Sohn[47], Douglas Guilfoyle[48], Robin Churchill[49],

45 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005); Natalie Klein, "The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?" *Proceedings of the ASIL Annual Meeting* 108 (2014): 359–364; Natalie Klein, "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention" *International Journal of Marine and Coastal Law* 32 (2017): 332-363; Natalie Klein, "Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions," *Chinese Journal of International Law* 15, 2 (2016): 403-415; Natalie Klein and McCreath Millicent, "Resolving international disputes concerning the marine environment" in *Research Handbook on International Marine Environmental Law* (Cheltenham, UK: Edward Elgar Publishing, 2023): 124-149; Douglas Guilfoyle and Natalie Klein, "The UN Convention on the Law of the Sea Dispute Settlement System, Written evidence (UNC0001)." *UK Parliament International Relations and Defence Committee Inquiry UNCLOS: fit for purpose in the 21st Century?* 12 November 2021.

46 Igor V. Karaman, *Dispute Resolution in the Law of the Sea* (Leiden: Brill Nijhoff, 2012).

47 Louis B. Sohn, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?" *Law and Contemporary Problems* 46, 2 (1983): 195–200.

48 Douglas Guilfoyle, "Governing the oceans and dispute resolution: An evolving legal order?" in *Global governance and regulation: Order and disorder in the 21st century* Leon Wolff and Danielle Ireland-Piper (eds) (Routledge, 2018).

49 Robin Churchill, "Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means", in *International Law and Dispute Settlement: New Problems and Techniques*, (Hart Publishing, 2010): 143–171; Robin Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During Its First Decade" in *The Law of the Sea: Progress and Prospects* David Freestone, Richard Barnes & David M Ong (eds.) (Oxford: Oxford University Press, 2006): 388–416; Robin Churchill, Robin Churchill, "The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use", *Ocean Development & International Law* 48, 3–4 (2 October 2017): 216-238; Robin Churchill, "International Law Obligations of States in Undelimited Maritime Frontier Areas", in *Frontiers in International Environmental Law: Oceans and Climate Challenges*, (Leiden: Brill Nijhoff, 2021): 141–170. And many more of his works and articles. The special attention has to be given to his articles in *International Journal of Marine and Coastal Law* about Dispute Settlement in the Law of the Sea: Survey for different years. See for example, the latest: Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2017," *International Journal of Marine and Coastal Law* 33, 4 (2018): 653-682; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2018," *International Journal of Marine and Coastal Law* 34, 4 (2019): 539-570; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2019", *The International Journal of Marine and Coastal Law* 35, 4 (2020): 621–659; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2020", *The International Journal of Marine and Coastal Law* 36, 4 (2021): 539-573; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2021", *The International Journal of Marine and Coastal Law* 37, 4 (2022): 575-609.

J. G. Merrills[50], A. O. Adede[51], Saiful Karim[52], Kate Parlett[53], Alexander Proelss[54], Sean D. Murphy[55], Bjørn Kunoy[56], David Anderson[57], James Harrison[58], Thomas A. Mensah[59], Lan Ngoc Nguyen[60], and many more.[61]

The question of territorial sovereignty and law of the sea was covered by works of

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50 John G. Merrills, "The Law of the Sea Convention" in *International Dispute Settlement* (Cambridge: Cambridge University Press, 2011): 167–193.

51 A. O. Adede, "The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention," *Ocean Development & International Law* 11, 1–2 (1982): 125–48; A. O. Adede, "The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary" in *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Leiden: Brill Nijhoff, 2021).

52 Saiful Karim, "Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System" in *Litigating International Law Disputes*, edited by Natalia Klein (Cambridge: Cambridge University Press, 2014): 260–283.

53 Kate Parlett, "Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals," *Ocean Development & International Law* 48, 3–4 (2017): 284–299.

54 Alexander Proelss, "The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics* 46 (2018): 47–60; Alexander Proelss, "Implicated Issues and Renvoi Clauses: Challenges to the Regime for the Peaceful Settlement of Disputes under the Law of the Sea Convention", in *Peaceful Management of Maritime Disputes* (London: Routledge, 2023): 29–54.

55 Sean D. Murphy, "Creativity in Dispute Settlement Relating to the Law of the Sea," in *By Peaceful Means: International Adjudication and Arbitration* Charles N. Brower et al. (Oxford, New York: Oxford University Press, 2023).

56 Bjørn Kunoy, "The Scope of Compulsory Jurisdiction and Exceptions Thereto under the United Nations Convention on the Law of the Sea", *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 58 (2021): 78–141.

57 David Anderson, "Peaceful settlement of disputes under UNCLOS", in *Law of The Sea: UNCLOS as a Living Treaty* Jill Barrett and Richard Barnes (eds.) (London, British Institute of International and Comparative Law, 2016): 385–415; David Anderson, "Strategies for dispute resolution: negotiating joint agreements", in *Boundaries and Energy: Problems and Prospects* Gerald Blake, et al. (eds.), (London, Kluwer Law International, 1998): 473–484; David Anderson, "The role of ITLOS as a means of dispute settlement under UNCLOS" in *International Marine Environmental Law: Institutions, Implementation and Innovations* Andree Kirchner (ed.) (The Hague, New York, London, Kluwer Law International, 2003): 19– 29, and others.

58 James Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", *Ocean Development and International Law* 48, 3-4 (2017): 269–283.

59 Thomas Mensah, "The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea", *Max Planck Yearbook of United Nations Law* 2 (1998): 307–323; Thomas Mensah, "The role of peaceful dispute settlement in contemporary ocean policy and law" in *Order for the Oceans at the Turn of The Century*, Davor Vidas and Willy Østreng (eds.), (The Hague, Kluwer Law International, 1999): 81–94.

60 Lan Ngoc Nguyen, *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (Cambridge: Cambridge University Press, 2023).

61 For fuller list of sources, see, "Select Bibliography on Settlement of Disputes Concerning the Law of the Sea" in *Yearbook International Tribunal for the Law of the Sea / Annuaire Tribunal international du droit de la mer, Volume 25 (2021)*, (Leiden: Brill Nijhoff, 2022): 165–168. It has a particular Chapter on Select

Irina Buga[62], Clive Schofield[63], Paul C. Irwin[64], Bernard H. Oxman[65], Robert W. Smith and Bradford Thomas[66], Natalie Klein[67], etc. A major view is that disputes over territorial sovereignty, including questions related to land territory, are outside of jurisdiction of a court or tribunal under UNCLOS. It is not addressed or covered by UNCLOS.[68]

The question of the maritime zones generated by the occupied land territory was covered by different scholars[69], including references to the question of applicability of the law of the sea during an armed conflict.[70] However, only in recent publications, some authors refer to waters around Crimea.[71]

Bibliography on Settlement of Disputes Concerning the Law of the Sea. The *Yearbook International Tribunal for the Law of the Sea* is published annually.

62 Irina Buga, "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals," *International Journal of Marine and Coastal Law* 27, 1 (2012): 59–95.

63 Clive Schofield, "Options to Avoid and Resolve Disputes over Island Sovereignty", in *Peaceful Management of Maritime Disputes* (London: Routledge, 2023), 109–128.

64 P. C. Irwin, "Settlement of Maritime Boundary Disputes - An Analysis of the Law of the Sea Negotiations", *Ocean Development & International Law* 8, 2 (1980): 114-115.

65 Bernard H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals," in *The Oxford Handbook of the Law of the Sea*, Donald R. Rothwell et al.(ed), (Oxford: Oxford University Press, 2015), 394-400.

66 Robert W. Smith and Thomas Bradford, "Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes," in *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, Myron H. Nordquist and John Norton Moore (eds), (Leiden: Brill Nijhoff, 1998).

67 Natalie Klein and Kate Parlett, *Judging the Law of the Sea* (Oxford, New York: Oxford University Press, 2022), 103-116.

68 See for example, Buga, *op. cit. 62,* 68; Smith and Bradford, *op. cit. 66,* 55, 66; Sienho Yee, "The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections," *Chinese Journal of International Law* 13, 3 (2014): 663-688.

69 See, for example, Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2019), 47-48, 224. Dinstein believes that when effective control is established on land, it attaches itself to any abutting maritime areas, including internal waters, territorial sea and continental shelf. He also covers legal regulation of submarine cables connecting an occupied territory with a neutral territory. Also see, Eyal Benvenisti, *The International Law of Occupation*, (Oxford, New York: Oxford University Press, 2012); Bing Bing Jia, "The Terra Nullius Requirement in the Doctrine of Effective Occupation: A Case Study in: Law of the Sea" in *From Grotius to the International Tribunal for the Law of the Sea*', Lilian del Castillo (ed.) (Leiden: Brill Nijhoff, 2015), 657-673.

70 Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford, New York: Oxford University Press, 2011), 259-261; John Astley and Michael Schmitt, "The Law of the Sea and Naval Operations," *Air Force Law Review* 42 (1997): 119-138; Vaughan Lowe, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," in *International Law Studies: The Law of Naval Operations*, Horace B. Robertson Jr (ed), (1991): 111, 130–3; George P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (Routledge, 1998): 7; Marco Longobardo, "The Occupation of Maritime Territory Under International Humanitarian Law," *International Law Studies* 95 (2019): 322-361.

71 Raul Pedrozo, "Russia-Ukraine Conflict: The War at Sea," *International Law Studies*, US Naval War College, 100 (2023): 1-61; Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law. Elements of International Law*, (Oxford, New York: Oxford University Press, 2022).

When it comes to the topic of Crimea, there were some historical analyses conducted prior to 2014. However, the research on this subject gained significant attention following the Russian annexation and occupation of Crimea. The literature on this issue includes discussions on self-determination, the presence of unidentified armed forces (Russian military personnel), the use of force, the illegal referendum to join Russia, the Russian declaration of Crimea as part of the Russian Federation, the application of economic sanctions, the abuse of human rights in Crimea since the occupation, the regulation and protection of investments, as well as the analysis of lawfare against Russia in various courts and tribunals. These matters all pertain to the annexation and occupation of Crimea.[72]

At the same time, there is still a limited amount of legal research specifically related to the occupation of Crimea and dispute settlement under UNCLOS. This can be easily explained by the fact that Crimea was occupied and annexed in 2014[73] and Ukraine submitted the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* to an Annex VII Arbitral Tribunal only in 2016. It has been ten

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72 Robert Geiß, "Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind," *International Legal Studies* 91 (2015): 425-449; Christian Maxsen, "The Crimea Crisis: An International Law Perspective," *Heidelberg Journal of International Law* 74 (2014): 367-391; Antonello Tancredi, "The Russian Annexation of the Crimea: Questions Relating to the Use of Force," *Questions in International Law* 1, 5 (2014): http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/; Oleksandr Zadorozhnii, "To Justify against All Odds: The Annexation of Crimea in 2014 and the Russian Legal Scholarship," *Polish Yearbook of International Law* 35 (2015): 139-170; Lina Laurinavičiūtė and Laurynas Biekša, "The Relevance of Remedial Secession in the Post-Soviet 'Frozen Conflicts'," *International Comparative Jurisprudence* 1, 1 (2015): 66–75; Ilona Khmelova, "Institute of Recognition in the Context of the Occupation and Annexation of the Crimea by the Russian Federation," *Ukrainian Journal of International Law* 2 (2016): 23-26; Alisa Gdalina, "Crimea and the Right to Self-Determination: Questioning the Legality of Crimea's Secession from Ukraine," *Cardozo Journal of International and Comparative Law* 24, 3 (2016): 531-564; Oleksandr Zadorozhnii, "The International Legal Personality of 'DPR' and 'LPR'," *Ukrainian Journal of International Law* 4 (2016): 5-11; Kit De Vriese, "The Application of Investment Treaties in Occupied or Annexed Territories and 'Frozen' Conflicts: Tabula Rasa or Occupata?" in *Investments in Conflict Zones* (Leiden: Brill Nijhoff, 2020): 319–358; Christine Sim, "Parallel Proceedings Arising from Uncertain Territorial and Maritime Boundaries" in *Investments in Conflict Zones*, (Leiden: Brill Nijhoff, 2020): 209–245; Peter Tzeng, "Sovereignty over Crimea: A Case for State-to-State Investment Arbitration," *Yale Journal of International Law* 41, 2 (2016): 459-468; Cameron Miles, "Lawfare in Crimea: Treaty, Territory, and Investor–State Dispute Settlement," *Arbitration International* 38, 3 (2022): 135–150; Saba Pipia, "Tensions in Crimean Waters: Can Russia's Actions Amount to Threat of Force?" *EJIL: Talk!* (blog), July 28, 2021. https://www.ejiltalk.org/tensions-in-crimean-waters-can-russias-actions-amount-to-threat-of-force/; Andrii Voitsikhovkyi and Oleksandr Bakumov, "Armed Aggression of the Russian Federation against Ukraine as a Threat to the Collective Security System" [in Ukrainian: "Zbroyna ahresiya Rosiys'koyi Federatsiyi proty Ukrayiny yak zahroza systemi kolektyvnoyi bezpeky"], *Law and Safety* 88, 1 (2023): 134-145.

73 "Condemning the ongoing temporary occupation of part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter "Crimea") – by the Russian Federation, and reaffirming the non-recognition of its annexation". See, General Assembly Resolution A/RES/77/229 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 15 December 2022.

years since the occupation and eight years since the topic of the Crimean occupation and dispute settlement under UNCLOS began to be discussed. While there have been a decent number of articles accompanying research on this topic, no comprehensive research has been conducted yet.

However, it should be noted that there is a quite some number of legal writings available on the matter of "mixed disputes", "incidental issue" or "implicated issue problem" within the law of the sea that existed before the occupation of Crimea or submission of disputes involving waters around Crimea under UNCLOS.[74] Moreover, once such disputes were submitted, they were analysed from the view of another example of a mixed dispute.[75] While some scholars use the definition of "mixed dispute" to address a dispute regarding maritime delimitation or law of the sea dispute involving questions over disputed territory,[76] other ones use it in broader sense, meaning that it is a dispute involving law of the sea issues dealt with by UNCLOS along with external issues[77] or a law of the dispute with matters excluded by the optional exception in Article 298 UNCLOS.[78] The definitions of "incidental issue" or "implicated issue problem" within the law of the sea scholarship is used to address matters that are

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74 Buga, *op. cit. 62,* 59–95; Wensheng Qu, "The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond", *Ocean Development & International Law* 47, 1 (2016): 40–51; Jia Bing Bing, "The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge", *German Yearbook of International Law* 57 (2015): 4; Miguel García García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Leiden: Brill Nijhoff, 2015), 26-28; etc.

75 Volterra, et al., *op. cit. 42,* 616; Sandrine W. De Herdt, "Mixed Disputes", *The International Journal of Marine and Coastal Law* 37, 2 (2022): 358–367; Xinxiang Shi and Chang Yen-Chiang, "Order of Provisional Measures in Ukraine versus Russia and Mixed Disputes Concerning Military Activities," *Journal of International Dispute Settlement* 11, 2 (2020): 278–294; Viktoriia Hamaiunova, "Legal Position of LOS Tribunal Regarding Mixed Disputes", *Technology Transfer: Innovative Solutions in Social Sciences and Humanities* 3 (18 May 2020): 80–83; Ke Song, "The Battle of Ideas under LOSC Dispute Settlement Procedures", The International Journal of Marine and Coastal Law 38, 2 (2023): 207–227; Yoshifumi Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *International Law Studies* 96 (2020): 223-256; Alexander Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits*, (Leiden: Brill Nijhoff, 2022): 28; Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", *op. cit. 58,* 275–278; Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *New York University Journal of International Law and Politics* 50 (2018): 447–508.

76 Buga, *op. cit. 62,* 60; Qu, *op. cit. 74,* 45; Song, *op. cit. 75,* 220-221; Hamaiunova, *op. cit. 75,* 80; Volterra, et al., *op. cit. 42,* 616.

77 Herdt, *op. cit. 75,* 359; Shi and Yen-Chiang, *op. cit. 75,* 10; Bing, "The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge", *op. cit. 74,* 4; García-Revillo, *op. cit. 74*, 26.

78 Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *op. cit. 75,* 238; Shi and Yen-Chiang, *op. cit. 75,* 10

considered as a law of the sea dispute but also invoke some external issues.[79] Overall, it is possible to determine the similarities between these definitions, as all of them one way or another are aimed to address the situation where a dispute that falls under the subject matter jurisdiction of a court or a tribunal also has some external element. Nevertheless, while there is still no clear choice of how to call such issue as well as no clear guidance on how address such issues, this thesis adds to the legal research the ways on what provisions of UNCLOS can be used or legal determinations be made without expanding the scope of the subject matter jurisdiction of a court or a tribunal instituted under Annex VII UNCLOS.

Among the legal research conducted on the topics related to the Crimean occupation and dispute settlement under UNCLOS, two main areas of scholarship can be identified. Some focus on ongoing disputes with *ad hoc* arbitral tribunals under Annex VII of UNCLOS and previously decided the case on provisional measures by ITLOS. These articles also provide an overview of general matters of the law of the sea and how the disputes between Ukraine and Russia raise important considerations. Others seek to evaluate the effectiveness of the lawfare initiated by Ukraine against Russia, not only within the framework of UNCLOS dispute settlement, but also in other courts and tribunals.

For the first ones, there are those who have analysed the *Coastal State Rights Dispute*,[80]

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79 Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 42*; Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *op. cit. 42*; Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *op. cit. 75,* 447–508; Volterra, et al., *op. cit. 42,* 614–622; Fabian Simon Eichberger, "Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues", *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht / Heidelberg Journal of International Law* 81, 1 (21 April 2021): 239–240; Loris Marotti, "Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals," in *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, ed. Angela Del Vecchio and Roberto Virzo (Cham: Springer International Publishing, 2019) 399; Matina Papadaki, "Incidental Questions as a Gatekeeping Doctrine", AJIL Unbound 116 (January 2022): 170–175; and others.

80 "*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation)", PCA Case Repository, accessed 16 June 2023, https://pca-cpa.org/en/cases/149/. See more details in: Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 42*; Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *op. cit. 42*; Volterra, et al., *op. cit. 42,* 614–622; Schatz and Koval, "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS", *op. cit. 11*; Massimo Lando and Nilüfer Oral, "Jurisdictional Challenges and Institutional Novelties – Procedural Developments in Law of the Sea Dispute Settlement in 2020," *The Law & Practice of International Courts and Tribunals* 20, 1 (2021): 191–221; Valentin Schatz, "The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections," *Review of Central and East European* Law 46, 3–4 (2021): 400–415; Dmytro Koval, "The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next" *Lex Portus* 7, 1 (2021): 7–30.

the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*,[81] the *Case concerning the detention of three Ukrainian naval vessels*[82] as well as all of them or some of them together.[83] These articles primarily focus on specific questions related to the disputes between Ukraine and the Russian Federation, providing brief overviews of the situation and drafting conclusions. The main emphasis is on evaluating whether the conflict over Crimea's status would hinder dispute settlement under UNCLOS and after the Award, why the tribunal reached certain findings, what is considered as military activities, etc. As a result, there has been a surge of legal scholarship exploring the issue of territorial sovereignty in law of the sea disputes and differences between military activities or law enforcement activities, legal status of the Azov Sea and the Kerch Strait.

Valentin Schatz and Dmytro Koval have a couple of publications regarding Crimea and waters surrounding Crimea with respect to disputes under UNCLOS.[84] For

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81 "*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation)," PCA Case Repository, accessed 16 June 2023, https://pca-cpa.org/en/cases/229/. See Yoshifumi Tanaka, "Military Activities or Law Enforcement Activities? Reflections on the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen," *The Korean Journal of International and Comparative Law* 11, 1 (2023): 1–26.

82 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS, *op. cit, 23*. See the articles: Tullio Treves, "The International Tribunal for the Law of the Sea and Other Law of the Sea Jurisdictions (2020)," *The Italian Yearbook of International Law Online* 30, 1 (2021): 321–355; Maria Pia Benosa, "Limits on the Use of Force at Sea in the Jurisprudence of ITLOS: From M/V Saiga to Ukraine/ Russia" in *Case-Law and the Development of International Law* (Leiden: Brill Nijhoff, 2021), 208–224; Yurika Ishii, "Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation): Provisional Measures Order (ITLOS)." *International Legal Materials* 58, 6 (2019): 1147–1166; Shi and Yen-Chiang, *op. cit. 75*; Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *op. cit. 75*. Also see the blog posts, James Kraska, "Did ITLOS Just Kill the Military Activities Exemption in Article 298?" *EJIL: Talk!* (blog), May 27, 2019. https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/; Yurika Ishii, "The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order," EJIL: Talk! (blog), May 31, 2019, https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/.

83 James Kraska, "The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?" *EJIL: Talk!* (blog), December 3, 2018. https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/; Shi and Yen-Chiang, *op. cit. 75*; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2019", *op. cit. 49*; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2020", *op. cit. 49*; Nilüfer Oral, "Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS," *International Law Studies* 97 (2021): 478–508; Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits*, *op. cit. 75,* 93–116; Hosang Boddens, "An Analysis of Some Recent Maritime Challenges from the Perspective of the International Law of Military Operations," *Adelaide Law Review* 43, 2 (2022): 752- 765.

84 Valentin Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part III" *Völkerrechtsblog*, January 15, 2018, https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-3/; Valentin Schatz and Dmytro Koval, "Insights

example, in their article "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov, (Part III): The Jurisdiction of the Arbitral Tribunal", Schatz and Koval have determined the potential obstacles to the arbitral tribunal's jurisdiction. The authors state that "it is beyond the scope of this blog post to offer a final conclusion of all issues raised in the course of the analysis". In addition, in the part named "The Problem of Incidental Sovereignty Questions" they mention that there is a need for "further in-depth consideration (which we are unable to provide here)".

Valentin Schatz and Dmytro Koval separately provided their comments over the Award issued in the *Coastal State Rights Dispute.*[85]

Oleksandr Zadorozhnii in "The Arbitration Process in Accordance with the UN Convention on the Law of the Sea of 1982 and the Recourse to the International Court of Justice as a Way to Resolve Disputes between Ukraine and the Russian Federation: The Effectiveness, Advantages, Disadvantages" provides "with some of the international legal actions to hold Russia responsible for waging the war of aggression against Ukraine and its consequences".[86] A different research is done by Maryna Rabinovych in 'The Interplay between Ukraine's Domestic Legislation on Conflict and Uncontrolled Territories and Its Strategic Use of "Lawfare" before Russia's 2022 Invasion of Ukraine – A Troubled Nexus?' where she has analysed the connection between domestic and international law in Ukraine before the invasion and examines the potential impact of such a connection on Ukraine's future legal actions against Russia with shortly mentioning its disputes under UNCLOS.[87]

Nilüfer Oral in "Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS" has examined disputes between Ukraine and Russia in

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from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS," *op. cit. 11*; Valentin Schatz, "The Award Concerning Preliminary Objections in Ukraine v. Russia: Observations Regarding the Implicated Status of Crimea and the Sea of Azov" *EJIL: Talk! (blog)*, March 20, 2020. https://www.ejiltalk.org/the-award-concerning-preliminary-objections-in-ukraine-v-russia-observations-regarding-the-implicated-status-of-crimea-and-the-sea-of-azov/; Koval, "The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next," *op. cit. 80*; Schatz, "The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections," *op. cit. 80.*

85 Schatz, "The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections" *op. cit. 80*; Koval, "The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next," *op. cit. 80.*

86 Oleksandr Zadorozhnii, "The Arbitration Process in Accordance with the UN Convention on the Law of the Sea of 1982 and the Recourse to the International Court of Justice as a Way to Resolve Disputes between Ukraine and the Russian Federation: The Effectiveness, Advantages, Disadvantages" [in Ukrainian: "Arbitrazhnyy protses vidpovidno do Konventsiyi OON z mors'koho prava 1982 r. ta zvernennya do Mizhnarodnoho Sudu OON yak sposoby rozv'yazaty spory mizh Ukrayinoyu i Rosiys'koyu Federatsiyeyu: efektyvnist', perevahy, nedoliky"], *Ukrainian Journal of International Law* 2 (2016): 7-15.

87 Maryna Rabinovych, "The Interplay between Ukraine's Domestic Legislation on Conflict and Uncontrolled Territories and Its Strategic Use of "Lawfare" before Russia's 2022 Invasion of Ukraine – A Troubled Nexus?" *Review of Central and East European Law* 47, 3–4 (2022): 268–297.

light of the historical context of the conflict over Crimea and the Black Sea fleet from the period of the Ottoman Empire, the USSR and the period following the dissolution of the former USSR. It concluded that these disputes present an important addition to the recent trend of cases where the underlying disputed sovereignty matters are brought under the UNCLOS dispute resolution procedures.[88]

Peter Tzeng was one of the first who wrote an article on the relevant to this dissertation topic: "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy."[89] This article analyses the implication of territorial sovereignty issues comparing the situation between Ukraine and Russia to cases between Mauritius v. United Kingdom and Philippines v. China. The article provides a general overview on how the tribunal might rule on its jurisdiction instead of focusing merely on the situation around the waters of Crimean and dispute settlement under UNCLOS. Later, his legal interest shifted more to the aspects of investment law related to the Crimean occupation.[90]

Therefore, the scholarship analysis on this matter focuses not only on the issues related to Crimea and UNCLOS dispute settlement, but similar matters regarding Crimea in other courts and tribunals.

Gaiane Nuridzhania in her article "Crimea in International Courts and Tribunals: Matters of Jurisdiction" provides a general overview about the relation of jurisdiction of the various international courts relating to the issue of Crimea.[91]

Lawrence Hill-Cawthorne in "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study" has analysed the concept of 'disaggregation' in international law, which involves dividing broader disputes into separate legal claims under different international rules and jurisdictions. Therefore, he has provided an overview of the disputes between Ukraine and the Russian Federation as a case study. His main focus is on three approaches observed in case law where tribunals deal with claims that appear to have jurisdiction over that are related to a broader dispute outside their jurisdiction. He concludes by discussing potential reasons why a tribunal may adopt one approach over the others in specific cases.[92]

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88 Oral, *op. cit. 83.*

89 Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *op. cit. 42,* 3-8. Before the article, it was a blog post, see: Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 42.*

90 Peter Tzeng, "Investment Protection in Disputed Maritime Areas," *The Journal of World Investment and Trade* 19, 5–6 (2018): 828–859; Peter Tzeng, "Investments on Disputed Territory: Indispensable Parties and Indispensable Issues", *Brazilian Journal of International Law* 14, 2 (2017):122-138; Peter Tzeng, "Sovereignty over Crimea: A Case for State-to-State Investment Arbitration," *op. cit. 72.* It is also worth to mention his blog post: Peter Tzeng, "Conditional Decisions: A Solution for *Ukraine v. Russia* and Other Similar Cases?" *EJIL: Talk!* (blog), March 20, 2020, https://www.ejiltalk.org/conditional-decisions-a-solution-for-ukraine-v-russia-and-other-similar-cases/.

91 Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction," *op. cit. 13,* 378–403.

92 Lawrence Hill-Cawthorne, "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study," *International & Comparative Law Quarterly* 68, 4 (2019): 783-785.

This literature analysis shows that the established research problem has not only become relevant only recently, but also that it has not been comprehensively examined before and very little examination has taken place in general. Previous academic research related to jurisdiction under UNCLOS and/or the Crimean occupation, lacks comprehensive and in-depth analysis on the influence of the Crimean occupation to effective dispute settlement procedures.

Methodology

This dissertation is based on the analysis of state and judicial practice as well as legal scholarly writings. It is based on the common methods of research (positivist international legal analysis based on the dogmatic and doctrinal approaches) relevant to the international legal scholarship. It provides a critical assessment of legal decisions rendered by courts and tribunals.

These are the methods used to attain the aim of the research:

- Description method is used for providing a general overview of the topic in the beginning of the dissertation.
- Historical method is engaged in order to understand what maritime zones were bordering Crimea and their delimitation before and after the Crimean occupation.
- Linguistic method and method of logic was used in order to interpret the provisions of UNCLOS, case law and other legal documents.
- Method of analysis is employed in the examination of breaches related to the rights and obligations provided by UNCLOS and predetermined by occupation of Crimea. The same method is used in the case analysis on tribunal decisions related to the lack of jurisdiction due to sovereignty issues. It is also employed in the determination of all possible ways of dispute settlement procedures under UNCLOS between Ukraine and Russia with regard to determination of the Crimea as occupied and annexed by the Russian Federation.

It should be noted that none of the earlier mentioned methods prevails over the other. All the methods are applied together for the detailed analysis and comprehensive research of this doctoral dissertation.

CHAPTER I. OVERVIEW OF THE STATUS OF CRIMEA AND DISPUTES UNDER UNCLOS

1.1. The concept and background of the Crimean occupation

Crimea is a peninsula in the south of Ukraine which is located between the Black Sea and Azov Sea. The total area of the peninsula is 27,000 square km. It is connected to the mainland by the narrow Perekop Isthmus which is from 7 to 23 km wide. There is the Syvash Bay that lies between the mainland of Ukraine and its peninsula. The Tonka of Arabat is a long sandspit that separates the Bay from the Sea of Azov. The Azov Sea is connected to the Black Sea by the Kerch Strait.[93]

Picture 2. The map of Crimea.[94]

93 "Crimean Peninsula," *Encyclopædia Britannica*, accessed 20 September 2021, https://www.britannica.com/place/Crimean-Peninsula; "Crimean Peninsula" [in Ukrainian: "Kryms'kyy Pivostriv"], *The Encyclopedia of Modern Ukraine*, accessed 20 September 2021, https://esu.com.ua/search_articles.php?id=1099; "Azov Sea" [in Ukrainian: "Azovs'ke More"], *The Encyclopedia of Modern Ukraine*, accessed 20 September 2021, https://esu.com.ua/search_articles.php?id=42775; "Sea of Azov," *Encyclopædia Britannica*, accessed 20 September 2021, https://www.britannica.com/place/Sea-of-Azov.

94 Drawings were made by the author. See, "Crimea", *Google Map*, accessed 19 March 2021, https://www.google.com.ua/maps/@44.5908599,34.2699952,6z?authuser=2&hl=en&entry=ttu.

1.1.1. Historical background before the Crimean occupation

Crimea has a long history where different nations were settled and were changing over the years and years of its history. Thus, in ancient times Greeks lived mostly on the coast of the peninsula while Scythians lived inside and away from the coastline. Later, the peninsula came under the rule of the Cimmerian Bosporus Kingdom with its peak of power in the 4th century BC.[95] Long years later, it was under the rule of the Golden Horde till the middle of the 15th century, when in 1441 the Crimean Khanate gained its independence from the Golden Horde. Right after, somewhere between 1475 and 1478, the Crimean Khanate became a vassal of the Ottoman Empire.[96]

In 1502, the Crimeans defeated the remnants of the Golden Horde, and since then the khanate began to rapidly increase its power.[97] However, already in 1783, the Crimean Peninsula was annexed the Russian Empire[98] and for almost a year, the peninsula was managed by the military authorities. Later, on February 2, 1784, the authorities issued a decree for establishment of the Tavriya region, which included the Crimean Peninsula, Taman and the lands north of the Crimea.[99]

During the Russian revolution in 1917–1920, several local and occupational governments changed in Crimea. The peninsula was conquered by the Bolsheviks in November 1920 and became part of Russia as an ordinary province.[100] On September 23, 1921, the Bolsheviks announced the demand for an autonomous status of Crimea.[101] Nearly a month later, on October 18, 1921, the province was transformed into the Crimean Autonomous Socialist Soviet Republic.

In 1946, the peninsula became an ordinary region within the Russian Soviet Federative Socialist Republic (further, RSFSR or Russian SFSR).[102] 8 years later, the year of 1954 was marked as the 300th anniversary of the Pereyaslav Agreement.[103] The events caused by the Pereyaslav Agreement were called "Reunification of Ukraine with

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95 "Crimean Peninsula," *Encyclopædia Britannica, op. cit. 93*; "Kingdom of the Bosporus", *Encyclopædia Britannica*, accessed 25 April 2023, https://www.britannica.com/place/Kingdom-of-the-Bosporus.

96 Serhii Hromenko, *Our Crimea: Non-Russian Stories of the Ukrainian Peninsula* [in Ukrainian: *Nash Krym: nerosiys'ki istoriyi ukrayins'koho pivostrova*], (Kyiv: K.I.C, 2016): 10.

97 *Ibid.*

98 "Crimean Peninsula," *Encyclopædia Britannica, op. cit. 93.*

99 Institute of History of Ukraine, *Crimea: A Journey through the Ages. History in Questions and Answers* [in Ukrainian: *Krym: shlyakh kriz' viky. Istoriya u zapytannyakh i vidpovidyakh*], (Kyiv: National Academy of Sciences of Ukraine, 2014): 181.

100 Hromenko, *op. cit. 96,* 265.

101 Mykola Melnyk, *Ukraine and Crimea in Historical Relations* [in Ukrainian: *Ukrayina i Krym v istorychnykh vzayemynakh*], (London: Ukrainian Publishing Association, 1983): 1257.

102 Hromenko, *op. cit. 96,* 265.

103 Pereyaslav Agreement is the act of the Rada (Council) of the Ukrainian Cossack army to bring Ukraine under Russian rule on 18 January [8 January, old style], 1654. See, "Pereyaslav Agreement," *Encyclopædia Britannica*, accessed 20 September 2021, https://www.britannica.com/event/Pereyaslav-Agreement.

Russia". One of the proofs of "Moscow–Ukrainian Friendship" was the Resolution of the *Prezidium Verkhovnogo Soveta* of the Union of Soviet Socialist Republics (further, the Soviet Union or USSR) dated February 19, 1954. This resolution adopted a request by the Russian SFSR to transfer Crimea to the Ukrainian Soviet Socialist Republic (further Ukrainian SSR).[104] Such transfer was explained due to the common economy, territorial proximity, and close economic and cultural ties between the Crimean Oblast and the Ukrainian SSR.[105] Also, some believe that such a move was solely administrative, as Crimea continued to remain within the Soviet Union.[106]

In 1991, the residents of the Crimean Peninsula voted for the restoration of the Crimean Autonomous Soviet Socialist Republic on the peninsula.[107] The same year later, *Verkhovna Rada* of the Ukrainian SSR adopted the Law on the Restoration of the Crimean Autonomous Soviet Socialist Republic [108]. Article 1 of this Law states about the restoration of the Crimean Autonomous Soviet Socialist Republic within the territory of the Crimean Oblast as part of the Ukrainian SSR. While the law was adopted in September, already in December 1991, the residents of Crimea took part in the All–Ukrainian referendum on the declaration of Ukrainian independence.[109] It means that even before the dissolution of the USSR, "Crimea formed an integral part of Ukrainian territory".[110]After the collapse of the USSR and the establishment of independent Ukraine, the Crimean Autonomous Soviet Socialist Republic was renamed to the Autonomous Republic of Crimea (further, ARC).[111]

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104 For detailed analysis, see, Oleksandr Yarmysh and Alina Cherviatsova, "Transferring Crimea from Russia to Ukraine: Historical and Legal Analysis of Soviet Legislation," in *Law, Territory and Conflict Resolution* (Leiden: Brill Nijhoff, 2016), 143–173.

105 Melnyk, *op. cit. 101,* 849. More detailed information about this transfer can be found in Gwendolyn Sasse, *The Crimea Question: Identity, Transition, and Conflict* (Harvard Series in Ukrainian Studies, 2007), 107-126.

106 Kent DeBenedictis, *Russian 'Hybrid Warfare' and the Annexation of Crimea*, 1st ed., (Great Britain: Bloomsbury Publishing, 2021), 10.

107 Tetiana Bykova, "Crimea, The Course of Major Prehistoric and Historical Events on the Crimean Peninsula" [in Ukrainian: "Krym, perebih osnovnykh doistorychnykh ta istorychnykh podiy na pivostrovi Krym"], *Encyclopedia of the History of Ukraine,* accessed 20 September 2021, http://www.history.org.ua/?termin=Krim.

108 "Law of the Ukrainian Soviet Socialist Republic on the Restoration of the Crimean Autonomous Soviet Socialist Republic" [in Ukrainian: "Zakon Ukrayins'koyi Radyans'koyi Sotsialistychnoyi Respubliky Pro vidnovlennya Kryms'koyi Avtonomnoyi Radyans'koyi Sotsialistychnoyi Respubliky"], Official Bulletin of the Verkhovna Rada of the Ukrainian SSR, 1991(9), Verkhovna Rada of Ukraine, accessed 20 September 2021, https://zakon.rada.gov.ua/go/712-12.

109 "Ukraine celebrates the Day of the Autonomous Republic of Crimea" [In Ukrainian: "Ukrayina vidznachaye den' Avtonomnoyi Respubliky Krym"], *ArmyFm*, January 20, 2020, https://www.armyfm.com.ua/ukraina-vidznachaye-den-avtonomnoi-respubliki-krim/.

110 Oleksandr Merezhko, "Crimea's Annexation by Russia–Contradictions of the New Russian Doctrine of International Law", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 75 (2015): 167.

111 Bykova, *op. cit. 107.*

In 1995 and 1997 Ukraine and the Russian Federation agreed on the Black Sea Fleet, on the parameters of the division of the Black Sea Fleet and on mutual settlements related to it and related the presence of the Black Sea Fleet of the Russian Federation on the territory of Ukraine.[112] Later, in 1997 Ukraine and the Russian Federation signed an Agreement on the Status and Conditions of stay of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine. In 1999 the agreement was ratified by the parties.[113] The Russian Navy was allowed to maintain its portion of the Black Sea Fleet in the port city of Sevastopol. The city maintained its special status as a city within Ukraine.[114]

The land border between Ukraine and Russia was established in 2003 by signing the Agreement on the Ukrainian–Russian State Border.[115] Earlier the border between Russia and Ukraine was fully delimitated on the map. The length of the land border between these two states is 2,063 kilometres.[116] However, the maritime delimitation between these two States have never been agreed. According to some authors, there was a particular reason for a failure to make maritime delimitation in the waters of the Kerch Strait and the Azov Sea. The reason was the following: under already existing maps of the inter-republican border between the Ukrainian SSR and the Russian SFSR as well as under the rules delimitation of maritime waters based on international law, the Russian Federation was going to have a smaller part of the Sea of Azov than Ukraine.[117] Moreover, passage from the Black Sea to the Azov Sea through the Kerch

112 "Agreement between Ukraine and the Russian Federation regarding the Black Sea Fleet" [in Ukrainian: "Uhoda mizh Ukrayinoyu ta Rosiys'koyu Federatsiyeyu shchodo Chornomors'koho flotu"], Verkhovna Rada of Ukraine, accessed 20 September 2021, https://zakon.rada.gov.ua/go/643_082; "Agreement between Ukraine and the Russian Federation on the Parameters of the Division of the Black Sea Fleet" [in Ukrainian: "Uhoda mizh Ukrayinoyu i Rosiys'koyu Federatsiyeyu pro parametry podilu Chornomors'koho flotu"], Verkhovna Rada of Ukraine, accessed 20 September 2021, https://zakon.rada.gov.ua/go/643_075; "Agreement between the Government of Ukraine and the Government of the Russian Federation on Mutual Settlements related to the Division of the Black Sea Fleet and the Stay of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine" [in Ukrainian: "Uhoda mizh Uryadom Ukrayiny i Uryadom Rosiys'koyi Federatsiyi pro vzayemni rozrakhunky, pov'yazani z podilom Chornomors'koho flotu ta perebuvannyam Chornomors'koho flotu Rosiys'koyi Federatsiyi na terytoriyi Ukrayiny"], Verkhovna Rada of Ukraine, accessed 20 September 2021, https://zakon.rada.gov.ua/laws/show/643_077#Text.

113 "Agreement between Ukraine and the Russian Federation on the Status and Conditions of the Stay of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine" [in Ukrainian: "Uhoda mizh Ukrayinoyu i Rosiys'koyu Federatsiyeyu pro status ta umovy perebuvannya Chornomors'koho flotu Rosiys'koyi Federatsiyi na terytoriyi Ukrayiny"], *Verkhovna Rada of Ukraine*, accessed 20 September 2021, https://zakon.rada.gov.ua/go/643_076.

114 DeBenedictis, *op. cit. 106,* 10.

115 Sergei R. Grinevetsky et al., *The Black Sea Encyclopedia*, (Berlin, Heidelberg: Springer, 2015), 846-884. It should be noted that the credibility of this source is questioned, at least, due to the description of events happening in Ukraine in 2014.

116 *Ibid.*

117 Iryna Panchenko, "Problems of Delimitation of the Sea of Azov and the Kerch Strait" [in Ukrainian: "Problemy delimitatsiyi Azovs'koho morya ta Kerchens'koyi protoky"], *Law Review of Kyiv University*

Strait is only possible within the Kerch-Yenikalskiy Channel. This channel is located closer to the Ukrainian shore. By drawing an equidistant line within the waters of the Kerch Strait, the Kerch-Yenikalskiy Channel would become a part of Ukrainian territorial sea.[118]

In 1999, Ukraine unilaterally declared a Kerch Strait border line. A few years later, Ukrainian authorities made a draft law that would solve maritime delimitation by Ukrainian legislation. In 2003, preventing the adoption of the mentioned law, the Russian Federation unilaterally started the construction of the dam from its coast towards Tuzla Island. Therefore, a new negotiation appeared. They resulted in signing two bilateral agreements between states. The first one was the Treaty between Ukraine and the Russian Federation on the Ukrainian–Russian State Border. The second one was the Agreement between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait (further, Cooperation Agreement or the Azov/Kerch Cooperation Treaty).[119] Following this movement of mutual cooperation, Ukraine and the Russian Federation made different agreements on different governmental levels related to waters surrounding Crimea in the Azov Sea and the Kerch Strait starting from the dissolution of the USSR till 2014.[120]

1.1.2. Occupation of Crimea in 2014

2014 is a famous year for the tremendous changes in the political landscape of the Black Sea region. In February 2014, unidentified armed groups, then later they were confirmed to be the Russian special forces and intelligence operatives, started military

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of Law (2020): 365.

118 Oude Alex G. Elferink, "The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 1," *The International Journal of Marine and Coastal Law* 11, 4 (1996): 533-569.

119 Valentin J. Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov Part I: The legal status of Kerch Strait and the Sea of Azov," paper presented at *Symposium Russian Perspectives on International Law,* Völkerrechtsblog, 10 January 2018, https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/#; Grinevetsky et al., *op. cit. 115.*

120 As example, see: "Agreement between the Government of Ukraine and the Government of the Russian Federation on Merchant Shipping" [in Ukrainian: "Uhoda mizh Uryadom Ukrayiny ta Uryadom Rosiys'koyi Federatsiyi pro realizatsiyu rezhymu vil'noyi torhivli"], Verkhovna Rada of Ukraine, accessed 2 September 2023, https://zakon.rada.gov.ua/laws/show/643_057#Text; "Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Cooperation in Maritime and Aviation Search and Rescue in the Black and the Azov Seas" [in Ukrainian: "Uhoda mizh Kabinetom Ministriv Ukrayiny ta Uryadom Rosiys'koyi Federatsiyi pro spivrobitnytstvo v mors'komu ta aviatsiynomu poshuku i ryatuvanni na Chornomu ta Azovs'komu moryakh"], Verkhovna Rada of Ukraine, accessed 20 September 2021, https://zakon.rada.gov.ua/laws/show/643_385#Text; "Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Measures to Ensure Maritime Safety in the Azov Sea and the Kerch Strait" [in Ukrainian: "Uhoda mizh Kabinetom Ministriv Ukrayiny ta Uryadom Rosiys'koyi Federatsiyi pro zakhody shchodo zabezpechennya bezpeky moreplavstva v Azovs'komu mori ta Kerchens'kiy prototsi"], Verkhovna Rada of Ukraine. accessed 20 September 2021, https://zakon.rada.gov.ua/laws/show/643_409#Text, etc.

operations to capture airports and control over the Crimea peninsula.[121] On March 11, 2014, the Parliament of the ARC adopted the Declaration of Independence.[122] Five days later, the question of the status of Crimea was brought to a referendum that violated the Ukrainian national legislation. 96.77% of the votes were in favour of the integration of Crimea into the Russian Federation. The turnout rate was 83.1%. According to these results, Crimea became part of the Russian Federation on March 18, 2014.[123] After these events, the Russian Federation terminated the Agreements regarding the stationing of its Black Sea Fleet in Crimea, Ukraine[124] as now it considered Crimea to be Russian territory. The waters around Crimea in the Black Sea and the Sea of Azov were claimed to become a part of the Russian Federation.[125]

The results of the referendum in Crimea and the subsequent transition of the Crimean Peninsula to the Russian Federation were not widely recognised internationally. Only a limited number of states officially recognised these events.[126]

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121 "Little Green Men": A Primer on Modern Russian Unconventional Warfare, Ukraine 2013–2014," *The United States Army Special Operations Command*, accessed 14 February 2024, https://www.jhuapl.edu/sites/default/files/2022-12/ARIS_LittleGreenMen.pdf, in particular, pages 50-51. Also, see: "'Little Green Men' or 'Russian Invaders'?" *BBC News*, 11 March 2014, https://www.bbc.com/news/world-europe-26532154; Shane R. Reeves and David Wallace, "The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict", *International Law Studies* 91 (2015): 361–401.

122 "Resolution of the Supreme Council of the Autonomous Republic of Crimea on the Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol" [in Russian: "Postanovleniye VR ARK O Deklaratsii o nezavisimosti Avtonomnoy Respubliki Krym i goroda Sevastopolya"], State Council of the Republic of Crimea, accessed 20 September 2021, http://crimea.gov.ru/act/11726. Also, see Christian Marxsen, "Crimea's Declaration of Independence", *EJIL: Talk! (blog)*, March 18, 2014. https://www.ejiltalk.org/crimeas-declaration-of-independence/.

123 Anne Peters, "Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law", *EJIL: Talk! (blog),* April 16, 2014. https://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/. For more detailed overview of events see, Caterina Filippini, "Constitutions and Territorial Claims: Lessons from the Former Soviet Space", in *Law, Territory and Conflict Resolution* (Leiden: Brill Nijhoff, 2016), 185-188.

124 "Federal Law of April 2, 2014, No. 38-FZ On the Termination of Agreements Concerning the Stay of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine" [in Russian: "Federal'nyy zakon ot 02.04.2014 g. № 38-FZ O prekrashchenii deystviya soglasheniy, kasayushchikhsya prebyvaniya Chernomorskogo flota Rossiyskoy Federatsii na territorii Ukrainy"], President of Russia, accessed 20 September 2022, http://kremlin.ru/acts/bank/38251; "Termination of Agreements Concerning the Stay of the Black Sea Fleet in Ukraine." [in Russian: Prekrashcheno deystviye soglasheniy, kasayushchikhsya prebyvaniya Chernomorskogo flota na Ukraine"], President of Russia, accessed 20 September 2022, http://kremlin.ru/events/president/news/20673.

125 For more detailed overview, see: "Chronology of the Annexation of Crimea," *Euromaidan Press*, 5 March 2015 https://euromaidanpress.com/2015/03/05/chronology-of-the-annexation-of-crimea/.

126 Such countries are Cuba, Nicaragua, Venezuela, Syria, Afghanistan, North Korea, Belarus. See, Jeremy Bender, "6 Countries OK with Russia Annexation of Crimea," *Business Insider*, March 31, 2016, https://www.businessinsider.com/six-countries-okay-with-russias-annexation-of-crimea-2016-5; "Lukashenko Says Crimea Is Russian, Will Visit Peninsula With Putin," *The Moscow Times*, November

The status of Crimea as occupied and annexed was confirmed by various international authorities and organisations. In this regard, the General Assembly adopted Resolution 68/262 on March 27, 2014, on 'Territorial integrity of Ukraine'. It highlights that "the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on March 16, 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."[127] The European Union also took the same view. It maintained its commitment to uphold Ukraine's sovereignty and territorial integrity. Therefore, "[t]he European Council does not recognise the illegal referendum in Crimea, which is in clear violation of the Ukrainian Constitution" as well as "[it] strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognise it".[128] Following years after 2014, the United Nations General Assembly adopted more resolutions concerning Ukraine and condemning Russian illegal occupation of Crimea. Thus, there are United Nations General Assembly Resolutions on the Situation of Human rights in the ARC and the city of Sevastopol, Ukraine in 2016[129], 2017[130], 2018[131], 2019[132], 2020[133], 2021[134], 2022[135], 2023[136]. Also, there

30, 2021, https://www.themoscowtimes.com/2021/11/30/lukashenko-says-crimea-is-russian-will-visit-peninsula-with-putin-a75707. Apart from the states, it also should be noted that the Nagorno-Karabakh Republic, Abkhazia and South Ossetia supported the results of referendum and by this recognised the Crimea as a part of the Russian territory. See, "Karabakh Foreign Ministry Issues Statement on Crimea," *Asbarez.Com*, March 17, 2014, https://asbarez.com/karabakh-foreign-ministry-issues-statement-on-crimea/; "Georgia's Breakaway Regions Recognise Crimea Vote," *Agenda.ge*, March 18, 2014, https://agenda.ge/en/news/2014/731.

127 General Assembly Resolution A/RES/68/262 on Territorial Integrity of Ukraine, 27 March 2014. Also see, Emily Crawford, "United Nations General Assembly Resolution on the Territorial Integrity of Ukraine", *International Legal Materials* 53, 5 (October 2014): 927-930.

128 "European Council Conclusions on 20-21 March," accessed 10 August 2020, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141749.pdf, 13, para. 29.

129 General Assembly Resolution A/RES/71/205 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 19 December 2016.

130 General Assembly Resolution A/RES/72/190 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 19 December 2017.

131 General Assembly Resolution A/RES/73/263 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 22 December 2018.

132 General Assembly Resolution A/RES/74/168 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 18 December 2019.

133 General Assembly Resolution A/RES/75/192 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 16 December 2020.

134 General Assembly Resolution A/RES/76/179 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 16 December 2021.

135 General Assembly Resolution A/RES/77/229 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 15 December 2022.

136 General Assembly Resolution A/RES/78/221 on Situation of human rights in the temporarily occupied territories of Ukraine, including the Autonomous Republic of Crimea and the city of Sevastopol, 19 December 2023.

are a number of United Nations General Assembly Resolutions on Problem of the Militarization of the ARC and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov.[137]

The Venice Commission in its Opinion stated that the circumstances in Crimea did not meet European democratic standards for holding a referendum. According to the Commission, any referendum regarding the status of a territory should have been preceded by meaningful negotiations involving all relevant parties. However, in the case of Crimea, such negotiations did not occur.[138]

There are also number of the reports by the Office of the Prosecutor of the ICC where it provides evaluation of events in Crimea from 20 February 2014 onwards. The Report on Preliminary Examination Activities 2016 as of 14 November 2016, states in para 158 that "the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation". Crimea as occupied territory is also mentioned in the Reports on Preliminary Examination Activities in 2017, 2018, 2019, 2020.

This subject gained significant legal research attention following the Russian annexation and occupation of Crimea.[139] Overall, it is possible to conclude that there is a strong international scholarship opinion claiming that such a referendum was not legal and therefore, Crimea has joined the Russian Federation illegally.[140] There are a

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137 General Assembly Resolution A/RES/73/194 on Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov, 17 December 2018; General Assembly Resolution A/RES/74/17 on Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov, 9 December 2019; General Assembly Resolution A/RES/75/29 on Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov, 7 December 2020; General Assembly Resolution A/RES/76/70 on Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov, 9 December 2021.

138 "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' adopted by the Venice Commission at its 98th Plenary Session", Council of Europe, accessed 20 September 2021, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)002-e. Also see, "European Commission for Democracy through Law, 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.'" Opinion no.762/2014, 21 March 2014.

139 See, Introduction, in particular, the research review.

140 For some of examples, see: "Special Issue: The Crisis in Ukraine", *German Law Journal* 16, 3 (2015); Thomas Grant, "Annexation of Crimea", *American Journal of International Law* 109, 1 (2015): 68–95; Thomas Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (New York: Palgrave Macmillan, 2015); Fabián Raimondo, "The Right of Peoples to Self-Determination Revisited: Did Crimea Have the Right to Secede from the Ukraine?" in *International Law and the Protection of Humanity: Essays in Honor of Judge Flavia Lattanzi*, edited by Pia Acconci et al. (Leiden: Brill Nijhoff, 2017), 535–548; Oleksandr Merezhko, "Crimea's Annexation by Russia–Contradictions of the New Russian Doctrine of International Law," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/*

number of reasons for this.[141]

First, even though according to international law, an independent state has the right to voluntarily give up its independence and to be annexed by another state, the legality of such a transition depends on the independent state making a free decision.[142] In the case of Crimea, there was no possibility for a free decision, as Crimea was occupied by a large Russian force, and the authorities in Crimea relied on this force for their influence.[143] As a proof, it is possible to use the facts that on March 1, 2014, the Russian Federation's Council granted its permission to employ Russian armed troops on Ukrainian territory "until the normalisation of the socio-economic situation in this country".[144] On the same day the Permanent Representative of Ukraine to the United Nations stated about this and also specified that Russian troops have already entered the territory of Ukraine in the Crimea region, which was illegal, with plans to further expand their military presence.[145] The permit was cancelled by the Russian Federation

Heidelberg Journal of International Law 75 (2015): 167–194; Bill Bowring, "International Law and Non-Recognised Entities: Towards a Frozen Future?" in *Unrecognised Entities. Perspectives in International, European and Constitutional Law*, Benedikt C. Harzl, Roman Petrov (Leiden: Brill Nijhoff, 2021), 25; Anne Peters, "The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum" in *Challenges to the State and the Constitution*, Christian Calliess (Baden-Baden: Nomos, 2015), 278–303; Peters, "Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law," *op. cit. 123*; Christian Marxsen and Matthias Hartwig (eds.), "The Incorporation of Crimea by the Russian Federation in the Light of International Law", papers presented at Symposium *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 75 (2015): 1-231; Erika Leonaitė and Dainius Žalimas, "The Annexation of Crimea and Attempts to Justify It in the Context of International Law", *Lithuanian Annual Strategic Review* 14 (2015-2016): 11-63; Regional Center for Human Rights and Ukrainian Helsinki Human Rights Union, *The Occupation of Crimea: No Markings, No Names And Hiding Behind Civilians. Analysis*, Kyiv, 2019, https://www.helsinki.org.ua/wp-content/uploads/2020/05/Prev_Okupation_Crimea_Engl_A4.pdf; "Intervention by Invitation: Impulses from the Max Planck Trialogues on the Law of Peace and War," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 79 (2019): 633-783.

141 For some interesting reading, see: "Debate Map: Ukraine Use of Force," *Max Planck Encyclopedias of International Law. Oxford Public International* Law. Oxford University Press, accessed 20 September 2022, https://opil.ouplaw.com/page/ukraine-use-of-force-debate-map.

142 Veronika Bílková, "Territorial (Se)Cession in Light of Recent Events in Crimea," in *Law, Territory and Conflict Resolution* (Leiden: Brill Nijhoff, 2016), 199.

143 Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law*, *op. cit. 140,* 37; Amandine Catala, "Secession and Annexation: The Case of Crimea," *German Law Journal* 16, 3 (2015): 602; Veronika Bílkova, "The Use of Force by the Russian Federation in Crimea," *ZaöRV* 75 (2015): 27-50.

144 "Resolution of the Federation Council of the Federal Assembly of the Russian Federation No. 48-СФ on the Use of the Armed Forces of the Russian Federation on the Territory of Ukraine" [in Russian: "Postanovleniyem Soveta Federatsii Federal'nogo cobraniya Rossiyskoy Federatsii № 48-SF Ob ispol'zovanii Vooruzhennykh Sil Rossiyskoy Federatsii na territorii Ukrainy"], Federation Council of the Federal Assembly of the Russian Federatio, accessed 20 September 2021, http://council.gov.ru/activity/documents/39979/.

145 "Address of Permanent Representative of Ukraine to the United Nations Yuriy Sergeyev to all UN Member-States and Observer Missions, President of the UN Security Council, UN Secretary-General,

on June 25, 2014 as it was never *formally* used in practice.[146]

Secondly, there is no specific provision in general international law that prohibits declarations of independence.[147] However, there are examples where the UN Security Council has condemned specific declarations of independence when such declarations are linked to the unlawful use of force or other serious violations of general international law, especially of violations of peremptory norms (*jus cogens*).[148] In the case of Crimea, its declaration of independence would not be possible without the support of Russian troops. The presence of these troops prevented Ukrainian forces from intervening and allowed pro-Russian forces to take control. This circumstance facilitated the holding of the referendum and the subsequent declaration of independence. It is obvious that these events relied on the use of force. Following the criteria outlined in the international practice, if the use of force was unlawful, then the declaration of independence would also be considered illegal.[149]

Thirdly, the Parliament of the ARC based its Declaration of Independence on the UN Charter and the principle of self-determination, claiming that it gives them the right to secede. However, this claim is not supported by international law. The general practice of states is to be cautious in recognizing a right to secession, as it can potentially threaten the territorial integrity of other states. The right to self-determination requires states to respect minority rights, but it does not grant sub-entities the freedom to choose their state affiliation. Self-determination is typically limited to internal measures, such as granting autonomy within a state. It is worth noting that Crimea already had the status of an autonomous republic under Ukraine's constitution, indicating that the necessary arrangements for implementing the right to self-determination were

1 March 2014", *Ministry of Foreign Affairs of Ukraine*, accessed 14 June 2021, https://mfa.gov.ua/en/news/18502-zvernennya-postijnogo-predstavnika-ukrajini-pri-oon-jurija-sergejeva-do-derzhav-chleniv-ta-sposterigachiv-oon-golovi-rb-oon-generalynogo-sekretarya-oon.

146 "Resolution On the Repeal of the Resolution of the Federation Council of the Federal Assembly of the Russian Federation of 1 March 2014 No. 48-SF On the Use of the Armed Forces of the Russian Federation on the Territory of Ukraine" [in Russian: "Postanovleniye Ob otmene postanovleniya Soveta Federatsii Federal'nogo Sobraniya Rossiyskoy Federatsii ot 1 marta 2014 goda № 48-SF Ob ispol'zovanii Vooruzhennykh Sil Rossiyskoy Federatsii na territorii Ukrainy"], Federation Council of the Federal Assembly of the Russian Federation, accessed 14 September 2021, http://council.gov.ru/activity/documents/44424/.

147 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, 438-439, para. 84.

148 For example, it was Security Council resolutions concerning Southern Rhodesia, Northern Cyprus, and the Respublika Srpska. See, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *op. cit. 147,* 437-438, para. 81. It would be also Security Council resolution on Russian intervention in Ukraine. However, Security Council failed to adopt a draft resolution to reaffirm Ukraine's sovereignty and to declare the referendum in Crimea to be invalid. See, "U.N. Security Council Resolution on Ukraine," C-Span broadcast, accessed 14 September 2021, https://www.c-span.org/video/?318324-1/un-security-council-resolution-ukraine.

149 Marxsen, *op. cit. 122*.

already in place.[150] Nevertheless, even if we assume that the people in Crimea are not prohibited from holding a referendum and expressing their wish for independence or integration with Russia, still, international law does not grant them a right to secede from Ukraine or integrate with Russia.[151]

To sum up, whether Crimea had the right to secede from the Ukraine or not is possible with the following:

> Neither the Autonomous Republic of Crimea was a non-self-governing territory, nor its population was subject to foreign domination, subjugation and exploitation, nor its authorities had claimed that the minority rights of ethnic Russians or Tatars were being grossly violated by the central government of the Ukraine, nor the secession of Crimea was effected in light of the Constitution of Ukraine, nor the government of Ukraine consented to the secession of Crimea. It thus follows that the secession of Crimea from the Ukraine was contrary to the international law in force at the time of the event.[152]

It is evident that while the Russian Federation was justifying its illegal annexation of Crimea, Ukraine issued a number of acts and statements condemning such actions.

According to the Law of Ukraine On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine, "[t]he Autonomous Republic of Crimea and the city of Sevastopol have been temporarily occupied by the Russian Federation since February 20, 2014".[153] Article 1 of this Law provides the legal status of the temporarily occupied territory of Ukraine by stating that "the temporarily occupied territory of Ukraine (hereinafter, the temporarily occupied territory) is an integral part of the territory of Ukraine, which is covered by the Constitution and laws of Ukraine". Under the law, some territories of Ukraine the beginning of the temporary occupation of the certain territories of Ukraine by the Russian Federation started from February 19, 2014.

According to Article 3 of the above-mentioned Law:

> 1. For the purposes of this Law, the temporarily occupied territory is defined as:
>
> 1) the land territory of the territories of Ukraine temporarily occupied by the Russian Federation, water bodies or parts thereof located in these territories; {Clause 1 of part one of Article 3 as amended by Law No. 2217-IX of 21.04.2022}
>
> 2) internal sea waters and the territorial sea of Ukraine around the

150 *Ibid.* Also see, Catala, *op. cit.,* 602.

151 Jure Vidmar, "The Annexation of Crimea and the Boundaries of the Will of the People," *German Law Journal* 16, 3 (2015): 375-376.

152 Raimondo, *op. cit. 140,* 548.

153 "Law of Ukraine on Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine" [in Ukrainian: "Zakon Ukrayiny Pro zabezpechennya prav i svobod hromadyan ta pravovyy rezhym na tymchasovo okupovaniy terytoriyi Ukrayiny"], Verkhovna Rada of Ukraine, accessed 15 January 2021, https://zakon.rada.gov.ua/laws/show/en/1207-18#Text.

> Crimean peninsula, the territory of the exclusive (maritime) economic zone of Ukraine along the coast of the Crimean peninsula and the continental shelf of Ukraine adjacent to the coast, internal sea waters adjacent to the land territory of other territories of Ukraine temporarily occupied by the Russian Federation, which are subject to the jurisdiction of the state authorities of Ukraine in accordance with international law, the Constitution and laws of Ukraine; {Clause 2 of part one of Article 3 as amended by Law No. 2217-IX of 21.04.2022}
>
> 3) other land territory of Ukraine, inland sea waters and the territorial sea of Ukraine, recognised as temporarily occupied under martial law in accordance with the procedure established by the Cabinet of Ministers of Ukraine; {Paragraph 3 of part one of Article 3 as amended by Laws No. 2268-VIII of 18.01.2018, No. 2138-IX of 15.03.2022; as amended by Law No. 2764-IX of 16.11.2022; as amended by Law No. 3050-IX of 11.04.2023}
>
> 4) subsoil under the territories referred to in clauses 1, 2 and 3 of this part and the airspace above these territories.

Thus, Ukraine in its legal regulation referred to the occupied territories of the water area that are not part of the land territory of Ukraine, namely – internal and territorial sea, the exclusive (maritime) economic zone and the continental shelf of Ukraine in the Black Sea, the Kerch Strait, the Azov Sea. In the event of armed conflict these occupied territories of the water area can be considered as a restrictive area in the context of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea.[154]

At the same period of time, after the annexation of Crimea and before the adoption by Ukraine its Law On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine, the Russian Federation adopted the Federal Constitutional Law of the Russian Federation of March 21, 2014 No. 6-FKZ "About acceptance to the Russian Federation of the Republic of Crimea and forming as a part of the Russian Federation new subjects – the Republic of Crimea and the federal city of Sevastopol". Due to the provisions of the Federal Constitutional Law, the Russian Federation considers the internal waters, territorial sea, EEZ and the continental shelf in the Black Sea, the Kerch Strait, the Azov Sea around the peninsula and Crimea itself as its own territory from March 21, 2014. Therefore, according to the para 1 of Article 1 of the mentioned law "The Republic of Crimea is accepted to the Russian Federation according to the Constitution of the Russian Federation and article 4 of the Federal constitutional Law of December 17, 2001 No. 6-FKZ 'About procedure

154 Borys Babin and Eduard Pleshko, "Legal Regime of Temporary Occupied Territory of Ukraine in Black and Azov Seas and in Kerch Strait" [in Ukrainian: "Pravovyy rezhym tymchasovo okupovanoyi terytoriyi Ukrayiny v Chornomu ta Azovs'komu moryakh i Kerchens'kiy prototsi"], *Scientific Papers of the Legislation Institute of the Verkhovna Rada of Ukraine* 2 (2016): 122-123. Also more detailed description of situation, see "Temporary Occupation of Crimea and City of Sevastopol, 8 August 2022," *Ministry of Foreign Affairs of Ukraine*, accessed 8 September 2022, https://mfa.gov.ua/en/timchasova-okupaciya-arkrim-ta-m-sevastopol.

for acceptance to the Russian Federation and entering in its list the new subject of the Russian Federation' and accordingly to para 1 and 3 of Article 3 the same Law:

> 1. Limits of the territory of the Republic of Crimea and the territory of the federal city of Sevastopol are determined by the borders of the territory of the Republic of Crimea and the territory of the federal city of Sevastopol existing on the date of acceptance to the Russian Federation of the Republic of Crimea and entering as a part of the Russian Federation new subject.
>
> 3. Differentiation of sea spaces of the Black and Azov seas is performed on the basis of international treaties of the Russian Federation, regulations and the principles of international law.

The Federal Law of the Russian Federation of July 31, 1998, No. 155-FZ 'On internal sea waters, territorial sea and contiguous zone of the Russian Federation' in Article 1 and 2 provides definitions of internal waters[155] and territorial sea[156] and these definitions are compliant with the relevant provisions of UNCLOS.

Ukraine has similar legislation regarding the determination of internal waters

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155 "Federal Law No. 155-FZ of July 31, 1998, On Internal Waters, Territorial Sea, and Contiguous Zone of the Russian Federation" [in Russian: "Federal'nyy zakon ot 31.07.1998 g. № 155-FZ O vnutrennikh morskikh vodakh, territorial'nom more i prilezhashchey zone Rossiyskoy Federatsi"], accessed 8 September 2022, https://www.consultant.ru/document/cons_doc_LAW_19643/.
Translated from Russian to English: "Article 1. Definition and boundaries of the internal waters of the Russian Federation.
1. The internal waters of the Russian Federation (hereinafter - internal waters) are the waters located towards the shore from the baseline from which the breadth of the territorial sea of the Russian Federation is measured.
The internal waters are an integral part of the territory of the Russian Federation.
2. The following waters are considered internal waters:
- ports of the Russian Federation, limited by a line passing through the outermost points of the hydro-technical and other permanent structures of the ports;
- bays, gulfs, estuaries, and lagoons, the shores of which belong entirely to the Russian Federation, up to the straight line drawn from one shore to another at the place of greatest ebb, where one or more openings are formed from the sea side, provided that the width of each of them does not exceed 24 nautical miles;
- bays, gulfs, estuaries, seas, and straits with an entrance width exceeding 24 nautical miles, which historically belong to the Russian Federation, the list of which is established by the Government of the Russian Federation and published in "Notices to Mariners."

156 *Ibid.* Translated from Russian to English: "Article 2. Definition and boundaries of the territorial sea of the Russian Federation
1. The territorial sea of the Russian Federation (hereinafter referred to as the territorial sea) is the maritime belt adjacent to the land territory or internal waters, with a width of 12 nautical miles, measured from the baselines specified in Article 4 of this Federal Law.
A different width of the territorial sea may be established in accordance with Article 3 of this Federal Law.
2. The definition of the territorial sea also applies to all islands of the Russian Federation.
3. The external boundary of the territorial sea is the State border of the Russian Federation.
The internal boundary of the territorial sea is the baselines from which the width of the territorial sea is measured.

and the territorial sea in the light of being compliant with the relevant provisions of UNCLOS. The use of internal waters and territorial sea is mostly regulated by the Water Code of Ukraine dated June 6, 1995, № 213/95-VR[157], Law of Ukraine 'On Environmental Protection' dated June 25, 1991, № 1264-XII[158] and Law of Ukraine on the State Border of Ukraine dated November 4, 1992, № 1777-XII.

The similarity of the understanding of internal waters and the territorial sea in the legislation of Ukraine and the Russian Federation, based on the requirements of UNCLOS, allows these states to mirror these spaces within the same limits: Russia as their own waters and Ukraine as occupied waters.[159]

Nevertheless, there is some uncertainty where the border of occupied territory is located. At the time of the annexation of Crimea in 2014, the Russian Federation occupied not only the territory of the Crimean Peninsula, but also some territories of the Kherson region (Ad peninsula, part of the Chonhar peninsula and Arabatska Strilka) that Russian military troops left afterwards.[160] The Russian Federation vision of its own land border and internal waters of Crimea region remained to be open and

4. The sovereignty of the Russian Federation extends to the territorial sea, the airspace above it, and the seabed and its subsoil, with recognition of the right of innocent passage of foreign ships through the territorial sea."

157 According to para. 3 Article 3 the Water Code of Ukraine: "The water fund of Ukraine includes: ... 3) internal waters and territorial sea." Translated from "Water Code of Ukraine № 213/95-ВР" [in Ukrainian: "Vodnyy kodeks Ukrayiny"], Verkhovna Rada of Ukraine, accessed 11 August 2021, https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80/conv#n895.

158 "Law of Ukraine on Environmental Protection" [In Ukrainian: "Zakon Ukrayiny Pro okhoronu navkolyshn'oho pryrodnoho seredovyshcha"], Verkhovna Rada of Ukraine, accessed 11 August 2021, https://zakon.rada.gov.ua/laws/show/1264-12#Text.

159 Babin and Pleshko, "Legal Regime of Temporary Occupied Territory of Ukraine in Black and Azov Seas and in Kerch Strait," *op. cit. 154,* 122-123. Also see, Borys Babin and Eduard Pleshko, "On the Issue of Restitution of Ukraine's Rights as a Coastal State in the Black Sea and the Sea of Azov," *Lex Portus* 4, 6 (2017): 25.

160 According to the article from the official website of the State Border Guard Service of Ukraine: "The head of the State Border Guard Service stressed that at present the withdrawal of Russian troops from the territory of the Kherson region is almost complete. Prior to that, there were three problem areas where the Russian military was temporarily located. Among them are parts of the peninsulas of Ad (Chaplin district) and Chongar (Genichesk district), as well as part of the Arabat Strilka. Today in all these three points divisions of the Russian troops depart for administrative border of the Kherson area and the State Border Service restores control over the given sites adjoining to the Autonomous Republic of Crimea." And a few days after on 11 of December 2014 "The Russian military has completely left the Kherson region." See, "Head of the State Border Guard Service of Ukraine inspects the organization of the service at the administrative border between Kherson Oblast and the Autonomous Republic of Crimea" [in Ukranian: "Holova Derzhprykordonsluzhby Ukrayiny pereviryv orhanizatsiyu sluzhby na administratyvniy mezhi Khersons'koyi oblasti ta AR Krym"], The State Border Guard Service of Ukraine, 9 December 2014, https://dpsu.gov.ua/ua/news/golova-derzhprikordonslyzhbi-ykraini-pereviriv-organizaciju-slyzhbi-na-administrativnij-mezhi-hersonskoi-oblasti-ta-ar-krim/; "Russian military completely left Kherson Oblast, State Border Guard Service of Ukraine. Ukrainian border guards set up their checkpoint" [in Ukrainian: "Rosiys'ki viys'kovi povnistyu pokynuly Khersons'ku oblast', Derzhprykordonsluzhba Ukrayins'ki prykordonnyky vystavyly sviy blokpost"], accessed 13

officially unclear till 2022. In 2022, Russia occupied more Ukrainian territories, made other illegal referendums and recognised territories next to Crimea as part of Russia.[161]

Considering the absence of any official statements and the impossibility of conducting a formal negotiation process, the Russian Federation's vision[162] of "the borders with Ukraine of its "own" EEZ and the continental shelf around Crimea, as well as the borders of the "territorial sea of Russia" in Karkinitsky Bay of the Black Sea" between 2014 and 2022 remains unclear.[163] Even if the Russian Federation's legislation provides that such borders can be "performed on the basis of international treaties of the

January 2021, https://ua.112.ua/suspilstvo/rosiyski-viyskovi-povnistyu-pokinuli-hersonsku-oblast-derzhprikordonsluzhba-159046.html.

161 It should be noted that such actions were not recognised and condemned by majority of the other states. See, Rob Picheta, "Russian Forces Have Staged Illegal "Referendums" in Ukraine. What Comes Next?", *CNN*, 27 September 2022, https://www.cnn.com/2022/09/27/europe/ukraine-russia-referendum-explainer-intl/index.html; "So-Called Referenda during Armed Conflict in Ukraine 'Illegal', Not Expression of Popular Will, United Nations Political Affairs Chief Tells Security Council," 9138th meeting (pm). *Meetings Coverage and Press Releases, UN Press*, 27 September 2022, https://press.un.org/en/2022/sc15039.doc.htm; "So-Called Elections in Occupied Areas of Ukraine 'Have No Legal Grounds', Undermine Peace Prospects, United Nations Official Tells Security Council Speakers Recall General Assembly's Condemnation of 2022 Referendums, Urge Talks," 9414th meeting (am). *Meetings Coverage and Press Releases, UN Press,* 8 September 2023, https://press.un.org/en/2022/sc15039.doc.htm; "Ukraine: Declaration by the High Representative on Behalf of the European Union on the Illegal Sham "Referenda" by Russia in the Donetsk, Kherson, Luhansk and Zaporizhzhia Regions", Press release by the Council of the EU on 28 September 2022, https://www.consilium.europa.eu/en/press/press-releases/2022/09/28/ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-illegal-sham-referenda-by-russia-in-the-donetsk-kherson-luhansk-and-zaporizhzhia-regions/.

162 In particular, considering the approach of Vladimir Putin, president of the Russian Federation, when he said that "Russia's borders 'do not end anywhere' during a live televised awards ceremony for students in Moscow. On stage, the Russian president asked a nine-year-old boy: 'Where does Russia's border end?' The child answered, 'at the Bering Strait with the United States'. Mr Putin then gave his own answer, adding 'it was a joke' to applause and laughter from the audience." See, Tom Embury-Dennis, "Vladimir Putin says Russia's borders do not end anywhere," *Independent*, November 25, 2016, https://www.independent.co.uk/news/world/europe/putin-russia-border-do-not-end-anywhere-comments-quote-eu-us-tensions-a7438686.html.

163 Babin and Pleshko, "Legal Regime of Temporary Occupied Territory of Ukraine in Black and Azov Seas and in Kerch Strait," *op. cit. 154,* 122-123. According to the information provided by Boris Babin and Eduard Pleshko, there was a negotiation process in the end of 2014 between General Staff of the Armed Forces of Ukraine and General Staff of the Armed Forces of the Russian Federation. These negotiations ended up in signing on December 7, 2014, a Memorandum banning all activities of military formations of the armed forces and other military formations in the Arabatska Strilka, the Ad peninsula and Chongar peninsula in the Kherson region. The Memorandum resulted in withdrawal of units of the Armed Forces of the Russian Federation from the mentioned territories. However, in the webpage of the source on which information was based there is nothing said about such memorandum. According to the same source, the memorandum was unpublished. However, due to the Russia's full-scale military invasion of Ukraine on February 24, 2022, the martial law has been established in Ukraine, so according to the author's opinion of this dissertation, at the moment it is inappropriate to send an official request to the General Staff of the Armed Forces of Ukraine asking to provide any public information about this Memorandum.

Russian Federation, regulations and the principles of international law", there is a lack of practical understanding where exactly those borders are.

The mainland of the Russian Federation and the territory of Crimea is divided by the Kerch Strait. The Russian Federation unilaterally started building a bridge between the Crimean Peninsula and Taman peninsula to connect these territories with each other.[164] This bridge, known as the Crimean Bridge, consists of both a road bridge (in operation since 2018) and a railway bridge (in operation since 2019) that run parallel from the Russian mainland coast to Crimea.[165]

After the occupation of Crimea, Ukraine submitted a number of cases to different international courts and tribunals against the Russian Federation based on different international agreements. Thus, some of them:

- *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) submitted to ICJ where Ukraine alleges violations of both conventions by the Russian Federation through its support of terrorism in Ukraine and its numerous and pervasive acts of racial discrimination of ethnic Ukrainians and Crimean Tatars in Crimea, etc.[166]
- *Case of Ukraine and the Netherlands v. Russia* (Applications nos. 8019/16, 43800/14 and 28525/20) submitted to ECtHR alleging numerous violations of human rights by the Russian Federation. The allegations included unlawful military attacks, torture, usage of forced labour of the Ukrainian prisoners of war and civilians, abductions, kidnapping for ransom, unlawful arrests and lengthy detentions, restrictions on religious freedom, restrictions on freedom of speech, destruction of property, disruption of elections, discrimination based on ethnicity or political affiliation, etc. In general, these are the allegations concerning events and actions related to the conflict in Eastern Ukraine and the downing of Malaysia Airlines Flight MH17.[167]
- ICC: Preliminary examination of the situation in Ukraine since Euromaidan, it is carried out by the ICC Prosecutor.
- *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. Russian Federation) initiated under Annex VII of UNCLOS. The dispute concerns the Russian violations of provision of UNCLOS in the

164 "Kerch Strait Bridge", Road Traffic Technology, accessed 4 October 2021, https://www.roadtraffic-technology.com/projects/kerch-strait-bridge/.

165 Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 41-42.

166 "*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)," International Court of Justice, accessed on 16 June 2023, https://www.icj-cij.org/case/166.

167 *Ukraine and the Netherlands v. Russia (Applications no. 8019/16, 43800/14 and 28525/20),* Decision, Grand Chamber of the European Court of Human Rights, 30 November 2022.

Black Sea, Sea of Azov, and Kerch Strait.[168] Also, the Arbitral Tribunal in this case is going to check the legality of the Crimean Bridge is being evaluated by the Annex VII Arbitral Tribunal in response to Ukraine's request in the Case Concerning Coastal State Rights.[169]

- *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation) initiated under Annex VII of UNCLOS. The dispute concerns events that occurred on November 25, 2018 which resulted in the detention of the three Ukrainian naval vessels and the twenty-four servicemen on board by the Russian Federation.[170]
- *Case concerning the detention of three Ukrainian naval vessels* (Ukraine v. Russian Federation) was also submitted to ITLOS. Ukraine has requested provisional measures from ITLOS, so the Russian Federation has to release Ukrainian naval vessels, to suspend its criminal proceedings against detained servicemen, and to release them so they can return back to Ukraine.[171]

Thus, as it is possible to see, Ukraine started its lawfare against the Russian Federation in different international courts and tribunals.[172] Such litigation is based on different conventions that are considered to be applicable during the peacetime. Indeed, while Ukraine was naming the actions of Russia as the Russian aggression against Ukraine[173], the submissions in the courts and tribunals were solely based on the actions or inactions taken by the Russian Federation as violations of the relevant provisions of those conventions. Part 3 of this Chapter I elaborates on these disputes

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168 "*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation)", PCA Case Repository, *op. cit. 80.*

169 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit.* 8, 492, para. 9.

170 "*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation)," PCA Case Repository, *op. cit. 81.*

171 *Detention of three Ukrainian naval vessels*, Provisional Measures, ITLOS, *op. cit. 23.*

172 For understanding how Ukraine's domestic legislation regarding the annexation of Crimea prior to the invasion is linked with Ukraine's use of lawfare against Russia with a focus on policy and legal coherence, see Rabinovych, *op. cit. 87,* 268–297.

173 For example, see: "Resolution of the Verkhovna Rada of Ukraine On the Appeal of the Verkhovna Rada of Ukraine to the United Nations, European Parliament, Parliamentary Assembly of the Council of Europe, NATO Parliamentary Assembly, OSCE Parliamentary Assembly, GUAM Parliamentary Assembly, and national parliaments of the world countries regarding the recognition of the Russian Federation as an aggressor state" [in Ukrainian: "Postanova Verkhovnoyi Rady Ukrayiny Pro Zvernennya Verkhovnoyi Rady Ukrayiny do Orhanizatsiyi Ob'yednanykh Natsiy, Yevropeys'koho Parlamentu, Parlament·s'koyi Asambleyi Rady Yevropy, Parlament·s'koyi Asambleyi NATO, Parlament·s'koyi Asambleyi OBSYE, Parlament·s'koyi Asambleyi HUAM, natsional'nykh parlamentiv derzhav svitu pro vyznannya Rosiys'koyi Federatsiyi derzhavoyu-ahresorom"], Verkhovna Rada of Ukraine, accessed 20 September 2021, https://zakon.rada.gov.ua/laws/show/129-19#n9; "Statement on Russia's on-Going Aggression against Ukraine and Illegal Occupation of Crimea, 23 March 2017," *Ministry of Foreign Affairs of Ukraine*, accessed on 8 September 2021, https://mfa.gov.ua/en/news/55831-zajava-delegaciji-ukrajini-shhodo-trivajuchoji-rosijsykoji-agresiji-proti-ukrajini-ta-nezakonnoji-okupaciji-krimu-movoju-originalu.

in more detail while this part I moves forward in the timeline and addresses a start of a new wave of aggression by the Russian Federation towards Ukraine.

1.1.3. February 24, 2022, as a start of a new wave of aggression

On February 24, 2022, the Russian Federation started the new wave of aggression against Ukraine by announcing a "Special Military Operation" in Ukraine.[174] It was after the Russian Federation declared its recognition of the so-called Donetsk People's Republic and the Luhansk People's Republic. Additionally, it also signed treaties on friendship, cooperation and mutual assistance between the Russian Federation and so-called republics.[175]

These events received quite a massive international reaction.[176] United Nations General Assembly following the failure of the Security Council to adopt the relevant resolution[177], adopts Resolution on 'Aggression against Ukraine'.[178] As a response to Russia's armed attack on Ukraine, the Council of Europe suspended Russia's representation rights in its decision-making body and debate forum on February 25, 2022.[179] Additionally, the Organization of American States (OAS) has condemned Russia's "naked aggression" as an unprecedented act of aggression in Europe for the past 70 years.[180]

Meanwhile, Ukraine has instituted proceedings against the Russian Federation concerning Allegations of Genocide under the Convention on the Prevention and

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174 "Statement of the Ministry of Foreign Affairs of Ukraine on the New Wave of Aggression of the Russian Federation against Ukraine, 24 February 2022," *Ministry of Foreign Affairs of Ukraine*, accessed 12 May 2023, https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-new-wave-aggression-russian-federation-against-ukraine; "Russian Federation Announces "Special Military Operation" in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict", *UN Press*, accessed 2 May 2023, https://press.un.org/en/2022/sc14803.doc.htm.

175 "Signing of documents on recognition of Donetsk and Luhansk People's Republics." [in Russian: "Podpisaniye dokumentov o priznanii Donetskoy i Luganskoy narodnykh respublik"], *President of Russia*, 22 February 2022, http://kremlin.ru/events/president/news/67829.

176 See the list provided by the Ministry of Foreign Affairs of Ukraine: "Multilateral Statements in Support of Ukraine, 1 July 2023", *Ministry of Foreign Affairs of Ukraine*, accessed 2 June 2023, https://mfa.gov.ua/en/multilateral-statements-support-ukraine.

177 "Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto SC/14808", *UN Press*, accessed 12 April 2023, https://press.un.org/en/2022/sc14808.doc.htm.

178 General Assembly Resolution A/RES/ES-11/1 on Aggression against Ukraine, 2 March 2022.

179 "Council of Europe Suspends Russia's Rights of Representation", *Council of Europe*, 25 February 2022, https://www.coe.int/en/web/portal/-/council-of-europe-suspends-russia-s-rights-of-representation.

180 "OAS Member States Condemn Russian Attack on Ukraine," *The U.S. Mission to the Organization of American States*, accessed 15 May 2023, https://usoas.usmission.gov/oas-member-states-condemn-russian-attack-on-ukraine/.

Punishment of the Crime of Genocide on February 26, 2022.[181] On the same day Ukraine submitted the Request for the indication of provisional measures. Ukraine urges ICJ to indicate the following provisional measures to prevent irreparable harm and avoid escalating the dispute under the Genocide Convention: (a) the immediate suspension of Russian military operations aimed at preventing and punishing a claimed genocide in the Luhansk and Donetsk regions of Ukraine; (b) ensuring that any military or armed units directed or supported by Russia, as well as affiliated organizations and individuals, do not take further steps in furtherance of these military operations, (c) refraining from any action that may worsen or extend the dispute, and (d) providing regular reports on measures taken to implement the Court's Order on Provisional Measures.[182]

On March 16, 2022, ICJ issued its Order where it obliged the Russian Federation "immediately suspend the military operations that it commenced on February 24, 2022 in the territory of Ukraine", to "ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations", and also obliged both parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".[183] However, the Russian Federation disregards this Order.[184]

Starting from February 2022, the Crimean peninsula and Crimean bridge became places actively involved in the Russian aggression against Ukraine.[185]

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181 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening), Application instituting proceedings on 26 February 2022. Also, see: "Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide as a Pretext For Its Unlawful Military Aggression, 26 February 2022," *Ministry of Foreign Affairs of Ukraine*, accessed 15 May 2023, https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi; "Statement by the Ministry of Foreign Affairs of Ukraine on the opening by the Prosecutor of the International Criminal Court of an investigation into the Situation in Ukraine, 1 March 2022," *Ministry of Foreign Affairs of Ukraine*, accessed 15 May 2023, https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-vidkrittya-rozsliduvannya-situaciyi-v-ukrayini-prokurorom-mizhnarodnogo-kriminalnogo-sudu.

182 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening), Request for the Indication of Provisional Measures, 26 February 2022.

183 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine V. Russian Federation), Order, 16 March 2022, para. 86.

184 "Statement on a Year since the Start of Russia's Full-Scale Military Invasion of Ukraine, 24 February 2023," *Ministry of Foreign Affairs of Ukraine*, accessed 12 May 2023, https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-do-roku-z-pochatku-povnomasshtabnogo-vijskovogo-vtorgnennya-rosiyi-v-ukrayinu.

185 Matthew Mpoke Bigg, "Russian Invasion of Ukraine: Ukraine Estimates Sharply Higher Russian Casualty Toll in Crimea Blasts," *The New York Times*, 12 August 2022, https://www.nytimes.com/live/2022/08/12/world/ukraine-russia-news-war; Luke Harding, "Ukraine Hints It Was behind Latest Attack on Russian Supply Lines in Crimea," *The Guardian*, 16 August 2022, https://www.theguardian.com/world/2022/aug/16/ukraine-hints-it-was-behind-latest-attack-on-russian-supply-lines-in-crimea; "Factbox:

On September 11, 2023, according to the information provided by the Defence Intelligence of the Ministry of Defence of Ukraine, Ukraine regained control of the so-called "Boiko Platforms". These platforms are drilling gas and oil extraction platforms located off the coast of Crimea in the Black Sea. Russia had occupied them in 2015 and had been using them for military purposes, including as helicopter landing pads and radar installations.[186]

Considering the extraordinary nature of the current situation regarding Russian aggression against Ukraine and its constant developments, this dissertation refrains to provide any legal analysis of the situation and sticks with its main objectives.[187] The given facts about the Russian aggression against Ukraine is provided above for the broadening picture and understanding of the general situation around the Crimea. Thus, the question of accountability of Russians violations of international law is not going to be analysed, unless it is violations of international law of the sea.

Some clarifications to be made. The author of this doctoral dissertation takes the position that Crimea has been occupied and annexed by the Russian Federation since 2014. Crimea continues to constitute the territory of Ukraine. Thus, based on the above mentioned reasons as well as being guided by the General Assembly Resolution 68/262 on 'Territorial integrity of Ukraine' dated March 27, 2014, it is assumed that "the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on March 16, 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". This doctoral dissertation is also not aimed to prove or provide an exhaustive list of the arguments or analyses on the Russian intervention in Ukraine in the light of the law

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Crimea Bridge Blast - Why Is Bridge Important and What Happened to It," *Reuters*, 10 October 2022, https://www.reuters.com/world/europe/bridge-linking-russia-crimean-peninsula-2022-10-08/; Carly Olson and Ivan Nechepurenko, "An Explosion in Crimea Destroyed Russian Cruise Missiles, Ukrainian Officials Say," *The New York Times*, 20 March 2023, https://www.nytimes.com/2023/03/21/world/europe/cruise-missiles-crimea.html; Victoria Kim and Matthew Mpoke Bigg, "Russia Says Ukraine Targeted Crimea With Dozens of Drones," *The New York Times*, 25 August 2023, https://www.nytimes.com/2023/08/25/world/europe/russia-crimea-drones.html; Marc Santora and Victoria Kim, "Large Fire Burns at Crimea Fuel Depot After Suspected Drone Attack," *The New York Times*, 29 April 2023, https://www.nytimes.com/2023/04/29/world/europe/russia-ukraine-war-crimea-fire.html; Vivek Shankar et al., "Ukraine Confirms Strikes on Bridges into Russian-Occupied Crimea," *The New York Times*, 7 August 2023, https://www.nytimes.com/live/2023/08/07/world/russia-ukraine-news; Hugo Bachega and James Gregory, "'Massive' Drone Attack on Black Sea Fleet – Russia," *BBC News*, 29 October 2022, https://www.bbc.com/news/world-europe-63437212.

186 "Ukraine regained control of the so-called 'Boiko Platforms'" [In Ukrainian: "Ukrayina Povernula Pid Kontrol' t.zv. 'Vyshky Boyka'"], *Defence Intelligence of the Ministry of Defence of Ukraine,* accessed 11 September 2023, https://gur.gov.ua/content/ukraina-povernula-pid-kontrol-t-zv-vyshkamy-boika.html; Paul Adams, "Ukraine Claims to Retake Black Sea Drilling Rigs from Russian Control," *BBC News*, 11 September 2023, https://www.bbc.com/news/66779639.

187 However, there is already a wave of scholarship devoted to Russian aggression in Ukraine. See, for example: "Category: Ukraine," accessed 12 May 2023, https://www.ejiltalk.org/category/ukraine/; Anna-Alexandra Marhold, "Responses of International Legal Academia to the Russian Invasion of Ukraine," *Leiden Journal of International Law*, 2023: 1–8.

on the use of force. However, for the purpose of further clarity it accepted the position and view of Ukraine, different international organisations and the opinion supported by vast majority international scholars confirming the fact of the Russian aggression against Ukraine.

This part provides an overview of the historical background of Crimea, its transition of ruling powers, and its eventual transfer to the Ukrainian SSR. The part also highlights the events occurring during and after the annexation of Crimea by Russia in 2014 with the focus on international responses to this situation, as well as elaborates on events happening after February 24, 2022. It also provides information on the legal disputes and court cases initiated by Ukraine against Russia and emphasises the author's assumption that Crimea is occupied and annexed by Russia where the author refrains from providing a legal analysis of the ongoing situation and thus, limiting the scope of this dissertation to the Crimean occupation as an established fact and its relationship with dispute settlement procedures under UNCLOS.

The next part elaborates on legal peculiarities of the main concepts where it offers a summary of the place of Crimean occupation within the international law and international law of the sea.

1.2. Legal peculiarities of the main categories in the context of the occupation of Crimea and dispute resolution under UNCLOS

While the general situation surrounding Ukraine nowadays is complex and enormous in the possibilities of the future legal research and analysis, this sub-chapter provides legal peculiarities of the main categories regarding the Crimean occupation and dispute settlement under UNCLOS. Thus, the first part elaborated on the legal framework governing occupation, then the second one – an overview of the dispute settlement procedure under UNCLOS as Ukraine and the Russian Federation being State parties to UNCLOS.

1.2.1. The legal evaluation governing occupation of Crimea: international humanitarian law and law of the sea

The legal framework governing occupation is primarily outlined by international humanitarian law, in particular, the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (Fourth Geneva Convention) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977. Other rules of international law, as example, human rights, environmental law, as well as customary international law are also applicable during occupation. Both Ukraine and the Russian Federation are parties to the Geneva Conventions and their Additional Protocols.[188]

188 "Treaties and State Parties," *International Humanitarian Law Databases*, accessed 26 July 2021, https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties. Ukraine became a part to

The legal regime of armed hostilities at sea is mostly governed by the Hague Conventions 1907. Mainly by Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities,[189] Convention (VII) relating to the Conversion of Merchant Ships into War-Ships,[190] Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines,[191] Convention (IX) concerning Bombardment by Naval Forces in Time of War,[192] Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War.[193] Also there is one more relevant Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. However, it is not in force. It makes sense also to mention the Declaration Respecting Maritime Law adopted in Paris on April 16, 1856.

Considering that these documents were adopted more than a century ago, they were not adopted having in mind the maritime zones and provisions provided by UNCLOS. However, they consist of basic principles that are recognised as customary ones.[194] The peculiarities of the legal status of the occupied maritime territories (occupied waters) are not defined in the Geneva Conventions and their Additional Protocols. There are also the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (further, San Remo Manual) and the Helsinki Principles which are not binding.[195] The San Remo Manual is considered as a codification of international customary law with an incorporation of existing legal principles for naval conflicts.[196]

San Remo Manual on International Law Applicable to Armed Conflicts at Sea, June 12, 1994 does not use the categories of occupied territories (waters). Instead, it uses the categories of "neutral waters" and "international waters" with recognition of the right of a belligerent to establish zones that may have a negative impact on the

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Geneva Conventions on 3 August 1954. Russia – on 10 May 1954. On 29 September 1989, Russia became a party to Additional Protocols I and II. However, on 23 October 2019 the Russian Federation informed the Swiss Federal Council of its withdrawal of its declaration to Additional Protocol I. Ukraine became a party to Additional Protocols I and II on 25 January1990, while to Additional Protocol III on 19 January 2010.

189 *Ibid.* The Russian Federation is a state party from 27 November 1909 with "the reservations made as to Article 3 and Article 4, paragraph 2". Ukraine is a state party from 29 May 2015.

190 *Ibid.* The Russian Federation is a state party from 27 November 1909. Ukraine is a state party from 29 May 2015.

191 *Ibid.* As on 21 September 2022 neither the Russian Federation, nor Ukraine is a state party to this Convention.

192 *Ibid.* The Russian Federation is a state party from 27 November 1909. Ukraine is a state party from 29 May 2015.

193 *Ibid.* As on 21 September 2022 neither the Russian Federation, nor Ukraine is a state party to this Convention.

194 Wolff Heintschel von Heinegg, "Maritime Warfare," in *The Oxford Handbook of International Law in Armed Conflict*, edited by Andrew Clapham and Paola Gaeta (Oxford University Press, 2014), 147.

195 *Ibid.*

196 Louise Doswald-Beck (ed.), *International Institute of Humanitarian Law. San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, (Cambridge: Cambridge University Press, 1995): 62.

legal use of certain areas of the sea (restricted areas).[197] Such zones may be defined and declared by the State entitled to the concerned waters as well as another belligerent State exercising effective control over those waters.[198] Obviously, such wording of the international instruments gives equal possibility to claim control and even sovereignty over occupied waters for both states in this matter. Ukraine claims that waters over Crimea are occupied and the Russian Federation claims that these maritime territories belong to Russia.

Interestingly, in Part II, Section I, para 14 of the San Remo Manual "neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States." And in Part I, Section V, para 13(d): "For the purposes of this document… neutral means any State not party to the conflict". So, from this determination of words "neutral waters" it is clear that San Remo Manual on International Law Applicable to Armed Conflicts at Sea is providing determination for the waters of states that are not involved in the conflict.

When it comes to belligerent states recognizing the right of a belligerent to establish zones that may negatively impact on the legal use of certain areas of the sea (restricted areas) the San Remo Manual on International Law Applicable to Armed Conflicts at Sea states in Article 105 that "A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea."

Moreover, the San Remo Manual states that such zones can be established and considered as an exceptional measure and provides exact provisions of functioning such zones in Article 106. Thus, zones should follow certain rules:

> (a) the same body of law applies both inside and outside the zone;
> (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
> (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
> (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
> (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
> (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and
> (e) the commencement, duration, location and extent of the zone, as

197 Leonid Davydenko, "On the issue of ensuring the legal regime of Ukraine's maritime spaces," paper presented at Legal life of modern Ukraine: in 3 volumes: materials of the International Scientific and Practical Conference [in Ukrainian: "Do problemy zabezpechennya pravovoho rezhymu mors'kykh prostoriv Ukrayiny u Pravove zhyttya suchasnoyi Ukrayiny: u 3 t.: materialy Mizhnar. nauk.-prakt. konf."], vol. 2 (Odesa: Helvetyka, 2020), 122.

198 *Ibid.* Also see, Babin and Pleshko, "Legal Regime of Temporary Occupied Territory of Ukraine in Black and Azov Seas and in Kerch Strait," *op. cit. 154,* 122.

> well as the restrictions imposed, shall be publicly declared and appropriately notified.

Thus, the mere fact of establishing such zones does not lead automatically to further access to sovereignty over such zones.

The boundaries of the occupied territories are usually determined by the relevant situation, which is based on the actual control by the party to the conflict of the territory of the other party. It is common that such boundaries do not coincide with administrative delimitation and do not depend on it at all. The additional factors that can have an impact on the determination of the boundaries of the occupied territories are military or/and political agreements concluded between the parties to the conflict (ceasefire agreements, etc.). Moreover, the reflection of the relevant situation in the national regulations of the parties is considered as evidence of effective control over a certain area and thus can have an impact for the delimitation.[199] However, in case of illegal occupation, such effective control would not have any influence on the delimitation or recognition of the maritime zones.

Under customary international law, "a territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised".[200] It is common practice to treat waters surrounding the occupied territory as also under occupation.[201]

Regarding internal waters and territorial sea, the Laws of Naval War Governing the Relations between Belligerents (usually referred as 1913 Oxford Manual of Naval War) in Article 88 on "Occupation: extent and effects" provides the following:

> Art. 88. Occupation: extent and effects. Occupation of maritime territory, that is of gulfs, bays, roadsteads, ports, and territorial waters, exists only when there is at the same time an occupation of continental territory, by either a naval or a military force. The occupation, in that case, is subject to the laws and usages of war on land.[202]

Therefore, "the laws and usages of war on land" are clearly referring to Article 42 of Hague Regulations through Article 56.[203] It is also important to keep in mind that

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199 Davydenko, *op. cit. 197*, 122.

200 *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 229-230, para. 172. The reference was made to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, 167, para. 78 and 172, para. 89.

201 Benvenisti, *The International Law of Occupation*, *op. cit. 69,* 55. Also see, Dinstein, *op. cit. 69,* 47-48.

202 The Institute of International Law, *Oxford Manual of Naval War* (1913) quoted in Dietrich Schindler and Toman Jirí (eds.) "The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents: Fourth Revised and Completed Edition" in *The Laws of Armed Conflicts* (Leiden: Brill Nijhoff, 2004), 1135; "Manual of the Laws of Naval War" (Oxford, 1913), accessed 16 January 2023, https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1913/article-88.

203 P. Verri, "Commentary on the 1913 Oxford Manual of Naval War," *The Law of Naval Warfare: a Collection of Agreements and Documents with Commentaries* (1988) quoted from Dinstein, *op. cit. 69,* 47.

adoption of the Oxford Manual of Naval War was in 1913. Back then, there was no clear determination of maritime zones. Only years later maritime zones were established, firstly, some of them were established by 1958 Geneva Conventions on the Law of the Sea, and then the rest of them – in 1982 by UNCLOS.[204] Thus, the principles outlined in the Oxford Manual should be applicable to maritime areas that are not specifically mentioned in the text, including the continental shelf, where no sovereign rights of the coastal state were recognised in 1913. The continental shelf is considered as "the natural prolongation" of the land territory[205], so according to this interpretation it allows for the application of the same rules as regards to the land during the occupation.[206]

However, some believe that the issue is more complex, and it is only clear that the law of occupation is only applicable to internal waters and territorial sea, while leaving aside the EEZ and continental shelf. The reasoning for this can be divided into a few points. Firstly, these zones were not established when the law of occupation was developed, leading to questions about whether the modern law of the sea, which governs these zones, applies together with the law of occupation.[207] Secondly, while applying the law of the sea, the EEZ and continental shelf cannot be "occupied" since the coastal state does not possess full sovereignty over these zones. Some argue for extending the principles of occupation to these maritime zones, particularly in cases where the state, territory of which was occupied, conducted activities there prior to the occupation. This would hold the occupant responsible for administering those specific activities, but it would not grant the occupant powers to conduct new activities in these zones beyond what is allowed under the law of occupation.[208]

There is no a definitive answer on a question on whether the occupying power should bear responsibility for the utilisation of marine resources located off the occupied coast or not.[209] There is no a definite answer whether the law of the sea can be applicable during times of armed conflict.[210] Moreover, belligerent parties can argue that their treaty relations with each other may be suspended during the conflict, thus,

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204 1958 Geneva Conventions on the Law of the Sea included four conventions and optional protocol: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; the Convention on the Continental Shelf; and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. United Nations Convention on the Law of the Sea was adopted on 10 December 1982, but it came to force on 16 November 1994.

205 Article 76(1) UNCLOS.

206 Dinstein, *op. cit. 69,* 47-48. Dinstein provides an example of such occupation. It is the Sinai Peninsula, where Israel conducted oil drilling activities in its continental shelf in the Gulf of Suez. It is also can be applicable in regards of the waters surrounding Crimea.

207 Lieblich and Benvenisti, *Occupation in International Law. Elements of International Law*, *op. cit. 71,* 45-46.

208 *Ibid.,* 46-47.

209 Benvenisti, *The International Law of Occupation*, *op. cit. 69,* 55.

210 Klein, *Maritime Security and the Law of the Sea, op. cit. 70,* 259.

the application of UNCLOS in the time of the armed conflict can be suspended.[211]

However, there is also no explicit exclusion of the application of UNCLOS during armed conflict or occupation in international law.[212] In practice, UNCLOS does apply during the occupation if both states do not object to it, therefore, creating such practice.[213] Thus, when Ukraine initiated disputes under provisions of UNCLOS, the Russian Federation also became involved in the proceedings. Both parties agreed on jurisdiction under UNCLOS over their dispute. Among all objections of the Russian Federation to jurisdiction under UNCLOS there was no objection that the waters surrounding Crimea are regulated by international humanitarian law.

At the same time, UNCLOS does not have any provisions related to the determination of occupied maritime territories or occupied waters. Citing the Preamble of UNCLOS "matters not regulated by this Convention continue to be governed by the rules and principles of general international law". Meanwhile, the law of occupation was formed much earlier than UNCLOS was negotiated and became into force. There is even a view that UNCLOS is applicable during armed conflicts because the laws of naval warfare became irrelevant due to changes in legal positions regarding the lawful use of force by states.[214] Also, there is a moderate position that asserts that law of the sea rights and duties of states are continuing to exist during armed conflicts, with some exceptions, taking into account the established norms of international humanitarian law and the UNCLOS.[215] Additionally, there is also a view that "the law of naval warfare is *lex specialis* and prevails over the peacetime international law of the sea."[216]

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211 *Ibid.*

212 Shani Friedman, "The Application of the Law of Occupation in Maritime Zones and Rights to 'Occupied' Marine Resources," *The International Journal of Marine and Coastal Law* 36, 3 (2021): 421. Although, there are views that UNCLOS is not applicable during armed conflicts at all. For example, Brian Wilson and James Kraska, "American Security and Law of the Sea," *Ocean Development & International Law*, 40 (2009): 268, 277.

213 The example of such case could be Ukraine and the Russian Federation. The detailed overview of the judges' opinions in the provisional measures' decision of ITLOS in the *Case concerning the detention of three Ukrainian naval vessels* can show that despite the fact that there were shared opinions regarding applicability of international humanitarian law, ITLOS ruled to release the Ukrainian vessels and crews under the provisions of UNCLOS. The main emphasis was made that none of the parties invoke international law provisions regarding occupation or international armed conflict, and therefore ITLOS was able to find its *prima facie* jurisdiction in this requestion. See, detailed in Chapter I, subchapter 1.3.2.2.

214 A position arguably supported by Professor Lowe. See, Klein, *Maritime Security and the Law of the Sea, op. cit. 70,* 259; Lowe, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," *op. cit. 70,* 130–133.

215 Klein, *Maritime Security and the Law of the Sea*, *op. cit. 70,* 259.

216 James Kraska et al., "The Newport Manual on the Law of Naval Warfare," *International Law Studies* 101, 1 (2023): 3, 67, 78; Also see the references to Vienna Convention on the Law of Treaties (VCLT), Article 73: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States"; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969); "Draft Articles on the Effects of Armed Conflicts on

However, since the hostilities started by the Russian Federation against Ukraine after 2014 remained mostly within the east land territory of Ukraine till 2022, it is possible to assume that even being in an international armed conflict, in this particular situation, the law of the sea also applies between these states, if not prevailed from 2014 to 2022. And the question goes from the perspective, which law is *lex specialis* in this case? The humanitarian law or the law of the sea? Or whether they both apply, or they must be interpreted in harmony with each other?

From the perspective when the law of the sea is considered as a special law, and therefore, *"lex specialis derogat legi generali"* applies, then despite the occupation of specific maritime zones, only the coastal state is entitled to explore and utilise natural resources within these areas. The displaced government retains its rights under UNCLOS, and the occupying state must either allow the occupied state to exercise these rights or cooperate with them in exploiting the resources, considering the long-term environmental, political, and economic impacts of such actions.[217]

However, UNCLOS does not have the answer in such complex situation as whether the coastal state can be interpreted as the one that *de facto* is the coastal state or the one that only *de jure*. The occupation of the Crimean Peninsula means that Ukraine exercises its coastal state rights and obligations in respect of the maritime zones generated by the peninsula *de jure*, while *de facto* the effective control is exercised by the Russian Federation.

There is something that humanitarian law as being full of customary international law does not have that UNCLOS has. It is the compulsory procedures entailing binding decisions. The jurisdiction of a court or tribunal in such proceedings is provided by UNCLOS. Therefore, due to the scope of this dissertation, the subject matter jurisdiction of a court or tribunal established under provisions of UNCLOS, the focus is given solely to the law of the sea provisions and its dispute settlement mechanism. Thus, the next section shortly elaborates on what are the dispute settlement procedures under UNCLOS and how they are regulated.

1.2.2. The dispute settlement mechanism of UNCLOS: Ukraine and the Russian Federation as state parties to UNCLOS

The UNCLOS preamble highlights that "all issues relating to the law of the sea" need to be settled "in a spirit of mutual understanding and cooperation". To give this clause a practical implementation, UNCLOS includes a dispute settlement mechanism in Part XV. This mechanism tries to seek a balance between the voluntary and

Treaties, with Commentaries," *Report of the International Law Commission,* 63rd Session, Art. 1, U.N. Doc. A/66/10 (2011).

217 Friedman, *op. cit. 212,* 421; Olesia Gorbun, "Crimean Occupation and UNCLOS Dispute Settlement: Navigating Territorial Sovereignty and Non-Recognition," *Baltic Journal of Legal and Social Sciences* 3 (2023): 23-24.

compulsory procedures.[218]

Following the adoption of the UN Charter in 1945, the adoption of UNCLOS in 1982 has been referred to as the second most important legal instrument in the history of modern international law. 161 sovereign States (both coastal and landlocked) signed, ratified, or acceded the UNCLOS. There are not many other conventions or legal instruments "which would be as widely recognised by the international community" as UNCLOS.[219]

The mechanism of dispute settlement under UNCLOS is provided in Part XV of UNCLOS. UNCLOS provides the possibility to solve the disputes by the means indicated in Article 33, paragraph 1, of the UN Charter. According to Article 279 UNCLOS, State Parties have an obligation to "settle any dispute between them concerning the interpretation or application of this Convention by peaceful means". Thus, the options for settlement of a dispute are negotiations, enquiries, mediations, conciliations, arbitrations, judicial settlements, resorts to regional agencies or arrangements, or any other peaceful means chosen by the parties involved.[220]

According to this, the most known and used means of settling law of the sea disputes are arbitration and the judicial process. A lot of the disputes have been resolved by these processes.[221] Obviously, there are some differences between arbitration and the judicial process, however, the certain similarity is the fact that they both are set out in Part XV of Section 2 of the UNCLOS and in Article 287 are considered as "means for the settlement of disputes concerning the interpretation or application of this Convention".

Article 287 provides 4 means for the settlement of disputes concerning the interpretation or application of UNCLOS:

1. the International Tribunal for the Law of the Sea established in accordance with Annex VI;
2. the International Court of Justice;
3. an arbitral tribunal constituted in accordance with Annex VII;
4. a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Article 288 determines the subject matter jurisdiction (*ratione materiae* jurisdiction) for the settlement of disputes under UNCLOS. [222] The wording of Article

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218 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 534.

219 Karaman, *op. cit.* 46.

220 Article 33(1) Charter of the United Nations, 26 June 1945, 1 UNTS XVI; Article 279 UNCLOS.

221 Hasan Monjur, "A Comparative Study between Arbitration and Judicial Settlement as Means of Maritime Boundary Dispute Settlement," *Beijing Law Review* 9, 1 (2018): 83-84.

222 "Article 288. Jurisdiction," in *United Nations Convention on the Law of the Sea: A Commentary*, edited by Alexander Proelß et al. (Baden-Baden: Nomos Verlagsgesellschaft, 2017), 1858. Also see, Center for Oceans Law and Policy, University of Virginia, "Article 288 - Jurisdiction (V),"in *United Nations Convention on the Law of the Sea*: 47.

288(1) of UNCLOS is as follows:

> 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.

Some scholars argue that the adoption of UNCLOS led to the creation of new conflicts related to overlapping boundaries, fundamentally changed and complicated border agreements and entitlements, particularly with respect to ensure further compliance with UNCLOS.[223] Some argue that when UNCLOS created reasons for new disputes to arise, it also provided the possibilities to solve the dispute. Thus, according to Jon Carlson,

> UNCLOS is unique in that the dispute-settlement mechanism is incorporated into the treaty, making it obligatory for parties to the convention to go through the settlement procedure in case of a dispute with another party. Thus, inherent in the convention is the vision that it is a dispute resolution mechanism.[224]

However, both sides admit that UNCLOS implemented a new regime with a few sovereignty layers that offered reasons for states to extend their seaward sovereignty as well as it generated differences between sovereignty and sovereign rights. In this case, "sovereignty refers to jurisdiction and rights refer to entitlements that fall short of "full sovereignty". According to UNCLOS, these entitlements are based on geography: land determines rights to marine resources. In existing maritime disputes, determining the owner of the land on which maritime entitlements are based is one of the key challenges which is based on the laws of territorial acquisition.[225]

The term of sovereignty itself is considered as "a foundational building block of the international community that determines land boundaries and territorial jurisdiction".[226] However, disputes involving the issues of sovereignty are not the ones that states agree to give for consideration or to overview to international society in general, having its recommendation and opinion-based character not even talking about the submission to compulsory procedures with binding decisions.[227] Once submitted – then the question to follow the ruling is coming and what to do if there is the decision that the state prefers not to follow? It is much easier and convenient not to give a dispute to decide rather than get a burdensome or disadvantageous binding award.

With acknowledgment of this fact, at the Third United Nations Conference on

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223 Rebecca Strating, "Maritime Disputes, Sovereignty and the Rules-Based Order," *East Asia Australian Journal of Politics and History* 65, 3 (2019): 451; Jon Carlson et al., "Scramble for the Arctic: Layered Sovereignty, UNCLOS, and Competing Maritime Territorial Claims," *SAIS Review of International Affairs* 33, 2 (2013): 23.

224 Carlson et al., *op. cit. 223,* 26.

225 Strating, *op. cit. 223,* 451.

226 *Ibid*.

227 Karaman, *op. cit. 46*, 9.

the Law of the Sea was concluded that Part XV of UNCLOS named as Settlement of Disputes that includes Section 2 Compulsory Procedures Entailing Binding Decisions must be subject to the limitations and optional exceptions covered by Section 3.[228] Section 3 has only 3 articles: Article 297 and 298 of UNCLOS provides limitations on applicability of section 2 and optional exceptions to applicability of section 2, while Article 299 gives right of the parties to agree upon a procedure.[229]

Article 297 of the UNCLOS exempts States from the mandatory process of submitting certain types of disputes without making any specific action or declaration.[230]

Article 298 of UNCLOS allows states to declare, at the time of signing or afterwards, that they do not accept certain disputes under compulsory resolution procedures. States can withdraw their declarations or agree to submit excluded disputes to the procedures outlined in UNCLOS, but they cannot submit a dispute falling within the exception against another state without their consent. This Article is closely linked with Article 309 of UNCLOS. It reads as: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." The Article 298 is providing such permission for the reservation.[231] Moreover, Article 298 was considered essential to ensure consensus on including a compulsory dispute resolution mechanism in UNCLOS.[232]

The Ukrainian SSR signed UNCLOS in December 1982. The Ukrainian SSR declared its independence on August 24, 1991. Later the name of the republic was legally changed to Ukraine. Consequently, Ukraine became a successor of the Ukrainian SSR. However, UNCLOS was ratified by Ukraine only in June 1999.[233] Under the Law of Ukraine "On Ratification of the 1982 United Nations Convention on the Law of the Sea and the Agreement on the Implementation of Part XI of the

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228 *Ibid.*

229 Part XV, UNCLOS.

230 Karaman, *op. cit.* 46, 9.

231 According to Article 2(1)(d) VCLT "reservation" is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

232 Robin Churchill, "The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use", *op. cit. 49,* 218-219.

233 "The List of State Parties to UNCLOS," *United Nations Treaty Collection*, accessed 15 March 2022, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en; "Law of Ukraine on the Ratification of the United Nations Convention on the Law of the Sea of 1982 and the Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 1982" [in Ukrainian: "Zakon Ukrayiny Pro ratyfikatsiyu Konventsiyi Orhanizatsiyi Ob'yednanykh Natsiy z mors'koho prava 1982 roku ta Uhody pro implementatsiyu Chastyny XI Konventsiyi Orhanizatsiyi Ob'yednanykh Natsiy z mors'koho prava 1982 roku"], *Verkhovna Rada of Ukraine*, accessed 17 January 2021, https://zakon.rada.gov.ua/laws/show/728-14#Text.

1982 United Nations Convention on the Law of the Sea"[234] Ukraine chooses as the principal means of resolving disputes concerning the interpretation or application of UNCLOS the special arbitral tribunal established under Annex VII. It chooses a special arbitration established in accordance with Annex VIII for the disputes concerning the interpretation or application of UNCLOS in matters relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping. It also recognises the competence and jurisdiction of ITLOS as provided in Article 292 of UNCLOS on the matters relating to the prompt release of detained vessels or their crews. Article 2 of the above-mentioned law consists of Ukrainian declarations indicating that Ukraine does not accept disputes referred to in article 298, paragraph 1 (a) and (b), of the Convention, unless otherwise provided by specific international treaties of Ukraine with relevant States. This means, that accordingly to provisions of UNCLOS, Ukraine does not accept such disputes as disputes concerning the interpretation or application of UNCLOS relating to sea boundary delimitations, disputes involving historic bays or titles, disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction.[235]

USSR signed UNCLOS in December 1982. On January 1992, shortly after the dissolution of the USSR, the Russian Federation declared that it "continues to exercise its rights and honour its commitments deriving from international treaties concluded by the Union of Soviet Socialist Republics" and "requests that the Russian Federation be considered a party to all international agreements in force, instead of the Soviet Union."[236] Upon signing UNCLOS, the USSR chose an arbitral tribunal constituted in accordance with Annex VII and Annex VIII as the primary means for settling disputes. It also declares that "it does not accept the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes concerning military activities, or disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations."[237] Later, upon ratification, the Russian Federation further declares the full list of optional exceptions provided in Article 298 UNCLOS. Thus, apart from the

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234 *Ibid.*

235 "Law of Ukraine on the Ratification of the United Nations Convention on the Law of the Sea of 1982 and the Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 1982," *op. cit. 233*; UNCLOS; "Declarations and statements," *Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations,* accessed 15 March 2021, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

236 It was made by sending a note to the Secretary-General of the United Nations by the permanent representative of the Russian Federation to the United Nations. Cited from Tullio Scovazzi, "Black Sea Update (1996) [Report Number 8-10 (4)]," in *International Maritime Boundaries*, edited by the American Society of International Law.

237 See, "The List of State Parties to UNCLOS," *op. cit. 233.*

above-mentioned exceptions, it was added nearly citing Article 298 UNCLOS, as following: "disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations."[238]

Therefore, when the legal peculiarities related to the topic of the dissertation are established, it becomes relevant to analyse how the Crimean occupation was or is addressed in the various legal forums, including law of the sea tribunals. Thus, the following sub-chapter provides an analysis of disputes between Ukraine and the Russian Federation with a focus on submissions related to the Crimean occupation.

1.3. International disputes involving Crimea

International law explicitly forbids the acquisition of territory through the threat or use of force. The prohibition on the use of force is presented in Article 2, paragraph 4, of the Charter of the United Nations. It reads as follows:

> 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.[239]

The prohibition on the threat or use of force is numerously confirmed in different occasions.

The General Assembly expressed it in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations citing the Article 2, paragraph 4 of the Charter of the United Nations a couple of times.[240] Also it states that

> The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charted. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.[241]

The prohibition on the threat or use of force is also mentioned in jurisprudence

238 *Ibid.*

239 Charter of the United Nations, *op. cit. 220.*

240 Preamble and Article 1, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (adopted at the 1883rd plenary meeting, 24 Oct. 1970), in *Resolutions adopted by the General Assembly during its 25th session*, *15 September - 17 December 1970*, A/8028, (1971): 122-123.

241 *Ibid.,* Article 1.

and recognised as a principle of customary international law. The illegality of acquiring territory through the threat or use of force was confirmed in such cases as *Military and Paramilitary Activities in and against Nicaragua*, *Armed Activities on the Territory of the* Congo; and such advisory opinions as Legal *Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Legality of the Threat or Use of Nuclear Weapons, etc.*[242] It is recognised as *jus cogens*.[243] *Jus cogens*, also known as a peremptory norm of general international law, is defined as "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[244]

Article 41, paragraph 2 of the ILC Articles on State Responsibility states about particular consequences of a serious breach of an obligation as "[n]o State shall recognise as lawful a situation created by a serious breach [an obligation arising under a peremptory norm of general international law…], nor render aid or assistance in maintaining that situation."[245]

It is clear that the obligation of non-recognition is aimed at maintaining the illegality of the situation and preventing any actions that could imply recognition of its legality.[246] However, the obligation "not to recognise as lawful" situations resulting from illegal force or serious breaches of international norms faces challenges in its specific implementation, as rules corresponding to the obligation have not fully developed in customary international law. While the obligation may serve as a powerful sanction in cases of widespread legal claims, its scope of application appears limited.[247] Moreover, the obligation to cooperate to bring to an end through lawful means any serious breach of international law, does not provide the clear binding determination and consequences of non-cooperation. So, when it comes into practice to the states, the states are "likely to seek further concrete measures."[248] Therefore, states that have lost their territory due to the use of force of another state may address the situation through different dispute settlement procedures.

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242 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, paras.187-190; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *op. cit. 200,* paras. 87-88, *Armed Activities on the Territory of the Congo*, Judgment, para. 148; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, paras. 47-48.

243 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission*, 53rd Session, GAOR, 56th Session, Supp. No. 10 (A/56/10), (2001): 283-284, paras. 4-5. Also, see, *Military and Paramilitary Activities in and against Nicaragua*, *op. cit. 242,* para.190.

244 Article 53 VCLT.

245 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit. 243.*

246 Stefan Talmon, "The Duty Not to 'Recognise as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?" in *The Fundamental Rules of the International Legal Order* (Leiden: Brill Nijhoff, 2006), 114.

247 *Ibid.,* 125.

248 Thomas Grant, "International Dispute Settlement in Response to an Unlawful Seizure of Territory: Three Mechanisms," *Chicago Journal of International Law* 16, 1 (2015): 4.

Then, when it comes to addressing the situation through different dispute settlement procedures, there is a challenge waiting as well. It is necessary to establish that such a dispute settlement procedure has jurisdiction to hear the case. The state occupying the territory may try to dismiss the claim as inadmissible or beyond the jurisdiction of the dispute settlement body. It is a common objection that questions of territorial acquisition are not within the competence of that dispute settlement body. In some dispute settlement mechanisms, objections regarding territorial questions have a strong chance of success.[249]

Thus, this sub-chapter is divided in two parts. The first one evaluates the place of Crimea in international disputes excluding disputes under UNCLOS. The second part provides an overview of the already existing disputes under provisions of UNCLOS and to what extent they are involving the occupation of Crimea.

1.3.1. Crimea in international disputes excluding disputes under provisions of UNCLOS

Since 2014 and onwards the status of Crimea became as occupied and thus, it led to disagreements between Ukraine and the Russian Federation. It has got its reflection in international law fora in relationships of these two states.

Ukraine initiated cases against the Russian Federation in different international courts and tribunals, such as the ICJ, ECtHR, and UNCLOS Annex VII tribunals. Additionally, there are also cases initiated by investors against the Russian Federation. Also, there are investment proceedings registered in PCA and addressed in foreign courts that are or were involved in handling investment cases related to Crimea's annexation.[250]

1.3.1.1. Disputes in ICJ

In ICJ Ukraine acts as a party to the proceeding in three cases:

1. *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);

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249 *Ibid.*

250 Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction," *op. cit. 13,* 378-379; Iryna Marchuk, "From Warfare to 'Lawfare': Increased Litigation and Rise of Parallel Proceedings in International Courts: A Case Study of Ukraine's and Georgia's Action against the Russian Federation" in *The Future of International Courts* (Abingdon, New York: Routledge, Taylor & Francis Group, 2019), 217- 234; Lawrence Hill-Cawthorne, "How Are International Courts Dealing with Russia's Invasion of Ukraine?" *University of Bristol Law School Blog*, July 4 2023, https://legalresearch.blogs.bris.ac.uk/2022/07/how-are-international-courts-dealing-with-russias-invasion-of-ukraine/; Julian Ku, "Ukraine Prepares Even More International Lawsuits That Russia Will Ignore," *Opinio Juris (blog)*, 27 February 2016, http://opiniojuris.org/2016/02/27/ukraine-v-russia-where-can-you-sue/. For fuller list, see "List of Court Venues Lawfare," *Law Confrontation with Russian Federation*, accessed 27 June 2021, https://lawfare.gov.ua.

2. *Aerial Incident of 8 January 2020* (Canada, Sweden, Ukraine and United Kingdom v. Islamic Republic of Iran);
3. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening).[251]

Thus, the short analysis of the cases mentioned above is presented below.

***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)**

The jurisdiction of ICJ in this case is based on two international conventions. It confirms with the ICJ Statute, where Article 36 paragraph 1 states

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for […] in treaties and conventions in force.[252]

Thus, the jurisdiction has to be found within the provisions of International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

In its submissions related to ICSFT, Ukraine asks ICJ to adjudge and declare that the Russian Federation is responsible for multiple violations of ICSFT. There are not any references of violations of this Convention concerning the territory of Crimea.[253]

Ukraine in its submissions related to CERD asks the Court to adjudge and declare that the Russian Federation violates different articles of CERD in its treatment of the Crimean Tatar and Ukrainian communities in Crimea. The violations include engaging in acts of racial discrimination; sponsoring, defending, supporting racial discrimination by other persons or organisations; promoting and inciting racial discrimination; and failing to guarantee and protect different rights of members of the Crimean Tatar and Ukrainian communities. Ukraine asks ICJ to order the Russian Federation to comply with provisional measures; to cease the violations; to guarantee the rights of the affected communities; to adopt measures to combat prejudice and discrimination; to provide financial compensation to Ukraine for the harm caused by the Russian Federation's violations of CERD, including the harm suffered by victims as a result of these violations.[254] And by asking to adjudge and declare the Russian Federation's violations of provisions under CERD, Ukraine specifies what does it mean by the Russian Federation: "its State organs, State agents, and other persons and entities exercising governmental authority, including the de facto authorities administering the

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251 "Pending Cases", *International Court of Justice*, accessed 1 June 2022, https://www.icj-cij.org/pending-cases.

252 Statute of the International Court of Justice, 26 June 1945.

253 *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), Memorial of Ukraine of 12 June 2018, 362-366, paras. 653 (a-e) – 654 (a-f).

254 *Ibid.,* 362-366, paras. 653 (f-k) – 654 (g-l).

illegal Russian occupation of Crimea, and […] other agents acting on its instructions or under its direction and control.[255]

Ukraine asks ICJ to adjudge and declare that Russian Federation is responsible under CERD for

> holding an illegal referendum in an atmosphere of violence and intimidation against non-Russian ethnic groups, without any effort to seek a consensual and inclusive solution protecting those groups, and as an initial step toward depriving these communities of the protection of Ukrainian law and subjecting them to a régime of Russian dominance.[256]

Most Ukrainian claims based on provisions of CERD are not limited to specific territories, including annexed and occupied Crimea. However, Ukraine does mention Russia's annexation of Crimea in some instances, stating that interpreting certain provisions of CERD requires reference to Article 49 of the Fourth Geneva Convention, which applies in occupied territory. Additionally, Ukraine argues that Russia cannot use certain clauses in CERD to justify its actions, as it would essentially be using its own unlawful conduct (annexation of Crimea) as a reason. The approach of ICJ to these arguments will be possible to see only when the decision is issued.[257]

ICJ in its decision on Preliminary Objection clearly states:

> In the present case, the Court notes that Ukraine is not requesting that it rule on issues concerning the Russian Federation's purported "aggression" or its alleged "unlawful occupation" of Ukrainian territory. Nor is the Applicant seeking a pronouncement from the Court on the status of Crimea or on any violations of rules of international law other than those contained in the ICSFT and CERD. These matters therefore do not constitute the subject-matter of the dispute before the Court.[258]

So, there is reference to "an unlawful occupation" of Crimea, however, due to the certain scope of the jurisdiction of ICJ granted by ICSFT and CERD, Ukraine rightfully seeks only the ICJ's decision on violations related to those conventions.[259]

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255 *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*, Application instituting proceedings on 16 January 2017, 94, para. 137.

256 *Ibid.,* 94, para. 137(b).

257 *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*, Memorial of Ukraine of 12 June 2018, *op. cit. 253,* paras. 613-614, 625-626, 653 (f-k) – 654 (g-l). Also, see, Hill-Cawthorne, "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study", *op. cit. 92,* 783-785.

258 *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, Judgment, I.C.J. Reports 2019, 577, para. 29.

259 To this matter it is possible to add that even despite the fact that the dispute is specifically focused on Ukraine's claims under CERD regarding the situation in Crimea and claims under ICSFT regarding the ongoing armed conflict in eastern Ukraine, but "it touches upon some broader highly contested issues related to the unlawful occupation/annexation of Crimea and Russia's degree of military involvement in

Thus, it could avoid the challenge of the jurisdiction that could appear. However, the Russian Federation's objection highlights some inconsistency within Ukrainian claims and provides a view that

> Ukraine's real goal in the present proceedings is not to demonstrate the existence of a "systematic racial discrimination campaign" conducted by the Russian Federation against Tatar and Ukrainian communities in violation of the CERD, but to challenge the status of Crimea and have the Court make a pronouncement on this matter, notably by imposing on the Russian Federation the status of "occupying power".[260]

The answer to this could be considered that in Judgment of 31 January 2024 of the same case, ICJ repeats its previous statement from the decision on Preliminary Objection: "Ukraine is not requesting that it rule on issues concerning the Russian Federation's alleged "aggression" or its alleged "unlawful occupation" of Ukrainian territory, nor is the Applicant seeking a pronouncement of the Court on the status of the Crimean peninsula under international law".[261] ICJ highlights that "[t]hese matters do not constitute the subject-matter of the dispute before the Court".[262] Therefore, ICJ clearly established its the subject-matter jurisdiction in this case.

Aerial Incident of 8 January 2020 **(Canada, Sweden, Ukraine and United Kingdom v. Islamic Republic of Iran)**

The *Aerial Incident of 8 January 2020* arose because of the shooting down of a civil aircraft by military personnel of Iran's Islamic Revolutionary Guard Corps. Obviously, it has nothing to do with the status of Crimea or the Russian Federation.

Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide **(Ukraine v. Russian Federation: 32 States intervening)**

In this case the jurisdiction of ICJ is based on the Genocide Convention. Ukraine states that it is "a dispute between Ukraine and the Russian Federation relating to the

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the conflict in eastern Ukraine, which are beyond the scope of the judicial inquiry at the ICJ". For this, see, Iryna Marchuk, "Green Light from the ICJ to Go Ahead with Ukraine's Dispute against the Russian Federation Involving Allegations of Racial Discrimination and Terrorism Financing," *EJIL: Talk!* (blog), November 22, 2019, https://www.ejiltalk.org/green-light-from-the-icj-to-go-ahead-with-ukraines-dispute-against-the-russian-federation-involving-allegations-of-racial-discrimination-and-terrorism-financing/; Iryna Marchuk, "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) (I.C.J.)," *International Legal Materials* 59, 3 (2020): 339–416.

260 *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), Rejoinder of the Russian Federation on 10 March 2023, pp. 341-342, para. 897.

261 *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), Judgment of 31 January 2024, General List No. 166, 30, para. 30.

262 *Ibid.*

interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (further Genocide Convention).[263] In the Application instituting proceedings Ukraine provides that the claim of the Russian Federation that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine is false and Russian declaration and implementation of a "special military operation" against Ukraine with "the express purpose of preventing and punishing purported acts of genocide that have no basis in fact".[264] Ukraine "denies that any such genocide has occurred" and asks ICJ "to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide."[265]

Moreover, on April 14, 2022, *Verkhovna Rada* of Ukraine adopted Declaration On the Genocide Committed by the Russian Federation in Ukraine.[266] By this declaration, Ukraine aims to recognise the actions committed by the Armed Forces of the Russian Federation and its political and military leadership during the latest phase of armed aggression by the Russian Federation against Ukraine, which began on February 24, 2022, as a genocide of the Ukrainian people.[267] Some legal scholarship already supports such determination.[268]

Within this case, the ICJ ordered Provisional Measures where it states that the Russian Federation shall immediately suspend its military operations in Ukraine, and any military or irregular armed units, any organisations and persons directed or supported

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263 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening), Application instituting proceedings on 26 February 2022, p. 4, para. 2.

264 *Ibid.*

265 *Ibid.*, 4, para. 3.

266 "Declaration of the Verkhovna Rada of Ukraine On the Genocide Committed by the Russian Federation in Ukraine No. 2188-IX of 14 April 2022" [in Ukrainian: "Zayava Verkhovnoyi Rady Ukrayiny Pro vchynennya Rosiys'koyu Federatsiyeyu henotsydu v Ukrayini"], *Verkhovna Rada of Ukraine*, accessed 21 August 2023, https://zakon.rada.gov.ua/laws/show/2188-20#Text. The English-language version of the Declaration is available online at https://zakon.rada.gov.ua/laws/file/text/97/f515139n154.pdf.

267 *Ibid.*, part 2, Objectives and Tasks of the Declaration.

268 Denys Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide," *Journal of International Criminal Justice* 21, 2 (1 May 2023): 233–264; Elizabeth Whatcott, "Compilation of Countries' Statements Calling Russian Actions in Ukraine 'Genocide'," *Just Security* (blog), 20 May 2022, https://www.justsecurity.org/81564/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/; Douglas Irvin Erickson, "Is Russia Committing Genocide in Ukraine?" *Opinio Juris* (blog), 21 April 2022, https://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/; Noëlle Quénivet, "The Conflict in Ukraine and Genocide," *Journal of International Peacekeeping* 25, 2 (3 August 2022): 141–154; Iryna Marchuk and Aloka Wanigasuriya, "Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ," *Journal of Genocide Research* (9 November 2022): 1–23; William Schabas, "Genocide and Ukraine: Do Words Mean What We Choose Them to Mean?" *Journal of International Criminal Justice* 20, 4 (1 September 2022): 843–857; Timothy Snyder, "Russia's Genocide Handbook", *Thinking About...* (blog), 8 April 2022, https://snyder.substack.com/p/russias-genocide-handbook; Maria Mälksoo, "The Postcolonial Moment in Russia's War Against Ukraine," *Journal of Genocide Research* (11 May 2022): 1–11.

by Russia should not take any further steps in these operations. Additionally, both parties are required to refrain from "any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".[269] Later the Ministry of Foreign Affairs of Ukraine states that the Russian Federation disregards this Order.[270]

From the analysis of Ukraine's Application instituting proceedings, it is possible to assume that the occupation of Crimea is not going to be mentioned within this dispute. Indeed, it is confirmed by the ICJ's judgment of 2 February 2024 on Preliminary objections where it does not state anything about Crimea.[271] Although Ukraine claims that "the Russian Federation's use of force . . . beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention"[272], according to ICJ "Genocide Convention does not incorporate rules of international law extrinsic to it such as rules on use of force."[273]

There is certainly some level of similarities of disputes that Ukraine presented to ICJ against the Russian Federation. All Ukrainian submissions against the Russian Federation are framed within the scope of disputes related to interpretation, application, or fulfilment of those conventions that grant ICJ to exercise its jurisdiction. As a result, Ukraine presents a dispute concerning the Genocide Convention. This approach aligns with how Ukraine previously framed its case when applying to the ICJ regarding Russia's actions in Crimea and Eastern Ukraine, where its jurisdiction is based on the

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269 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, 230–231, para. 86. Also see, "Statement of the Ministry of Foreign Affairs of Ukraine regarding the decision of the International Court of Justice of the United Nations" [in Ukrainian: "Zayava MZS Ukrayiny shchodo rishennya Mizhnarodnoho Sudu OON, Ministerstva zakordonnykh sprav Ukrayiny"], *Ministry of Foreign Affairs of Ukraine*, 16 March 2022, accessed 21 September 2022, https://mfa.gov.ua/news/zayava-mzs-ukrayini-shchodo-rishennya-mizhnarodnogo-sudu-oon; Andreas Kulick, "Provisional Measures after Ukraine v Russia (2022)," *Journal of International Dispute Settlement* 13, 2 (2022): 323–340; Kateryna Busol, "Commentary. Order of the ICJ. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine V. Russian Federation)" [in Ukrainian: "Komentar. Rozporyadzhennya Mizhnarodnoho Sudu OON. Zvynuvachennya v henotsydi vidpovidno do Konventsiyi pro zapobihannya zlochynu henotsydu ta pokarannya za n'oho (Ukrayina proty Rosiys'koyi Federatsiy)"], *Ukrainian Journal of International Law* 1 (2022): 91; Michael Ramsden, "Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention," *Vanderbilt Journal of Transnational Law* 56, 1 (2023): 181-210.

270 "Comment of the Ministry of Foreign Affairs of Ukraine regarding the disregard by the Russian Federation of the Order of the International Court of Justice of the United Nations" [in Ukrainian: "Komentar MZS Ukrayiny stosovno ihnoruvannya Rosiys'koyu Federatsiyeyu Nakazu Mizhnarodnoho Sudu OON"], *Ministry of Foreign Affairs of Ukraine*, 19 April 2022, https://mfa.gov.ua/news/komentar-mzs-ukrayini-stosovno-ignoruvannya-rosijskoyu-federaciyeyu-nakazu-mizhnarodnogo-sudu-oon.

271 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Preliminary objections, Judgment of 2 February 2024, General List No. 182.

272 *Ibid*., 35-36, 49, paras. 55, 119.

273 *Ibid*., 56, para. 146.

application on ICSFT and CERD.[274] Thus, this approach goes further than mentioned proceedings in ICJ as all courts or tribunal has limits to its jurisdiction.

1.3.1.2. Disputes in ECtHR

ECtHR was the first court where Ukraine filed its application against Russia concerning the events before and after the annexation of Crimea.[275] In general the connection between claims under ECHR and the Crimea sovereignty dispute is complex.[276] There are a number of claims related to the Crimean occupation.

There are two cases between Ukraine and the Russian Federation that are currently being held before the Grand Chamber of the ECtHR.[277]

The first case involves events in Crimea and includes three inter-State applications from 2014, 2015, and 2018. It was considered as partly admissible on December 16, 2020.[278]

The second case concerns events in Eastern Ukraine, including the downing of Flight MH17 and Russia's military operations in Ukraine since February 24, 2022. This case includes four inter-State applications joined in February 2023.[279]

Additionally, there is one case before a Chamber concerning events in the Azov Sea in 2018[280], and another case lodged on February 19, 2021, regarding alleged targeted assassination operations by the Russian Federation.[281]

All four previous cases were brought by Ukraine. However, there used to also be a case initiated by the Russian Federation against Ukraine. The Russian government alleged various incidents, including "killings, abductions, forced displacement,

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274 Hill-Cawthorne, "How Are International Courts Dealing with Russia's Invasion of Ukraine?" *op. cit. 250.*

275 Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction," *op. cit. 13,* 387.

276 Hill-Cawthorne, "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study", op. cit. 92.

277 "Questions and Answers on Inter-State applications," Press Release of 18 July 2023, *ECHR*, accessed 27 July 2023, https://www.echr.coe.int/documents/d/echr/press_q_a_inter-state_cases_eng?download=true.

278 "Complaints brought by Ukraine against Russia concerning a pattern of human rights violations in Crimea declared partly admissible," Press Release of 14 January 2021, *ECHR* 010 (2021), accessed 27 July 2023, https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6904972-9271650%22]}.

279 "European Court joins inter-State case concerning Russian military operations in Ukraine to inter-State case concerning eastern Ukraine and downing of flight MH17," Press Release of 20 February 2023, *ECHR* 055 (2023), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7575325-10413252%22]}.

280 "ECHR puts questions to Russian Government after receiving new inter-State case from Ukraine concerning events in the Sea of Azov," Press Release of 30 November 2018, *ECHR* 412 (2018), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6266330-8160558%22]}.

281 "New inter-State application brought by Ukraine against Russia", Press Release of 23 February 2021, *ECHR* 069 (2021), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6946898-9342602%22]}.

interference with the right to vote, restrictions on the use of the Russian language and attacks on Russian 4 embassies and consulates". It also claimed that Ukraine was responsible for the deaths of those who were on board Malaysia Airlines Flight MH17 because Ukraine did not close its airspace. Additionally, it complained that Ukraine switched off the water supply to Crimea by the Northern Crimean Canal.[282]

On July 18, 2023, the ECtHR unanimously decided to remove the Russian application from its list of cases. The ECtHR found that the Russian Federation stopped pursuing the application and failed to respond to its correspondence.[283]

It should be mentioned that on March 16, 2022, the Russian Federation was excluded from the Council of Europe[284] and on September 16, 2022 the Russian Federation ceases to be party to ECHR.[285] However, according to the ECtHR Press Release of July 18, 2023, there are approximately 8,500 individual applications before the Court related to events in Crimea, Eastern Ukraine, the Sea of Azov, and Russia's military operations in Ukraine since February 24, 2022.[286]

While those applications are still in the process of being reviewed by ECtHR, the most recent and relevant decision in regard to the occupation of Crimea and ECHR was on December 16, 2020.[287] The ECtHR has been careful not to make a definitive statement on the status of Crimea. However, its position on jurisdiction can be considered partly favourable to Ukraine. The ECtHR ruled that Russia had effective control over Crimea, making it obligated to apply the ECHR not just after annexation but also for some weeks before it.[288] It shows that ECtHR lacks its jurisdiction to determine if the interference with Ukraine's sovereignty and territorial integrity is legal or not according to international law.[289] Thus, ECtHR deals with the

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282 "Inter-State application brought by Russia against Ukraine", Press Release of 23 July 2021, *ECHR* 240 (2021), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7085775-9583164%22]}. Also, on the possible motives why the Russian Federation has brought this case, see Milena Ingelevič-Citak, "Russia Against Ukraine Before the European Court of Human Rights. The Empire Strikes Back?", *Polish Political Science Yearbook* 1, 51 (2022): 7–29.

283 "Inter-State case brought by Russia against Ukraine struck out of list", Press Release of 18 July 2023, *ECHR* 232 (2023) https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7706301-10639634%22]}.

284 "The Russian Federation Is Excluded from the Council of Europe", *Council of Europe*, 16 March 2022, https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe.

285 "Russia Ceases to Be Party to the European Convention on Human Rights", *Council of Europe*, 16 September 2022, https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights.

286 "Questions and Answers on Inter-State applications," Press Release of 18 July 2023, *ECHR*, accessed 27 July 2023, https://www.echr.coe.int/documents/d/echr/press_q_a_inter-state_cases_eng?download=true, 3.

287 *Ukraine v. Russia (Re Crimea)*, Applications no. 20958/14 and 38334/18, Decision, Grand Chamber of the European Court of Human Rights, 16 December 2020.

288 Marko Milanovic, "ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia Re Crimea," *EJIL: Talk! (blog)*, 15 January 2021, https://www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/.

289 Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction," *op. cit. 13,* 391.

factual circumstances surrounding the annexation of Crimea by handling the alleged violations of ECHR presented to it.

1.3.1.3. Investment disputes in courts and arbitral tribunals against the Russian Federation

After the annexation of Crimea in 2014, there were numerous investors' claims under the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments to challenge Russia's actions of interfering with and expropriating their assets in Crimea.[290]

There are some investment disputes registered in PCA[291] as well as held by different foreign courts. Thus, for example, in 2022, French and Dutch courts found the Russian Federation in violation of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments due to its actions in Crimea after the 2014 annexation. The tribunals considered Crimea as part of Russian territory for the purposes of the mentioned agreement.[292]

The legal issue of territorial interpretation and non-recognition of illegally annexed territories within an investment arbitration is a complex one.[293] However,

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290 *Ibid.,* 396. Also, see provisions of "Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments" [in Ukrainian: "Uhoda mizh Kabinetom Ministriv Ukrayiny i Uryadom Rosiys'koyi Federatsiyi pro zaokhochennya ta vzayemnyy zakhyst investytsiy"], *Verkhovna Rada of Ukraine*, accessed 20 September 2021, https://zakon.rada.gov.ua/laws/show/643_101#Text.

291 "Cases | PCA-CPA", accessed 21 June 2022, https://pca-cpa.org/en/cases/. Thus, there are number of pending and past cases. Such as: *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation [2017-16] NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation* PCA Case No 2015-07; *Everest Estate LLC et al. v. The Russian Federation PCA Case No [2015-35] (i) Stabil LLC, (ii) Rubenor LLC, (iii) Rustel LLC, (iv) Novel-Estate LLC, (v) PII Kirovograd-Nafta LLC, (vi) Crimea-Petrol LLC, (vii) Pirsan LLC, (viii) Trade-Trust LLC, (ix) Elefteria LLC, (x) VKF Satek LLC,(xi) Stemv Group LLC v. The Russian Federation* PCA Case No 2015-36; *Financial Performance Holdings B.V. (the Netherlands) v. The Russian Federation* PCA Case No 2015-02; *JSC CB PrivatBank v. The Russian Federation* PCA Case No 2015-21; *Limited Liability Company Lugzor, (2) Limited Liability Company Libset, (3) Limited Liability Company Ukrinterinvest, (4) Public Joint Stock Company DniproAzot, (5) Limited Liability Company Aberon Ltd v. The Russian Federation* PCA Case No 2015-29; *PJSC Ukrnafta v. The Russian Federation* PCA Case No 2015-34.

292 Athina Papaefstratiou, "Crimea as Russian Territory for the Purposes of the Russia-Ukraine BIT: Consent v. International Law?", *Kluwer Arbitration Blog*, 5 February 2023, https://arbitrationblog.kluwerarbitration.com/2023/02/05/crimea-as-russian-territory-for-the-purposes-of-the-russia-ukraine-bit-consent-v-international-law/.

293 *Ibid.* For the detailed argumentation, see: Richard Happ and Sebastian Wuschka, "*Horror Vacui*: Or Why Investment Treaties Should Apply to Illegally Annexed Territories," *Journal of International Arbitration* 33, 3 (2016), https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2016014.pdf. For the short general overview, see, Asaf Niemoj, "The Protection of Investments in Disputed Territories: A Panel Hosted by BIICL's Investment Treaty Forum," *Kluwer Arbitration Blog*,

even if there is a conflict between the parties regarding territorial sovereignty, it does not automatically preclude an investment tribunal's jurisdiction to decide on the specific dispute concerning the treatment of investments in Crimea.[294] Therefore, the investment arbitration addresses the dispute from the perspective of who *de facto* has authority over the investments located in disputed territory without anyhow addressing the lawfulness or unlawfulness of the acquisition of the territory.

By all these cases and disputes brought to different courts and tribunals, it is shown how the status of Crimea as occupied was treated by the different dispute settlement authorities, except those established under UNCLOS. And it follows that the place of Crimea in the mentioned international disputes is not in the main scene and remains behind the curtains. It could be logically concluded that the reason for many of the initiated disputes is aggression of the Russian Federation against Ukraine, including the fact of the occupation of Crimea. However, the international dispute settlement mechanism is strict and predictable. All dispute settlement bodies are bound by its own jurisdiction as well as limited by it. Thus, despite the fact that Ukraine invoked matters related to the occupation of Crimea or caused by it, none of the dispute settlement bodies do not have jurisdiction to address the status of Crimea explicitly or implicitly. Therefore, any of the courts or arbitration did not deal with the status of Crimea. Such analysis shows that the status of Crimea as a part of disputes in other fields of law remains unanswered due to the subject matter jurisdiction of those dispute settlement bodies. The law of the sea dispute settlement is not anyhow different from dispute settlement under other treaty or convention mentioned above.

The next part deals on how the law of the sea tribunals established under the provisions of UNCLOS has acted and to what extent they are involving the occupation of Crimea.

1.3.2. Ukraine and the Russian Federation disputes under UNCLOS

Ukraine and the Russian Federation are State Parties to UNCLOS and by it are subject to the possibility of involvement of the compulsory dispute settlement procedures under UNCLOS.[295] Ukraine started its first proceeding against Russia under the UNCLOS in September 2016. The second one was started after Ukrainian ships were arrested by the Russian Federation in November 2018 resulting in Provisional Measures issues by ITLOS and ongoing proceedings under UNCLOS.

Thus, the following part is divided into two parts. The first one elaborates on the analysis of the *Coastal State Rights Dispute*, including Award on Preliminary Objections by Annex VII arbitral tribunal in regard of its jurisdiction. The second one – on the analysis of *Dispute Concerning the Detention of Ukrainian Naval Vessels*

17 May 2017, https://arbitrationblog.kluwerarbitration.com/2017/05/17/the-protection-of-investments-in-disputed-territories-a-panel-hosted-by-biicls-investment-treaty-forum/.

294 Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction," *op. cit. 13,* 398.

295 Ukraine ratified UNCLOS on 26 July 1999, the Russian Federation ratified on 12 March 1997.

and Servicemen that is under deliberation of Annex VII arbitral tribunal with a focus on ITLOS Provisional Measures in *Case Concerning the Detention of Three Ukrainian Naval Vessels* and recent Award on Preliminary Objections of Annex VII arbitral tribunal itself.

1.3.2.1. Coastal State Rights Dispute

Ukraine initiated the *Coastal State Rights Dispute* on September 16, 2016, by serving a Notification and Statement of Claim to the Russian Federation under UNCLOS.[296] The *Coastal State Rights Dispute* can be characterised as a case that serves to examine how sovereignty issues are presented in the law of the sea jurisprudence with respect to concurrent consideration of the unsettled sovereignty dispute over land territory. Consequently, this case presents simultaneously territorial sovereignty issues and issues related to the law of the sea.[297]

In this dispute Ukraine outlined various violations of Russia regarding Ukrainian coastal state rights in the Black Sea, the Sea of Azov, and Kerch Strait. Ukraine requested the tribunal to rule on several issues, including its exclusive rights to exploration and exploitation of natural resources, fishing rights, passage through the Kerch Strait, and protection of the marine environment, etc. Ukraine also requested the Arbitral Tribunal to order Russia to cease its alleged internationally wrongful actions in the mentioned areas, sought assurances from Russia that such actions would not be repeated and asked for full reparation, including restitution and monetary compensation, for the damages caused by these actions.[298]

After the Ukrainian submission of the dispute to Annex VII Arbitral Tribunal, it was argued that Ukraine would have no difficulty to identify a number of UNCLOS claims that are understood and applied in the context of the dispute.[299] However, under the principle of domination of land over the sea, before rendering the decision about Russia's alleged infringement of Ukrainian rights in the maritime zones adjacent to Crimea the arbitral tribunal would need a prior determination of to whom belongs the land territory of Crimea.[300]

According to Peter Tzeng,

> the UNCLOS tribunal could - although it would most certainly be controversial - treat Ukraine's sovereignty over Crimea as an established fact. After all, according to Ukraine, Russia violated the prohibition on

296 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 3-4, paras. 8-10.

297 Alexandre Pereira da Silva, "International Arbitration under Annex VII of the United Nations Convention on the Law of the Sea and the Mixed Disputes: Analysis of Recent Cases," *Brazilian Journal of International Law* 16 (2019): 90-91.

298 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 3-4, para 8-10.

299 Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *op. cit. 75,* 487-488.

300 *Ibid.*

the use of force and the principle of territorial integrity in annexing Crimea, and, under the principle of *ex injuria jus non oritur* ("facts which flow from wrongful conduct [cannot] determine the law").

Following this he also stated that the Crimea referendum was considered to be invalid by various organisations and many scholars took the same view. [301] So, there is no surprise that Ukraine provides in its submission that Ukrainian sovereignty over Crimea is a matter of a 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."[302]

In reply to Ukrainian submissions the Russian Federation submitted its Preliminary Objections on 19 May 2018.[303] Russia challenges the Annex VII tribunal's jurisdiction in variety of aspects arguing that the tribunal lacks jurisdiction over

- Ukraine's sovereignty claim;
- claims concerning activities in the Sea of Azov and the Kerch Strait;
- claims in light of the parties' declarations under Article 298(1) of UNCLOS;
- fisheries claims in light of Article 297(3)(A) of UNCLOS, fisheries, protection, preservation of the marine environment, and navigation in light of Annex VIII;
- pursuant to Article 281 of UNCLOS.[304]

Following this, the arbitral tribunal issued its Order on August 20, 2018, where it decided to address Preliminary Objections of the Russian Federation in a preliminary phase of the case.[305] After parties has submitted its writing statements[306] and hearing was conducted,[307] the Award Concerning the Preliminary Objections of the Russian Federation was issued on February 21, 2020.

This award partially brings light on the jurisdiction of the tribunal. Thus, according to the award, "the question the Arbitral Tribunal should address is whether a dispute that involves the determination of a question of territorial sovereignty would fall within the jurisdiction of a court or tribunal under Article 288, paragraph 1, of the Convention."[308] Article 288 para 2 is not used as there is not a special agreement or a

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301 For example, see: Peters, "The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum," *op. cit. 140.*

302 Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *op. cit. 75,* 487-488.

303 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation (19 May 2018).

304 *Ibid.,* Chapters 2-7.

305 *Coastal State Rights Dispute*, Procedural Order 3 Regarding Bifurcation of the Proceedings, (20 August 2018), 5.

306 *Coastal State Rights Dispute*: Preliminary Objections of the Russian Federation (19 May 2018), Written Observations and Submissions of Ukraine on Jurisdiction (27 November 2018), Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction (28 January 2019), Rejoinder of Ukraine on Jurisdiction (28 March 2019).

307 *Coastal State Rights Dispute*, Procedural Order 5 Regarding the Schedule for the Hearing on Jurisdiction (8 April 2019).

308 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 48, para 156.

separate treaty between the parties.[309]

The name of the dispute itself as *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* obviously involves the tribunal decision about a coastal state over Crimea. The arbitral tribunal "considers that the question as to which State is sovereign over Crimea, and thus the "coastal State" within the meaning of several provisions of the Convention invoked by Ukraine, is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine."[310]

UNCLOS provisions do not directly answer the question whether the dispute related to the determination of sovereignty over the territory falls under the tribunal's jurisdiction. Although, even before the dispute between Ukraine and Russia the law of the sea tribunal answered this question negatively in other decisions.[311] As UNCLOS does not provide neither definition of occupation nor sovereignty, it is extremely reasonable to mention that UNCLOS only deals with disputes regarding application or interpretation of the UNCLOS and everything that is out of this scope is out of the jurisdiction under UNCLOS unless parties made a special agreement between themselves. And even in that case the main provisions of the dispute should be within the interpretation or application provisions of UNCLOS.[312]

However, the arbitral tribunal notes that some articles of UNCLOS do have provisions related to sovereignty and by this it adds another argument of determining a territorial sovereignty dispute as not a dispute concerning the interpretation or application of UNCLOS. This determination is done by interpreting and applying the provisions in Articles 297 and 298 UNCLOS. Article 297 is dealing with limitations of certain categories of disputes relating to the exercise of sovereign rights and jurisdiction in EEZ while Article 298 provides optional exceptions for a law of the sea court's of tribunal's jurisdiction that could be chosen by states. A sovereignty dispute is included neither in the limitations, nor in the optional exceptions to compulsory dispute settlement procedures. The above-mentioned supports the view that the drafters of the UNCLOS did not consider a sovereignty dispute to be "a dispute concerning the interpretation or application of the Convention." It means that a sovereignty dispute may not be regarded as a dispute concerning the interpretation or application of the Convention.[313] The same explanation the tribunal took in *Chagos Marine Protected Area Arbitration.*[314]

Therefore, for the arbitral tribunal it is important that its decisions should not be dependent on a finding of sovereignty, nor should anything in its decisions be

309 Volterra et al., *op. cit. 42,* 616-617.

310 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 48, para 154.

311 *Chagos MPA Arbitration*, Award, *op. cit. 27,* 86, para 206; *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility (29 October 2015): 59-60, para 153.

312 In this case the jurisdiction would be granted by Article 288(2) UNCLOS.

313 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 48-49, para 156.

314 *Chagos MPA Arbitration*, Award, *op. cit. 27,* 86, para 206 and 89, para 215.

understood to imply a view with respect to questions of land sovereignty.[315] The tribunal in the dispute between Ukraine and Russia recalls the award in *The South China Sea Arbitration*. According to this award, Article 288 is not applicable in the case when the tribunal should first expressly or implicitly render a decision on sovereignty and/or the actual objective of the claim is to make a preferable position in the existing dispute over sovereignty to be able to resolve the claims.[316]

Thus, logically, Ukraine rejects the relation of the *Coastal State Rights Dispute* to a sovereignty dispute over Crimea. It argues that there is no sovereignty dispute over Crimea at all. To allow the tribunal to render a decision in this matter, in case it would find one, Ukraine states that even if the tribunal finds that the dispute exists then such dispute is ancillary to the dispute concerning the interpretation or application of UNCLOS. In opposition, the Russian Federation insists that there is a sovereignty dispute over Crimea, and it could not be considered ancillary to the dispute concerning the interpretation or application of UNCLOS.[317] The issue on which Ukraine and Russia agree on is a dispute that involves the determination of a question of territorial sovereignty that would not fall within the jurisdiction of a tribunal.[318]

In consideration of the arguments presented by the parties the tribunal assumed that the real issue to decide in this case is "whether there exists a sovereignty dispute over Crimea, and if so, whether such a dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine."

To be able to determine whether a sovereignty dispute exists, the tribunal applies the determination of what is "a dispute". This definition is considered as a fixed term in the jurisprudence of international courts and tribunals. According to it, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties. It is possible to presume that a dispute exists "if the claim of one party is positively opposed by the other and that the two sides must 'hold clearly opposite views' concerning the question of the performance or non-performance of certain international obligations."[319]

The arbitral tribunal evaluates various submissions of the Russian Federation relating to the sovereignty claim over Crimea and takes into account that such submissions are consistently opposed by Ukraine. Due to this, both states are holding clearly

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315 *Ibid.,* 49, para 160, citing *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, *op. cit. 311,* 59, para 153. It is also worth mentioning that the same approach was previously implied in *Guyana v. Suriname Arbitration*. Suriname contested that tribunal "does not have jurisdiction to determine any question relating to the land boundary between the Parties". The Tribunal rejected this argument because it found that its decision had "no consequence for any land boundary that might exist between the Parties". Consequently, it was able to determine the starting point of the maritime boundary and proceed with maritime delimitation between countries. *Guyana v. Suriname*, Award (17 September 2007): 98, para 308.

316 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8*, 49, para 160.

317 *Ibid*., 50, para. 161.

318 *Ibid*.

319 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 50, para. 163.

opposite views on the question of the legal status of Crimea, so the sovereignty dispute exists. Thus, the tribunal goes further to assess whether the Russian Federation's claim over Crimea is inadmissible and/or implausible.

The first argument that the claim is inadmissible is based on the recognition that the alteration of the legal status of Crimea cannot be entertained in the dispute. It is the so-called *international law principle of non-recognition*. The tribunal states that it neither recognises alteration nor it is in favour of non-recognition. Such a neutral position on the matter is based that the tribunal recognises that there is a legal dispute, but it does not have jurisdiction to decide it.[320]

The second argument for the claim's inadmissibility is applying *principles of good faith and estoppel*. The tribunal finds that a dispute concerning sovereignty over Crimea has arisen since March 2014. Based on the earlier mentioned neutral position of the tribunal, the changes in the legal status of Crimea does not fall under its jurisdiction.[321]

Following this, the tribunal rejects arguments of Ukraine that the Russian Federation's claim of sovereignty fails under the plausibility test. According to the tribunal: it "is not convinced by the plausibility test as advanced by Ukraine. Even if such a test exists, Ukraine has failed to state the content or standard of such a test in sufficiently clear terms."[322]

Some remarks should be made in regard to the application of the non-recognition principle of the arbitral tribunal in this case. This application can be considered as contradictory. It could be seen that the arbitral tribunal in the *Coastal State Rights Dispute* acknowledges the fact of a dispute between Ukraine and the Russian Federation to certain extent despite the principle of non-recognition. Indeed, the words are carefully chosen and placed, but it is hard to deny that the aim of the obligation of non-recognition is to ensure that the fact of the illegality of the situation is maintained and to prevent any actions that may show the recognition of its legality.[323] The tribunal in the *Coastal State Rights Dispute* acknowledges that UNGA Resolution 68/262 calls upon states not to recognise any alteration of Crimea's status. But it "does not consider that the UNGA resolutions […] can be read to go as far as prohibiting it from recognising the existence of a dispute over the territorial status of Crimea."[324] Moreover, "the mere recognition of the objective fact of the existence of a dispute over Crimea in the sense that the claim of one party is positively opposed by the other party cannot be considered to contravene the UNGA resolutions."[325]

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320 *Ibid*., 51-55, paras. 167-178.

321 *Ibid*., 55-56, paras. 179-182.

322 *Ibid*., 57, para. 187.

323 For the obligation of non-recognition, see: Talmon, "The Duty Not to "Recognise as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: an Obligation without Real Substance?" *op. cit. 246,* 99–125.

324 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8*, 58-59, para. 175.

325 *Ibid.,* para. 177.

Therefore, the arbitral tribunal "recognises […] reality without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong. In this regard, the Arbitral Tribunal recalls the statement of the ICJ in *East Timor* that Portugal, similarly to the Russian Federation in this case, "has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute".[326] While the tribunal puts its arguments and focus on the UNGA resolutions, its interpretation and application of obligation of non-recognition is unclear.

If the non-recognition principle is applied, there should be no dispute because the actions of the Russian Federation are considered as a serious breach of the prohibition of aggression and illegal use of force. Thus, it could not prevent Ukraine from defending its legal rights. However, if a non-recognition principle is not applicable in this case, then, indeed, there is a clear dispute between these two parties regarding the status of Crimea, and the Tribunal lacks jurisdiction to rule on this matter. Or as another option, tribunal interprets obligation of non-recognition as it allows for *de-facto recognition* not of the illegal act itself but the consequences of such act.[327]

In this specific context of the Crimean occupation, the obligation of non-recognition is especially significant.[328] It is arguable whether the initial illegality can ever become the source of legal rights.[329] As we see, the consequences of the Crimean occupation (initial illegality) had their own impact on dispute settlement under UNCLOS.

The arbitral tribunal faced quite a challenging situation. In the *Coastal State Rights Dispute*, if it would not have chosen such a neutral position in respect of the status of Crimea, either Ukraine or the Russian Federation would be the ones who would not accept its ruling. The essential characteristic of the settlement of disputes is that jurisdiction shall be based on consent. The legal order for the ocean and the compulsory dispute settlement system depends on the continued willingness of States to participate in it, uphold it, and comply with it. Considering the time of the award, it was just a couple years ago when China in *the South China Sea Arbitration* adopted a position of non-acceptance and non-participation in the proceedings. Consequently, it seems that the arbitral tribunal intentionally decided to contradict itself with non-recognition principle by accommodating both parties of the case: Ukraine and the

326 *Ibid.,* para. 178.

327 Gorbun, "Crimean Occupation and UNCLOS Dispute Settlement: Navigating Territorial Sovereignty and Non-Recognition," *op. cit. 217,* 25-26.

328 This was highlighted in the International Law Commission's commentaries to the 2001 Draft Articles, which analyzed State practices. See, "Articles on State Responsibility. How Does Law Protect in War?" *International Law Commission. Online Casebook,* accessed 17 September 2023, https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility; Diane Desierto, "Non-Recognition," *EJIL: Talk!* (blog), 22 February 2022, https://www.ejiltalk.org/non-recognition/.

329 Ian Brownlie, *International Law and the Use of Force by States* (Oxford, 1963; online edn, Oxford Academic, 22 Mar. 2012), 422.

Russian Federation. [330] Such a contradiction secured the acceptance of the decision by both parties.

When it is clear that a sovereignty dispute over Crimea exists and such a fact is established by the arbitral tribunal, Ukraine has another argument to make the tribunal decide the case from the side that Ukraine is a coastal state. Ukraine also claims that even if there is a sovereignty dispute over Crimea, such dispute is ancillary to the determination of the law of the sea dispute.[331] Tribunal finds that the fact of determination of the coastal state over the territory cannot be considered as "a minor issue of territorial sovereignty". [332] That is exactly the issue of territorial sovereignty.

Thus, in paragraph 197 of the Award on Preliminary Objections in the *Coastal State Rights Dispute* the tribunal concludes

> In light of the foregoing, the Arbitral Tribunal concludes that pursuant to Article 288, paragraph 1, of the Convention, it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. As a result, the Arbitral Tribunal cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea.[333]

In the next paragraph, paragraph 198 of the same award, the tribunal specifies that despite the conclusion that it lacks jurisdiction, it "affects many, but not all, of the claims articulated in different forms in Ukraine's Notification and Statement of Claim and Ukraine's Memorial." [334] And consequently, the tribunal in the *Coastal State Rights Dispute* takes the approach used by another Annex VII arbitral tribunal in *the South China Sea Arbitration* decision. It states that "there is no need to reject the whole dispute based on taking attention to one particular aspect of a dispute merely because that dispute has other aspects."[335] Thus, even taking into consideration that the tribunal cannot rule on any claims of Ukraine which are dependent on the premise of Ukraine being sovereign over Crimea, this award does not influence all the submissions made by Ukraine, therefore, the tribunal asks Ukraine to submit its revised Memorial.

After the Award on Preliminary Objections in the *Coastal State Rights Dispute* was released on February 21, 2020, on the same day the press service of the Ministry of

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330 *The South China Sea Arbitration*, Award on Jurisdiction and Admissibility, *op. cit. 311,* para. 10; *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), Award, (16 July 2016): para. 53. Gorbun, "Crimean Occupation and UNCLOS Dispute Settlement: Navigating Territorial Sovereignty and Non-Recognition," *op. cit. 217,* 26.

331 *Coastal State Rights Dispute,* Award on Preliminary Objections, *op. cit. 8,* 50, para. 161.

332 *Ibid.,* 58-59, paras. 191-196.

333 *Ibid.,* 59, para. 197.

334 *Ibid.,* 59, paras. 197-198, (emphasise is added by the author).

335 *The South China Sea Arbitration*, Award on Jurisdiction and Admissibility, *op. cit. 311,* 59, para. 152.

Foreign Affairs of Ukraine made a comment regarding the confirmation by the arbitration tribunal of its jurisdiction in the case of Russia's violations of UNCLOS. It describes the award as that the award confirms the existing international consensus on the non-recognition of the illegal annexation of Crimea by the Russian Federation and does not support Russia's claim to sovereignty. Moreover, the Ministry of Foreign Affairs of Ukraine also emphasises that "today's decision is a direct denial of Russia's position that its unilateral actions are protected from legal appeals."[336]

The most interesting part here, that the relevant paragraph 178 of the tribunal's award states as follows:

> It must be stressed that the Arbitral Tribunal's recognition of the existence of a dispute over the territorial status of Crimea in no way amounts to recognising any alteration of the status of Crimea from the territory of one Party to the other, or to "any action or dealing that might be interpreted as recognizing any such altered status." Neither would it imply that the Russian Federation's actions toward and in Crimea were lawful. In fact, the Russian Federation has not asked the Arbitral Tribunal to find that Crimea belongs to the Russian Federation, nor that it acted lawfully with respect to Crimea. On the contrary, the Russian Federation simply asks the Arbitral Tribunal to recognise the reality that it claims sovereignty over Crimea, which claim is disputed and opposed by Ukraine. The Arbitral Tribunal recognises this reality without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong.

From the statement above, it is not clear how it is presented as "a direct denial of Russia's position that its unilateral actions are protected from legal appeals", when the tribunal simply takes a neutral approach. It neither supports Ukraine's arguments, nor Russian ones. It adds certain legal weight to the factual situation between Ukraine and the Russian Federation. Because instead of applying the principle of non-recognition and proceeding with Ukrainian submissions as a coastal state, the tribunal directly says that it acknowledges a dispute between the parties. Obviously, as a result, it goes to the question of what the scope of the non-recognition principle is.[337] However, it

336 "Comment by the Ministry of Foreign Affairs of Ukraine regarding the Arbitral Tribunal's confirmation of jurisdiction in the case concerning Russia's violation of the UN Convention on the Law of the Sea in the Kerch Strait and the Azov Sea" [in Ukrainian: "Komentar MZS shchodo pidtverdzhennya Arbitrazhnym Trybunalom yurysdyktsiyi u spravi pro porushennya Rosiyeyu Konventsiyi OON z mors'koho prava v Kerchens'kiy prototsi ta Azovs'komu mori"], *The Ministry of Foreign Affairs of Ukraine*, 21 February 2020, https://mfa.gov.ua/news/komentar-mzs-shchodo-pidtverdzhennya-arbitrazhnim-tribunalom-yurisdikciyi-u-spravi-pro-porushennya-rosiyeyu-konvenciyi-oon-z-morskogo-prava-v-kerchenskij-protoci-ta-azovskomu-mori; "The Arbitral Tribunal will consider Russia's violations of the UN Convention on the Law of the Sea in the Kerch Strait and the Sea of Azov" [in Ukrainian: "Arbitrazhnyy trybunal roz·hlyane porushennya Rosiyeyu Konventsiyi OON z mors'koho prava u Kerchens'kiy prototsi ta Azovs'komu mori"], *Black Sea News*, February 21, 2020, https://www.blackseanews.net/read/16106.

337 Discussed later in more detail.

would not change a factual situation: all submissions related to Ukraine as a coastal state are left out of the jurisdiction under UNCLOS. Thus, the question that could be asked: what are those claims?[338] Whether the provision of UNCLOS is within the chapter providing coastal state rights and obligation could be applied without naming a coastal state? In this respect, the jurisprudence is given the opportunity to interpret and apply some articles of UNCLOS within the next case that Ukraine submitted under Annex VII of UNCLOS. Thus, the next part deals with the relevant dispute.

1.3.2.2. Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen

While the prehistory of the *Coastal State Rights Dispute* was illustrated earlier, this dispute became another consequence of the occupation. That is why it is important to briefly state what was the background of the situation, what were the events in the dispute, what was happening after the legal dispute between Ukraine and the Russian Federation under provisions of UNCLOS was initiated.

On April 1, 2019, Ukraine began arbitral proceedings pursuant to Annex VII of UNCLOS against Russia in relation to an incident which took place in November 2018.

According to Ukraine, three of its naval vessels were on their way from the port of Odesa in the Black Sea to the port of Berdyansk in the Azov Sea, with the intention of crossing the Kerch Strait.[339] The Russian Coast Guard blocked their entrance into the strait. Ukrainian warships have turned back, despite that, they were followed by the Russians vessels and captured by them afterwards. Ukrainian vessels and their teams were restrained to the Russian port of Kerch as a part of the establishment of the discretionary procedures by the Russian Coast Guard. From the view of the Russian Coast Guard, Ukrainian vessels and their teams were caught based on the concern that they wrongfully crossed the Russian State Border.[340]

In its Notification and Statement of Claim, Ukraine claimed that Russia breached its obligations under UNCLOS by seizing and detaining Ukrainian naval vessels and crew members and requested the tribunal to order Russia to release the vessels and servicemen, and to provide guarantees of non-repetition and full reparation.[341]

On April 16, 2019, Ukraine filed a Request for the prescription of provisional measures to ITLOS.

Ukraine and the Russian Federation have explicitly picked ITLOS in regard to

338 Clearly, there should be a mention of UNCLOS articles concerning environmental protection, but what other provisions are relevant in this context?

339 It should be noted that there is no other way to go from the first port to another without using the Kerch Strait.

340 Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2019", *op. cit. 49,* 611–613.

341 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Award on the Preliminary Objections of the Russian Federation (27 June 2022), 2-3, para. 7.

the prompt release of detained vessels and/or crews.[342] Although, even without those declarations, the jurisdiction of ITLOS under Article 292 is mandatory. It implies that all States Parties to UNCLOS without any difference to whether they made declarations under Article 287 UNCLOS or not and whether they referred to ITLOS in those declarations or not, "*can* be the applicants and *will* be brought as the respondents in the framework of Article 292 prompt release proceedings."[343] However, the case *Concerning the Detention of Three Ukrainian Naval Vessels* was not initiated as a prompt release case.

From a quick glimpse, the question that would arise is, how the part of the dispute submitted to the dispute settlement under Annex VII ended up in the ITLOS? And the answer can be easily found in Article 290(5) UNCLOS. According to it:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

This means that there was a need to preserve the respective rights of the parties to the dispute without waiting when Annex VII would be instituted. In this case, the ITLOS was required to rule over the *prima facie* jurisdiction and prescribe any provisional measures that it considers as appropriate given to the existing circumstances of the case.

ITLOS in its Order as regard to its *prima facie* jurisdiction notes that both Ukraine and the Russian Federation are parties to the Convention and have chosen an arbitral tribunal as the main way to resolve disputes related to the Convention.[344]

It by 19 votes to 1 decides that:

– the Russian Federation shall immediately release the Ukrainian naval vessels and 24 detained Ukrainian servicemen, return them to Ukraine;

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342 "Chronological lists of ratifications of accessions and successions to the Convention and the related Agreements," *Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations*, accessed 19 January 2021, https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.

343 Karaman, *op. cit. 46*, 43.

344 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS*, op. cit, 23,* 292-293, paras. 33-34.

– Ukraine and the Russian Federation shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.[345]

It is impossible not to make a remark that Ukraine has filed a case against Russia's actions having the purpose to urgently release Ukrainian sailors detained illegally and Ukrainian vessels seized by the Russian Federation.[346] However, the expectations for the decision of the ITLOS were high because among other things, the decision might have put some clarity on the debate over what is the current state of the relations between Ukraine and Russia in terms of international law – the ongoing armed conflict or "peaceful" coexistence?[347]

Such debate had its effect on the time of the submission by Ukraine of its dispute under UNCLOS. The explanation can be found is that in relatively similar case, in particular, *the Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation)[348] the time from the event to provisional measures was a bit more than 2 months, while in the case between Ukraine and the Russian Federation it took much longer.

In *the Arctic Sunrise Case* the Netherlands has sued Russia after Russian special forces seized the vessel "Arctic Sunrise" with GreenPeace activists protesting in the Barents Sea on September 19, 2013. Thus, ITLOS received a lawsuit from the Netherlands, under whose flag the hijacked ship was flying, on October 21, 2013, and on November 22, 2013, ITLOS made its decision, deciding that the activists and the ship should be released.

In *Case concerning the detention of three Ukrainian naval vessels*, the seizure and detention of Ukrainian naval vessels "Berdyansk", "Nikopol" and "Yani Kapu", and their crews happened on November 25, 2018. However, Ukraine submitted the Request for the prescription of provisional measures to ITLOS only on April 16, 2019 and the Order by ITLOS was issued on May 25, 2019.

Now if to consider the dates in *the Arctic Sunrise Case* and dates in *Case concerning the detention of three Ukrainian naval vessels*, it took approximately two months from the date of the seizing vessel "Arctic Sunrise" with GreenPeace activists till the decision about their release and it took nearly 6 months for Ukrainian case. It is clear from the dates that ITLOS took approximately one month to render its orders in both cases. However, in *Case concerning the detention of three Ukrainian naval vessels,* submission of the dispute had been delayed for approximately 4 months.

Such delay was caused not only by Russians who were postponing their answer about holding the formal consultations on the lawsuit concerning Ukrainian naval

345 *Ibid.*, 311-313, para. 124.

346 Serhii Sydorenko, "The Court on War and Peace: What to Expect from the UN Tribunal in the Case of Russia's Attack on the Azov" [in Ukrainian: "Sud pro viynu ta myr: choho chekaty vid trybunalu OON u spravi pro napad RF na Azovi Sud pro viynu ta myr: choho chekaty vid trybunalu OON u spravi pro napad RF na Azovi"], *Yevropeiska Pravda*, April, 16, 2019, https://www.eurointegration.com.ua/articles/2019/04/16/7095261/.

347 *Ibid.*

348 *Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, ITLOS.

vessels but also the lack of support within the Ukrainian government to submit this case at all. Initially it was considered that the case would be lost, however, at the end wording of the lawsuit was changed and improved and the lawsuit was submitted.[349]

Throughout the whole text of the Request of Ukraine for the Prescription of Provisional Measures there are never mentioned the word "prisoners of war", "aggression" or anything that would lead for interpretation to international humanitarian law. Moreover, the possibility of using such wording was the main reason why there were huge doubts about effectiveness to seek the decision by ITLOS and seek for settlement of the dispute under provisions of UNCLOS.[350]

The Order by ITLOS shows a certain level of discussion that occurred among the judges. Thus, two judges submitted declarations and another two submitted separate opinions, while one submitted a dissenting opinion.[351] The discussion also occurred within the legal scholarship. Some believes that ITLOS has shown a willingness to adopt an expansive approach when granting provisional measures[352] and that the military activities exception under Article 298(1)(b) UNCLOS was interpreted too narrowly.[353] This order is the first time when ITLOS gives its determination to military activities within Article 298(1)(b) UNCLOS.[354]

However, while the majority puts the main emphasis on interpretation and application of military exception and its distinction with the law enforcement activities, there are some remarks to be made in respect of waters where such activities occurred.

The ITLOS Order does not mention or have any reference to Crimea. The references are only in the judges' declarations and opinions.

Thus, Judge Kittichaisaree refers to the letter of the Russian Federation to ITLOS on April 30, 2019, where Russia disagrees with Ukraine's position on the status of Kerch Strait and Crimea. Russia claims that issues of sovereignty over Crimea should

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349 Sydorenko, *op. cit. 346.*

350 *Ibid.*

351 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS, *op.cit, 23,* Declaration of Judge Kittichaisaree, Declaration of Judge Lijnzaad, Separate Opinion of Judge Jesus, Separate Opinion of Judge Lucky, Separate Opinion of Judge Gao and Dissenting Opinion of Judge Kolodkin.

352 Ishii, "Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation): Provisional Measures Order (ITLOS)," *op. cit. 82*: 1148; Ishii, "The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order," *op. cit. 82*; Saulius Katuoka and Skirmante Klumbyte, "Kerch Strait Incident in the Light of UNCLOS," *Problems of Legality* 145 (2019): 225-243.

353 Kraska, "Did ITLOS Just Kill the Military Activities Exemption in Article 298?" *op. cit*. 82. For the assessment of the Order from the perspective of the military aspect of the incident and the existence of a mixed dispute see, Shi and Yen-Chiang, *op. cit. 75*, 281-288.

354 Ishii, "Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation): Provisional Measures Order (ITLOS)," *op. cit. 82,* 1147; Oral, *op. cit. 83,* 505. For more detailed interpretation of military activities under Article 298(1)(b) UNCLOS, see: Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *op. cit. 75,* 229-238.

not be addressed by ITLOS. Judge Kittichaisaree further mentions that during a public hearing on May 10, 2019, Ukraine has correctly argued that regardless of the legal status of the Kerch Strait and Crimea, Russia's actions have violated the immunity of warships and its crews under UNCLOS and customary international law.[355]

Judge Lijnzaad is concerned about whether the current case truly involves a dispute concerning the interpretation and application of UNCLOS, or if it involves other international laws that might not fall under ITLOS's jurisdiction. Ukrainian diplomatic notes sent to Russia suggest the potential applicability of other legal rules. One of the notes refers to a violation of Article 33 of the UN Charter and the right to self-defence under Article 51 of the UN Charter and to the Third Geneva Convention of 1949 concerning the treatment of prisoners of war for the detained crew members.[356]

Judge Gao also mentions those Ukrainian diplomatic notes as well as acknowledges that before submitting the Request for provisional measures to ITLOS, Ukraine had already brought the matter to the United Nations Security Council and ECtHR on November 26, 2018.[357] Only events involving the use or threat of force in potential violation of Article 2(4) of the United Nations Charter can be referred to the UN Security Council for resolution. Other disputes related to the Convention are usually resolved through diplomatic or judicial means.[358] He mentions Award in *"ARA Libertad" case* where "the firing of target shots against a naval vessel is therefore tantamount to use of force against the sovereignty of the State whose flag that vessel flies". Consequently, such activities indicate the presence of military activities.[359] He believes that an objective assessment of the activities should consider the international actions, official positions, and legal documents of both Parties and regrets that the Order does not consider these essential facts and available evidence.[360]

Judge Jesus observes that while ITLOS solely focuses on determining whether the actions of the Russian Federation are military activities or law enforcement activities to decide on its jurisdiction, there is a need also to consider both the actions of the Russian Federation during the arrest and detention of the Ukrainian warships and the activities of the Ukrainian warships exercising their right of passage through territorial waters.[361]

Judge Kolodkin submitted its Dissenting Opinion. He believes that the incident on November 25, 2018, included military activities from both states. He mentions that Ukraine officially characterises its relations with the Russian Federation as an armed conflict before the incident took place and continues to do so after it. According to him, Ukraine accused Russia of "aggression" against it, and therefore, Ukraine deliberately

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355 *Detention of three Ukrainian naval vessels,* Declaration of Judge Kittichaisaree, 314, para. 2.

356 *Ibid.*, Declaration of Judge Lijnzaad, 331, para 5.

357 *Ibid.*, Separate Opinion of Judge Gao, 352, para. 31.

358 *Detention of three Ukrainian naval vessels,* Separate Opinion of Judge Gao, 352, para. 32.

359 *Ibid.*, 352, para. 33.

360 *Ibid.*, 353, paras. 37-38.

361 *Detention of three Ukrainian naval vessels,* Separate Opinion of Judge Jesus, 333, paras. 2-3.

sent its warships to pass through waters controlled by the "enemy" coast guard and military forces.[362]

Judge Lucky agrees with the Order and provides his observations on the Russian Federation's non-participation.[363] He also notes that based on the evidence presented to ITLOS, it seems that the events of November 25, 2018, are a law enforcement activity. He points out that because the Russian Federation has not provided any substantial evidence, such events could be law enforcement or military in nature. Therefore, he believes it falls within the jurisdiction of the Annex VII arbitral tribunal to decide conclusively on this matter.[364]

Coming back to the dispute instituted under Annex VII UNCLOS, Russia decided to finish with its non-participation based on their own evaluation of jurisdiction of law of the sea tribunals under UNCLOS. Thus, in reply to Ukrainian submissions under Annex VII of UNCLOS the Russian Federation submitted its Preliminary Objections on August 24, 2020.[365] Russia challenges the Annex VII tribunal's jurisdiction in variety of aspects arguing that the tribunal lacks jurisdiction due to:

- the military activities exception;
- UNCLOS does not provide for an applicable immunity, alleged breaches of the ITLOS Provisional Measures Order and alleged aggravation of the dispute because it is not under article 279 of UNCLOS.
- failure to comply with article 283 requirement of an expeditious exchange of views on settlement of the dispute.[366]

Following this, the arbitral tribunal issued its Order on October 27, 2020 accompanied with the Dissenting Opinion by Judge Eiriksson, where the arbitral tribunal decided to address Preliminary Objections of the Russian Federation in a preliminary phase of the case.[367]

After parties has submitted its writing statements[368] and hearing was conducted[369]

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362 *Detention of three Ukrainian naval vessels*, Dissenting Opinion of Judge Kolodkin, 361, paras. 10-11.

363 *Detention of three Ukrainian naval vessels*, Separate Opinion of Judge Lucky, 340, para. 5.

364 *Ibid.*, 344–345, paras. 20-21.

365 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation), Preliminary Objections of the Russian Federation, *op. cit. 20*

366 *Ibid.,* Table of Contents.

367 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen,* Procedural Order 2, (27 October 2020), 5. Also see, Dissenting Opinion to Procedural Order 2 (27 October 2020) by Judge Eiriksson, p.1. He agreed with the decision in but did not share the reasons behind the Procedural Order decision.

368 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*: Preliminary Objections of the Russian Federation (24 August 2020), Observations of Ukraine on the question of bifurcation (7 September 2020), Response of the Russian Federation to the observations of Ukraine on the question of bifurcation (21 September 2020), Reply of Ukraine to the response of the Russian Federation on the question of bifurcation (28 September 2020), Written observations and submissions of Ukraine on the Preliminary objections of the Russian Federation on Preliminary objections (27 January 2021).

369 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Procedural Order 3 (17 September 2021).

the Award on the Preliminary Objections of the Russian Federation was issued on June 27, 2022.

By this award, the tribunal determines that the events from November 25, 2018 until a certain point after the Ukrainian naval vessels left anchorage are considered "military activities", while the events that occurred after the arrest of the Ukrainian naval vessels are not considered "military activities". The applicability of Article 298(1) (b) UNCLOS and, therefore, tribunal's jurisdiction depends whether it is "military activities" or not. The exact point at which the events stopped to be "military activities" will be decided later with the merits of the case. Some other objections of the Russian Federation were left to be decided on the merits of the case.[370]

Yet there is not a lot of legal scholarship written on this award.[371] However, it is possible to guess that the main focus will be on determination of military activities and the arbitral tribunal's approach to do so.

Thus, this dispute included ITLOS Order, Annex VII Arbitration Award on Preliminary Objects and future Award on Merits. They all are mostly based on the events that happened rather than questioning the coastal state of Crimea. Exactly such focus gave the possibility for the dispute to be resolved under UNCLOS, excluding military activities as an exception to the jurisdiction. In its submissions, Ukraine did not mention any maritime zones generated by Crimea but rather emphasised activities that were done by the Russian Federation.

The arbitral tribunals in the *Coastal State Rights Dispute* and *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* would not answer on the direct question whether the status of Crimea has changed or not. This is obviously not their jurisdiction to do so. However, the question which remains, to which extend or how many claims of Ukraine as a coastal state has to wait its perfect moment to be decided? Thus, the next two chapters addresses the question which rights and obligations concerning the waters around Crimea, as outlined in UNCLOS, directly or indirectly depend on Crimea's status and how the determination the Crimean occupation can be solved so Ukrainian coastal state rights can be adjudicated within the provisions provided by UNCLOS.

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370 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation), Award on Preliminary Objections, *op. cit. 341,* 77-78, para. 208.

371 Tanaka, "Military Activities or Law Enforcement Activities? Reflections on the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen," *op. cit. 81*; Alexander Lott, "Reflections on the Kerch Strait Incident Award from the Military Activities Exception Perspective", *Brill Blog,* August 9, 2022, https://blog.brill.com/display/post/guest-post/reflections-on-the-kerch-strait-incident-award-from-the-military-activities-exception-perspective.xml.

CHAPTER II. MATTERS COVERED BY THE COMPULSORY DISPUTE SETTLEMENT PROCEDURES UNDER UNCLOS BETWEEN UKRAINE AND THE RUSSIAN FEDERATION

Article 288 of UNCLOS clearly establishes the matters covered for the jurisdiction within compulsory procedures entailing binding decisions under UNCLOS as "any dispute concerning the interpretation or application of this Convention." This dispute should be a dispute over the interpretation or application of Articles of UNCLOS. It is well-known that Articles of UNCLOS establish rights and obligations of its State Parties. Therefore, Chapter II provides a detailed analysis of what Articles of UNCLOS can be applicable in waters generated by Crimea with perspective of rights and obligations of UNCLOS State-parties based on the maritime zones and legal regimes established in it. This Chapter also examines situations where there's a dispute about interpreting and applying rights and obligations of states under Articles of UNCLOS, but Section 3 of Part XV UNCLOS comes into play, limiting or excluding such disputes from jurisdiction under UNCLOS in its compulsory procedures entailing binding decisions.

2.1. Rights and obligations of coastal states in the Black Sea

While possession of the land since the beginning of times was always in arguments or disputes, the fact that the sea belongs to mankind was firstly stated in the famous work of Hugo Grotius *Mare Liberum* (The Freedom of the Seas) in 1609.[372] Much later, in November 1967, Arvid Pardo, the ambassador of Malta at the United Nations, declared that "the concept of the common heritage of mankind" is extended to the seabed and ocean floor beyond national jurisdiction.[373] The international rules for determining sovereignty over maritime areas have grown quite differently from the determining sovereignty over land territories.[374]

There is a well-known principle of "land dominates the sea."[375] Since the time of

372 Yasuaki Onuma, "Hugo Grotius", *Encyclopædia Britannica*, August 24, 2020, https://www.britannica.com/biography/Hugo-Grotius. Also, some interesting information in this regard can be found in Mónica Brito Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas", *Journal of the History of Ideas* 64, 3 (2003): 361-377.

373 Alan Beesley, "Grotius and the New Law", *Ocean Yearbook Online* 18, 1 (2004): 103; Arvid Pardo, "Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Seabed and the Ocean Floor, and the Subsoil thereof, underlying the High Sea Beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interest of Mankind," Agenda item presented to the First Committee of the 22nd United Nations General Assembly, 1 November 1967.

374 Strating, *op. cit. 223,* 452.

375 Bing, "The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge," *op. cit. 74*, 1. The unusual approach to the principle of the domination of the land over the sea was taken by Arvid Pardo, the ambassador of Malta in 1967. He concluded that "from the sea the vastest land masses can be dominated, and the

Grotius, it was recognised that a portion of the world's seas could be obtained "as belonging to a territory" to the extent that "those who sail in that part of the sea can be compelled from the shore as if they were on land."[376] Such a principle was enormously supported by the different jurisprudence. The first reference to it was made in the case in 1909 between Norway and Sweden *Grisbadarna Maritime Frontier*. The Award states that "the maritime territory is essentially an appurtenance of a land territory". Moreover, "[i]t is the land which confers upon the coastal State a right to the waters off its coasts."[377]

Nowadays it is obvious that "[m]aritime areas are subject to the dominium of a coastal state by virtue of its land territory."[378] UNCLOS established a new legal balance between the interests of coastal states and other states. Initially motivated by security concerns and later by economic interests, this allocation of maritime areas to states is now firmly established within the UNCLOS zoning system.[379] This system is considered as customary international law.[380]

So, maritime zones depend on the status of the land, while maritime rights and obligations depend on the zone established. Thus, the further evaluation is made by applying the maritime zone's regime provided by UNCLOS and the impact that determination of coastal state can have on it within the perspective of occupation of Crimea and dispute settlement under UNCLOS.

As it is clear from Chapter I the jurisdiction of a law of the sea courts or tribunal

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sea in turn is dominated and can be dominated, from the sea floor." Such a situation might happen if "a technology that permits the physical occupation and military use of large areas of the sea-bed beyond the continental shelf" will be available to humankind. This view is interesting, but it seems not anymore relevant as on 19 June 2023, the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction was adopted. See, "Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction", accessed 2 August 2023, https://www.un.org/bbnj/; General Assembly Resolution A/CONF.232/2023/4 on Intergovernmental Conference on an International Legally Binding Instrument Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, further resumed fifth session New York, 19 and 20 June 2023. For the view of Arvid Pardo see, UN GAOR, 22nd Session, First Committee, 1515th Meeting, 1 November 1967, UN Doc. A/C.1/PV.1515 (1967): para. 47, 57.

376 Bing, "The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge," *op. cit. 74*, 6.

377 *Fisheries case,* Judgement of December 18th, I95I: I949 I.C.J. Reports 1951, p. 133; *Aegean Sea Continental Shelf,* Judgment, I.C.J. Reports 1978, 36; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, I.C.J. Reports 1982, 61; and all maritime delimitation decisions of the ICJ and other courts and tribunals, including *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61.

378 Nuno Marques Antunes and Vasco Becker-Weinberg, "Entitlement to Maritime Zones and Their Delimitation: In the Doldrums of Uncertainty and Unpredictability," in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* edited by Alex G. Oude Elferink et al. (Cambridge: Cambridge University Press, 2018), 64.

379 *Ibid.*

380 *Ibid.*

is based on the dispute concerning the interpretation or application of provisions of UNCLOS.[381] So while "[t]he real issue […] is whether Ukraine or Russia has sovereignty over Crimea, […] the legal analysis is skilfully couched within the language of UNCLOS.[382] Award on Preliminary Objection in *Coastal State Rights Disputes* asks Ukraine to revise its Memorial. Therefore, from one side, there is a coastal state that the arbitral tribunal disregards within its jurisdiction because of the existence of a legal dispute. From the other side, there are quite plenty of UNCLOS articles related to coastal states and able to be applied only if the coastal state is known and clear. Whether all of these articles shall be automatically disregarded?

As it is possible to see from Picture 3, apart from the occupied territory the Russian Federation also claims maritime zones generated by the Crimean peninsula as those under control by Russia.

Picture 3. Crimea and Black Sea Boundaries After Annexation.[383]

381 Article 288 UNCLOS.

382 Oral, *op. cit. 83.*

383 Picture is taken from Christine Metz Howard and University of Kansas, "Geographers Study Link between Russia's Western Military Action, Eastern Gas Deal", *Phys.or*g, June 23, 2015, https://phys.org/news/2015-06-geographers-link-russia-western-military.html.

Thus, this chapter elaborates on the question which rights and obligations concerning the waters around Crimea, as outlined in UNCLOS, directly or indirectly depends on Crimea's status and what disputes can and cannot be used due to the limitations and optional exceptions to compulsory jurisdiction of the tribunal.

2.1.1. Rights and obligations in the territorial sea

Coastal State's sovereignty goes beyond their land territory and internal waters. It also goes to the territorial sea.[384] This view started in the beginning of the 20th century when states and scholars moved towards the view that the territorial sea is subject to the "sovereignty" of the coastal state.[385]

According to Article 3 of the State Border Law of Ukraine, the state border of Ukraine at sea is established along the outer boundary of Ukraine's territorial sea unless otherwise provided by international treaties of Ukraine.[386]

The exercise of sovereignty of the coastal state over the territorial sea is regulated by UNCLOS and other rules of international law.[387] Therefore, it emphasised that the scope of a state's sovereignty in its territorial sea is not identical to its sovereignty within its land territory. It is also proven in practice. For example, regarding the right of innocent passage through the territorial sea by foreign flag States' vessels, there is no comparable right of passage for foreign states over the land territory.[388]

It is possible to say that there are not just two international regimes over land and over the territorial sea, in fact there are two types of state sovereignty. The first one is a state sovereignty over land, in the air over the territorial sea, over the seabed and subsoil under the territorial sea. The second one is a state sovereignty over the territorial sea. The first sovereignty, meaning sovereignty of the state over land, the air above the territorial sea, water column and the seabed of the territorial sea is the same. This sovereignty is governed by domestic law. The second one, meaning sovereignty of the state over the territorial sea, extends exclusively to the territorial sea and is determined by the norms of international law.[389]

Consequently, two points shall be made. First, even if Ukraine would succeed and an arbitral tribunal would be able to rule over its coastal state rights, the question is whether the court would have jurisdiction to declare the violation of the coastal state's

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384 Art 2(1) UNCLOS.

385 Louis B. Sohn et al., *Cases and Materials on the Law of the Sea* (Leiden: Brill Nijhoff, 2014), 409.

386 "Law of Ukraine on the State Border of Ukraine" [in Ukrainian: "Zakon Ukrayiny Pro derzhavnyy kordon Ukrayiny"], *Verkhovna Rada of Ukraine*, accessed 15 August 2023, http://zakon5.rada.gov.ua/laws/show/1777-12.

387 Art 2(3) UNCLOS.

388 Louis B. Sohn et al., *Cases and Materials on the Law of the Sea, op. cit. 385*, 409-410; Oleksandr Brylyov, "Sovereignty of the Coastal State over the Territorial Sea" [in Ukrainian: "Suverenitet pryberezhnoyi derzhavy nad terytorial'nym morem"]. *Ukrainian Journal of International Law*, 1 (2020): 29.

389 Brylyov, "Sovereignty of the Coastal State over the Territorial Sea," *op. cit. 388,* 32.

domestic laws and regulations by another state. Since these laws and regulations are domestic, there should be a national court ruling over such situations. However, some possible exceptions to this scenario are presented later in the text of the dissertation.

Second, since Ukraine is not considered by the Annex VII tribunal as a coastal state, it is not possible to prove the violation of the relevant UNCLOS articles on territorial sea by Russia. However, neither Russia was recognised as a coastal state. Thus, regardless of whether the state is a coastal state or not, it has a right of innocent passage within the waters of another state and obviously even broader rights if it is a coastal state. So, if to leave the broader rights apart, there is a general obligation that innocent passage is available to all states. As it was rightly said "[w]hile sovereignty has a long history in the law of the sea, it has thus never been absolute, and its conditional character is perhaps even more visible in ocean space than it is on land".[390]

The right of innocent passage is considered as the most prominent navigational regime under UNCLOS.[391] This regime consists of two aspects. The first one involves understanding of what the "passage" is itself. The second one is what conduct is "innocent".[392]

The coastal State has rights to protect its interests. It can temporarily close the territorial sea for weapons exercises or security reasons. The coastal State can also take necessary steps to prevent non-innocent passage, but the exact measures are not clearly defined in UNCLOS. State practice suggests that it can range from requesting a foreign vessel to leave the territorial sea to physically intercepting it. Violating vessels may also be subject to arrest.[393] However, the coastal State must not hinder innocent passage of foreign ships or take measures that deny or hinder innocent passage.[394] Therefore, the applicability of UNCLOS articles related to innocent passage has to be checked with regard if one state can be declared in violation of preventing the innocent passage by another state without establishing a coastal state between those states.

However, in the case of Ukraine and Russia, this discussion most likely can only be made at the theoretical level. And there are several reasons for this.

From summer 2014 Ukraine closed its ports in Kerch, Sevastopol, Feodosiya,

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390 Rozemarijn J. Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Leiden: Brill Nijhoff, 2022), 56.

391 Donald Rothwell, "Challenges to the Distinction between Innocent Passage and Transit Passage According to UNCLOS," in *UNCLOS and the Protection of Innocent and Transit Passage in Maritime Chokepoints*, Benny Spanieret al. (Maritime Policy & Strategy Research Center University of Haifa, 2021), 11.

392 Articles 18-19 UNCLOS.

393 Rothwell, "Challenges to the Distinction between Innocent Passage and Transit Passage According to UNCLOS," *op. cit. 391*, 13.

394 *Ibid.* Article 24 UNLOS. It is also possible to add such obligations of a coastal state within innocent passage in the territorial sea as duty of abstention, duty of non-discrimination, duty of information. See, Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, vol. 4, Hamburg Studies on Maritime Affairs (Berlin, Heidelberg: Springer, 2006) 180-184.

Yalta, and Yevpatoriya until the restoration of Ukraine's constitutional order in the temporarily occupied territory of Crimea.[395] Vessels visiting Crimean ports are blacklisted and face arrests upon visiting Ukrainian ports on the mainland.[396] Also, Ukraine adopted the Law on the rights and freedoms of citizens and legal regime of the temporarily occupied territory of Ukraine.[397] This law introduced changes to the Criminal Code of Ukraine, adding Article 332-1. This article brings criminal responsibility over violating the entry and exit procedures of the temporarily occupied territory of Ukraine.[398] The sanctions may lead to the vessel being confiscated and the master facing imprisonment for up to 3 years.[399] The responsibility for the violations of the procedure for entry to and exit from the temporarily occupied territory of Ukraine

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395 "Order of the Ministry of Infrastructure of Ukraine № 255 On the Closure of the Seaports" [in Ukrainian: "Nakaz Ministerstva Infrastruktury Ukrayiny № 255 "Pro zakryttya mors'kykh portiv"], *Verkhovna Rada of* Ukraine, accessed 21 December 2021, http://zakon5.rada.gov.ua/laws/show/z0690-14.

396 "International sanctions and criminal liability for Masters for visit ports in Crimea", CIS PANDI Services (Ukraine) LTD, October 21, 2015, http://cispandi.com/2015/10/international-sanction-s-and-criminal-liability-for-masters-for-visit-ports-in-crimea/; Andrii Klymenko, "'Black List' of Ships Violating Crimean Sanctions for the Entire Period of Occupation 2014-2020 (Foreign, Except for Russia) – Database" [in Ukrainian: : "'Chornyy spysok' mors'kykh suden-porushnykiv kryms'kykh sanktsiy za ves' termin okupatsiyi 2014-2020 rik (inozemni, krim RF) - baza danykh)"], *BlackSeaNews*, March 4, 2021, https://www.blackseanews.net/read/173975; Henning Jessen, "Sanctions Compliance Risks in International Shipping: Closure of Five Crimean Ports, the Sanctions Regime in Respect of Ukraine/Russia and Related Compliance Challenges," in *Maritime Law in Motion*, edited by Proshanto K. Mukherjee et al., WMU Studies in Maritime Affairs (Cham: Springer International Publishing, 2020), 289–309.

397 "Law of Ukraine on the rights and freedoms of citizens and legal regime of the temporarily occupied territory of Ukraine" [in Ukrainian: "Zakon Ukrayiny Pro zabezpechennya prav i svobod hromadyan ta pravovyy rezhym na tymchasovo okupovaniy terytoriyi Ukrayiny"], *Verkhovna Rada of Ukraine*, accessed 21 December 2021, https://zakon.rada.gov.ua/laws/show/1207-18#Text.

398 "Criminal Code of Ukraine" [in Ukrainian: "Kryminal'nyy kodeks Ukrayiny"], *Verkhovna Rada of Ukraine*, accessed 21 August 2023, https://zakon.rada.gov.ua/go/2341-14.
Article 332-1. (translated from Ukrainian) Violation of the Procedure for Entering the Temporarily Occupied Territory of Ukraine and Exiting from It
1. Violation of the procedure for entering the temporarily occupied territory of Ukraine and exiting from it with the intent to harm the interests of the state shall be punishable by imprisonment for a term of up to three years or deprivation of liberty for the same term.
2. The same actions committed repeatedly or by a group of persons conspiring beforehand, or by a public official using their official position shall be punishable by imprisonment for a term ranging from three to five years with the deprivation of the right to hold certain positions or engage in certain activities for up to three years.
3. Actions provided for in the first or second part of this article, committed by an organized group, shall be punishable by imprisonment for a term ranging from five to eight years with the deprivation of the right to hold certain positions or engage in certain activities for up to three years.

399 "International sanctions and criminal liability for Masters for visit ports in Crimea," *op. cit. 396*; "Ukraine Confiscated a Foreign Ship for Entering the Crimea," UAWire, March 17, 2017, https://www.uawire.org/news/ukraine-has-confiscated-a-foreign-ship-entering-the-crimea; "The Ship Confiscated for Visiting the Port in Crimea Will Be Handed Over tothe Ukrainian Navy - The Prosecutor's Office" [in Ukrainian: "Sudno, konfiskovane za vidviduvannya portu v Krymu, peredadut' VMS Ukrayiny – prokuratura"], *Radio Svoboda*, February 24, 2018, https://www.radiosvoboda.org/a/news/29060261.html.

is also provided in Code of Ukraine on Administrative Offences.[400]

The sanctions imposed by Ukraine at the national level, combined with the international sanctions, imposed by the USA, EU, United Kingdom, Australia, Japan, and Switzerland, lead to decreasing ship passage within the territorial sea of the occupied peninsula.[401] Moreover, in April 2022, Ukraine adopted the Action Plan on Strengthening Sanctions against the Russian Federation[402] and as of today, the Russian Federation is the most sanctioned state in the world.[403]

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400 "Code of Ukraine on Administrative Offenses" [in Ukrainian: "Kodeks Ukrayiny pro administratyvni pravoporushennya"], *Verkhovna Rada of Ukraine*, accessed 21 August 2023, https://zakon.rada.gov.ua/laws/show/80731-10#n2603 (part 1); https://zakon.rada.gov.ua/laws/show/80732-10 (part 2).
See, Article 204-[2] (translated from Ukrainian): Violation of the procedure for entering the temporarily occupied territory of Ukraine and exiting from it:
1. Violation of the procedure for entering the temporarily occupied territory of Ukraine and exiting from it shall entail a fine ranging from one hundred to three hundred untaxed minimum incomes of citizens.
2. The same actions committed by a group of persons or by a person who has been subjected to administrative penalties for an offense stipulated in part one of this article within a year shall entail a fine ranging from three hundred to five hundred untaxed minimum incomes of citizens.
Article 263 Administrative Detention Periods:
2. Individuals who have illegally crossed or attempted to illegally cross the state border of Ukraine, violated the procedure for entering the temporarily occupied territory of Ukraine or the area of the anti-terrorist operation, or exiting from them, violated the border regime, regime at checkpoints across the state border of Ukraine, or regulatory rules at entry-exit checkpoints, rules for the use of wildlife within the border zone and controlled border area, in the territorial sea, internal waters, and the exclusive (maritime) economic zone of Ukraine, demonstrated deliberate disobedience to a lawful order or demand of a military servicemember or employee of the State Border Guard Service of Ukraine or a member of a public order and state border protection unit, as well as foreigners and stateless persons who have not complied with the decision to prohibit entry into Ukraine, violated the rules of stay in Ukraine or transit through the territory of Ukraine, may be detained for a period of up to three hours for the preparation of a protocol, and in necessary cases, for the identification of the person and/or clarification of the circumstances of the offense - for up to three days.

401 "International sanctions and criminal liability for Masters for visit ports in Crimea," *op. cit. 396*; "Sanctions & Crimea - Kerch Commercial Sea Port," *The London P&I Club*, accessed 21 December 2021, https://www.londonpandi.com/knowledge/news-alerts/sanctions-crimea-kerch-commercial-sea-port/; "Russia Sanctions: Guidance," *GOV.UK*, accessed 12 July 2023, https://www.gov.uk/government/publications/russia-sanctions-guidance/russia-sanctions-guidance; Andriy Klymenko, "The Effectiveness of the International Maritime Sanctions Against Russia Over the Occupation of Crimea," *Maidan of Foreign Affairs*, October 7, 2016, https://www.mfaua.org/en/projects/the-effectiveness-of-the-international-maritime-sanctions-against-russia-over-the-occupation-of-crimea.

402 The International Working Group on Russian Sanctions, "Working Group Paper #1 Action Plan on Strengthening Sanctions against the Russian Federation," April 19, 2022; "The International Working Group on Russian Sanctions," accessed 2 July 2023, https://fsi.stanford.edu/working-group-sanctions; "The Main Database of Sanctions That Were Imposed after Russia's Attack on Ukraine | War and Sanctions", accessed 2 July 2023, https://sanctions.nazk.gov.ua/en/.

403 "Sanctions against the Russian Federation" [in Ukrainian: "Sanktsiyi proty RF, Ministerstvo zakordonnykh sprav Ukrayiny"], *Ministry of Foreign Affairs of Ukraine*, accessed 2 August 2023, https://mfa.gov.ua/sankciyi-proti-rf. For Crimean sanctions see: Andrii Klymenko and Tetyana Guchakova, Olha Korbut, "The Real Impact of Crimean Sanctions", *BlackSeaNews*, December 21, 2018,

In the *ARA Libertad case* ITLOS provides a broad interpretation and application of Articles UNCLOS in the Part II of UNCLOS named as "Territorial Sea and Contiguous Zone". It states that even "the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas".[404] One of the examples of the articles applicable to all maritime areas are Article 29 and 32 UNCLOS.[405]

The possibility of applying the articles involving territorial sea is based solely on an incident that happens within the limits of the territorial sea without establishing what state is considered as a coastal one. Thus, in *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, the arbitral tribunal states that

> the present dispute arises in the context of competing claims to sovereignty over the land and maritime areas in the vicinity of the Kerch Strait, matters that are outside the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal takes no position on these claims. References to "territorial sea" in the paragraphs that follow simply reflect the pleadings of the Parties and are without prejudice to their competing claims.[406]

Indeed, Ukraine's submissions in this case do not ask the tribunal to deal with any maritime zone as it refers to the warship immunity under Articles 32, 95 and 96 and mentioning Article 58 with regard to its rights to freedom of navigation.[407] This is a way when an issue is perfectly fit within the jurisdiction of a tribunal.[408] In this particular submission there is no coastal state involved, so the question of the Crimean occupation does not affect the jurisdiction under UNCLOS. Thus, it does not matter if there would be a coastal state, neighbouring state or any other. No state is allowed to violate warship immunity and prevent a right to freedom of navigation. Therefore, assuming that such provisions of UNCLOS provide obligations *erga omnes partes*, then, any state can claim violations of their rights related to warship immunity and freedom of navigation. However, practically it would mean that a court or a tribunal under jurisdiction provided by UNCLOS has to qualify such obligations as *erga omnes partes*.

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https://www.blackseanews.net/en/read/169525; Andrii Klymenko et al., "Impact of Sanctions on Maritime Connections with the Occupied Crimean Peninsula (3)", *BlackSeaNews*, May 7, 2020, https://www.blackseanews.net/en/read/163290.

404 *"ARA Libertad"* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, 344, para 64.

405 *Ibid.*

406 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Award on the Preliminary Objections of the Russian Federation, *op. cit. 341,* 12, para. 42.

407 *Ibid.,* 2-3, para. 7. It provides Ukraine's Notification and Statement of Claim submissions.

408 Although, there are some challenges and obstacles to jurisdiction in the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* such as an optional exception to dispute settlement concerning military activities.

2.1.2. Rights and obligations in the contiguous zone

The contiguous zone is not automatically established. It must be officially declared or proclaimed.[409] Ukraine officially established the contiguous zone by its Law on the Contiguous Zone of Ukraine in December 2018.[410] An important remark to be made. Even if the arbitral tribunal acknowledged Ukraine as a coastal state, would Ukraine be able to claim its contiguous zone rights since 2014? The answer is no, Ukraine is not able to claim its contiguous zone rights before 2018. The reason is that Ukraine did not declare such a zone before 2018. Prior to the establishment of the contiguous zone, Ukraine had its EEZ after 12 nautical miles of its territorial sea.

The regime of contiguous zone is presented by a single article of UNCLOS. In particular, Article 33:

> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Also, in this zone coastal states can rely on Article 303(2) UNCLOS concerning the management of the traffic around archaeological and historical objects found at sea. In this case, a coastal state can apply Article 33 and assume that if these objects are removed from the seabed in the specified zone without its approval, it may lead to a violation of its laws and regulations within its territory or territorial sea.

In the *Coastal State Rights Dispute* Ukraine made two submissions regarding Article 303 UNCLOS.[411] Due to the revision of its Memorial, it should avoid references to coastal state rights. Thus, if para 2 of this Article refers to coastal state rights, para 1 refers to all states. Namely, that "[s]tates have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.[412] Thus, Article 303(2) UNCLOS would be still applicable regardless of the name of the

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409 Robin Churchill and Vaughan Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1999), 135-136.

410 "Law of Ukraine on the Contiguous Zone of Ukraine" [in Ukrainian: "Zakon Ukrayiny Pro prylehlu zonu Ukrayiny"], *Verkhovna Rada of Ukraine*, accessed 21 September 2023, https://zakon.rada.gov.ua/laws/show/2641-19#Text.

411 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 506, para 17: "(r). The Russian Federation has violated Article 303 of the Convention by unlawfully interfering with Ukraine's exercise of jurisdiction in its contiguous zone and preventing the removal of archaeological and historical objects from the seabed of its contiguous zone. (s). The Russian Federation has violated Article 303 of the Convention by failing to cooperate with Ukraine concerning archaeological and historical objects found at sea."

412 Article 303 UNCLOS.

coastal state. However, Article 33 as regards to the contiguous zone – would require the determination of the coastal state and, therefore, the determination of the fact of occupation of Crimea.

It should be also emphasised that despite the applicability of Article 303(2) UNCLOS, the archaeological and historical objects are governed by a different legal regime. The relevant regime in this case is the Convention on the Protection of the Underwater Cultural Heritage, which was adopted by UNESCO. This Convention can be seen as a "reasonable defence against the disastrous regime on underwater cultural heritage" set forth in UNCLOS.[413] However, the analysis of this Convention is outside of the scope of this doctoral dissertation. Thus, it is possible to move to the analysis related to rights and obligations in EEZ with perspective of the Crimean occupation and dispute settlement under UNCLOS.

2.1.3. Rights and obligations in the EEZ

The EEZ is "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in [UNCLOS], under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of [UNCLOS]."[414] The creation of the EEZ was "one of the most revolutionary features of UNCLOS" by granting to coastal states jurisdiction over approximately "38 million square nautical miles of ocean space".[415]

Ukraine defines that its EEZ constitutes the maritime areas adjacent to Ukraine's territorial sea, including areas surrounding its islands.[416] In accordance with UNCLOS, Article 75, Ukraine created the lists of geographical coordinates and copies of it were deposited with the Secretary-General of the United Nations.[417]

The impact on the EEZ of Ukraine because of the Crimean occupation can be visible by comparing two maps with before and after.

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413 Helmut Tuerk, *Reflections on the Contemporary Law of the Sea*, vol. 71, Publications on Ocean Development (Leiden: Martinus Nijhoff, 2012), 162.

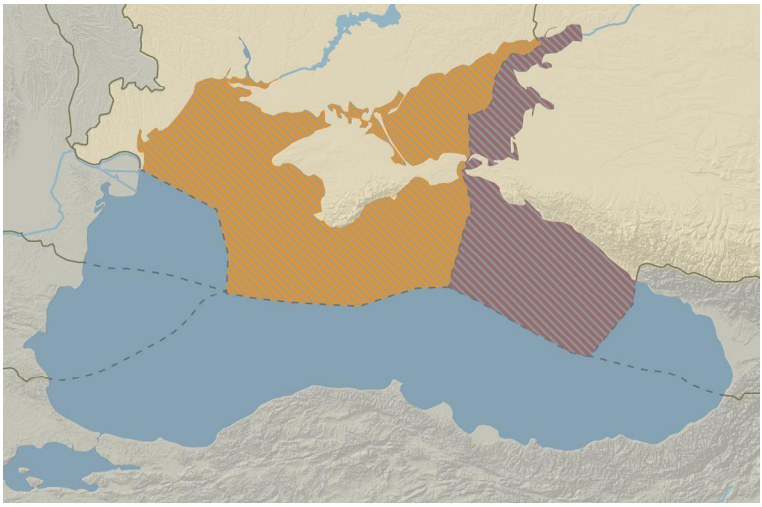
414 Article 55 UNCLOS.

415 Tuerk, *op. cit. 413*, 26-27.

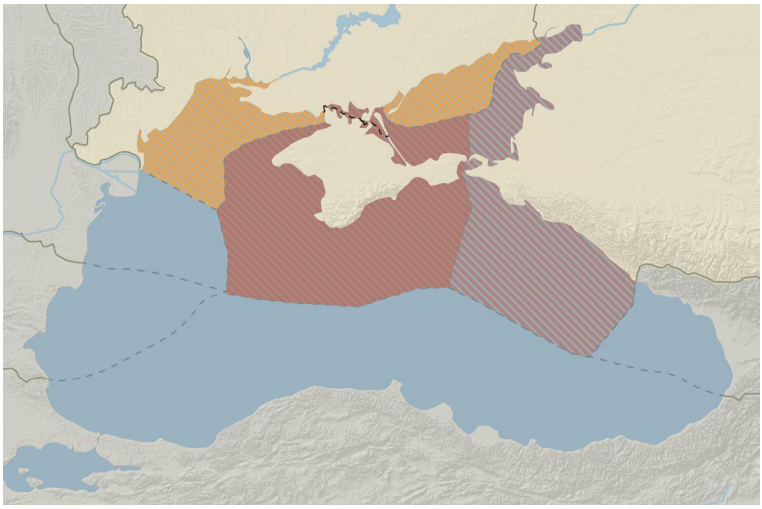
416 "Law of Ukraine on the Exclusive (Maritime) Economic Zone of Ukraine" 16 May 1995, № 162/95-BP [in Ukrainian: "Zakon Ukrayiny Pro vyklyuchnu (mors'ku) ekonomichnu zonu Ukrayiny"], *Verkhovna Rada of* Ukraine, accessed 21 December 2021, https://zakon.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80#Text.

417 "List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Black Sea, notified by note verbale dated 11 November 1992", *UN Law of the Sea Bulletin* 36, (1998): 49; "List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov, notified by note verbale dated 11 November 1992", *UN Law of the Sea Bulletin* 36, 1998: 51-52.

The EEZ of Ukraine before the occupation of the Crimean peninsula



The EEZ of Ukraine after the occupation of the Crimean peninsula



Picture 4. Maps of the Crimean EEZ.[418]

418 Bohdan Ustymenko and Tetiana Ustymenko, "Maritime Security of Ukraine. A Reference Work. (3) The Exclusive Economic Zone and the Continental Shelf," *BlackSeaNews*, December 10, 2021. https://www.blackseanews.net/en/read/183601.

Explanation of Picture 4:
The yellow colour with blue stripes represents Ukraine's territorial sea and exclusive economic zone. The red colour with blue stripes signifies Russia's territorial sea and exclusive economic zone.
The bright red colour with grey stripes indicates Ukraine's territorial sea and exclusive economic zone that is occupied by Russia.

Despite the fact that EEZ is not a "zone of national jurisdiction"[419] but a zone "with national jurisdiction", still it represents a balance between the rights of the coastal State and the international community.[420] Having Crimea occupied, annexed and deprived of the possibility to protect its rights as a coastal state, Ukraine has an option to seek justice from the perspective of the international community. In its submissions within *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* among other Articles of UNCLOS Ukraine involves Article 58 UNCLOS. [421] It refers to the rights and duties of other States in the EEZ. Apart from this Article, Article 59 UNCLOS could also be invoked. This Article provides the existence of the residual rights in the EEZ. [422] Such residual rights within EEZ creates a question whether their application falls within the rights of the coastal State or other States.[423]

Therefore, the important issue that has to be interpreted is whether Article 59 UNCLOS can be applicable from the perspective that **any** "conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole". Indeed, this Article specifies that a conflict arises between the interests of the coastal State and any other State or States. Following the *Coastal State Rights Award,* the arbitral tribunal acknowledges existence of a dispute between Ukraine and Russia and due to its lack of jurisdiction states that some "claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the "coastal State" within the meaning of provisions of the Convention invoked by Ukraine."[424] However, as a result of this, the tribunal actually establishes that there is a conflict between one coastal state and another one. It does not say which state is a

419 The notion that was used in to refer to EEZ but was not accepted at the Third United Nations Conference on the Law of the Sea. See, Tuerk, *op. cit. 413,* 161.

420 *Ibid.*

421 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Award on the Preliminary Objections of the Russian Federation, *op. cit. 341,* 2-3, para. 7.

422 Article 59 UNCLOS: In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

423 Tanaka, *The International Law of the Sea, op. cit. 44,* 159.

424 *Coastal State Rights Dispute,* Award on Preliminary Objections, *op. cit. 8,* 58-59, para. 195.

coastal one, but the conflict has two sides required by Article 59 UNCLOS.

The argument against it could be that Ukraine cannot bring such submission because that would mean its acceptance of the existence of a dispute concerning sovereignty over Crimea which Ukraine rightly denies. It is indeed contradictory, however, the careful choosing of wording the submission could avoid the contradiction. Therefore, Ukraine can elaborate on its wording and argumentation of its possible submission involving Article 59 UNCLOS. Ukraine has to ensure that it does not recognise or acknowledge the Russian Federation as a coastal state over Crimea by not calling itself as a coastal state. It has to present its submission from the position that because of the tribunal's award, Ukraine follows the wording of the award and therefore, asks the tribunal to provide its interpretation and application of Article 59 UNCLOS.

It is considered that Article 59 UNCLOS contains a very wise but somehow imprecise formula for the resolution of conflicts regarding the attribution of rights and jurisdictions in the EEZ. Moreover, it "still needs to prove its value in practice."[425] And the practical value of this Article could become extremely significant in UNCLOS disputes between Ukraine and the Russian Federation. In particular, Ukraine can apply this Article to submit the request of provisional measures to stop any Russian activity interfering with this provision.

Article 290(1) UNCLOS states:

> 1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

The interpretation of Article 290(1) UNCLOS allows a court or tribunal to order such provisional measures in regard to the residual rights in EEZ. However, if to apply a broad interpretation of Article 59, it might be possible to assume that this Article can be applicable even to territorial sea, contiguous zone, and continental shelf.[426] But this is not very straightforward and has significant weakness in its legal argumentation as intensity of a coastal state sovereignty and its sovereign rights within those maritime zones is higher than in EEZ. Nevertheless, the interpretation of "importance of the interests involved to the parties as well as to the international community" has to be clarified and then, it would be possible to see if it is applicable or not.

So, "to preserve the respective rights of the parties to the dispute" there is a need to stop all activities related to Article 59 and carried out by Russia until the dispute is not solved. Due to the wording of this Article, it applies "in cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone". Therefore, by interpreting Article 59 as "taking

425 Tuerk, *op. cit. 413,* 28.

426 Consequently, it involves other initial submissions of Ukraine concerning territorial sea, contiguous zone, and continental shelf.

into account the respective importance of the interests involved to the parties as well as to the international community" the tribunal can possibly stop all activities not related to coastal state rights and obligation within a dispute between Ukraine and the Russian Federation.

Coming back to the rest of Ukrainian submissions that do relate to coastal state rights, Ukraine claims in some of its initial submission that

> b. The Russian Federation has violated Articles 56 and 77 of the Convention by excluding Ukraine from accessing gas fields in its exclusive economic zone and continental shelf, exploring such gas fields, extracting gas found in such fields, and usurping Ukraine's exclusive jurisdiction over the hydrocarbons in such fields.
>
> c. The Russian Federation has violated Articles 2, 56, and 77 by causing proprietary data on the hydrocarbon resources of Ukraine's territorial sea, exclusive economic zone, and continental shelf to be transferred to Russia and to Russian entities.
>
> d. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over, and unlawfully taking possession of, Ukrainian-flagged CNG-UA vessels, including mobile jack-up drilling rigs in Ukraine's territorial sea, exclusive economic zone, and continental shelf.
>
> e. The Russian Federation has violated Articles 2, 56, 60, and 77 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over, and unlawfully taking possession of, fixed platforms on Ukraine's territorial sea, exclusive economic zone, and continental shelf.
>
> g. The Russian Federation has violated Articles 56, 58, 61, 62, 73, and 92 of the Convention by excluding Ukraine from accessing fisheries within its exclusive economic zone, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its exclusive economic zone.
>
> h. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over Ukrainian-flagged fishing vessels in Ukraine's territorial sea, exclusive economic zone, and continental shelf.
>
> i. The Russian Federation has violated Articles 2, 21, 33, 56, 58, 73, and 92 of the Convention by unlawfully interfering with the navigation of Ukrainian Sea Guard vessels through Ukraine's territorial sea and exclusive economic zone.
>
> q. The Russian Federation has violated Article 2 of the Convention by interfering with Ukraine's attempts to protect archaeological and historical objects in its territorial sea and by usurping Ukraine's right to regulate with regard to such archaeological and historical objects.
>
> t. The Russian Federation has violated Article 279 of the Convention by aggravating and extending the dispute between the parties since the

> commencement of this arbitration in September 2016, including by completing construction of the Kerch Strait bridge, expanding its hydrocarbon and fisheries activities in Ukraine's territorial sea, exclusive economic zone, and continental shelf, and continuing to disturb and remove archaeological artifacts found in Ukraine's territorial sea and contiguous zone.

It is clear that such submissions have to be revised due to the scope and limits of already established jurisdiction by the arbitral tribunal and cannot be decided by the tribunal. It is also clear that Article 59 UNCLOS could not be used in this regard. However, by using a broad interpretation, it is possible to apply such Articles not to declare that Russia has violated numerous provisions of UNCLOS but to order Russia to cease its activities based on the fact that there is a dispute between two states and one of them a coastal state and another one is not. As it is already established that there is a dispute over who is a coastal state, therefore both parties have to refrain from exercising their coastal state rights under UNCLOS until there would be legal determination of the Crimean occupation.

The arbitral tribunal in the *Chagos MPA case* finds that Articles 2(3), 56(2), and 194(4) UNCLOS require states to act in good faith and consider the rights and duties of other states. It ruled that the United Kingdom violated these obligations by not consulting and balancing with Mauritius regarding its rights and interests, rather than directly violating those rights.[427] This finding raised some concerns. The tribunal's approach seems contradictory because it treats the United Kingdom as a "coastal state" despite declining jurisdiction on the matter earlier. Additionally, the tribunal goes into determining Mauritius's rights through external sources, which was not entirely necessary for assessing the consultation obligation. This led to questions about the tribunal's jurisdiction and appropriateness in deciding non-UNCLOS rights and interests in its judgement.[428] By using this precedent, the same approach can be taken in regard to the dispute between Ukraine and the Russian Federation.

Therefore, there is a possibility for Ukraine to request provisional measures to order the Russian Federation to stop/cease its activities as follows:

- accessing gas fields in EEZ generated by Crimea and its continental shelf, exploring such gas fields, extracting gas found in such fields, as well as to cease all activities related to hydrocarbon found in such fields;
- accessing and transferring the proprietary data on the hydrocarbon resources of the territorial sea, EEZ, and continental shelf generated by Crimea to Russia and to Russian entities, as well as to any other state;

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427 *Chagos MPA Arbitration*, Award, *op. cit. 27,* paras. 520, 540, 547; Stefan Talmon, "The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCOLS Part XV Courts and Tribunals," *International & Comparative Law Quarterly* 65, 4 (October 2016): 939.

428 Islam Attia, "Revisiting Jurisdiction of UNCLOS Courts and Tribunals Over Ancillary Sovereignty Disputes," *Journal of Territorial and Maritime Studies* 10, 2 (2023): 13.

– using Ukrainian-flagged CNG-UA vessels, including mobile jack-up drilling rigs in the territorial sea, EEZ, and continental shelf generated by Crimea;
– using fixed platforms on the territorial sea, EEZ, and continental shelf generated by Crimea;
– Russian access to fisheries within the EEZ generated by Crimea, by stopping exploiting such fisheries, and other living resources of its EEZ;
– interfering with Ukrainian-flagged fishing vessels and Ukrainian Sea Guard vessels allowing them to exercise their right of freedom of navigation in EEZ and right of innocent passage in territorial sea generated by Crimean Peninsula;
– all its activities related to archaeological and historical objects, in particular, cease to disturb and remove archaeological artefacts found in territorial sea and contiguous zone generated by Crimea, etc.

Some clarification has to be made regarding ordering the Russian Federation to cease its access to fisheries within EEZ generated by Crimea and stopping exploiting such fisheries, and other living resources of its EEZ. The challenge here can be how the tribunal would interpret limitation provided by Article 297 UNCLOS and it obviously can be foreseen Russian objection to the tribunal's jurisdiction in this regard.

Meanwhile, it should not be forgotten that such measures work towards both sides.[429] Therefore, Ukraine would also need to stop its activities.

However, from a side of jurisprudence, the tribunal could apply a different approach that would be asked in the provisional measures or submissions.

In the *Guyana v. Suriname* case, the arbitral tribunal states that one party in a dispute is not allowed to carry out any unilateral activity that permanently affects the other party's rights. It also specifies that international courts and tribunals should be cautious not to hinder the parties' pursuit of economic development in a disputed area during a boundary dispute, considering that resolving such disputes usually takes a long time.[430] In the order on provisional measures in the case *Fisheries Jurisdiction* between United Kingdom and Iceland ICJ states that "irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings".[431] Consequently, it would make sense to interpret it as "exploitation of fish can be undertaken by one or both of the disputing States, so long as it is done sustainably."[432] Thus, it is a kind of recognition of the Russian Federation's right to conduct exploitation because the zone is disputed. Therefore, the activities that could be stopped have to have a unilateral character and permanently affect the other party's rights. As a clear example

429 For detailed overview on Provisional measures, see, Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, International Courts and Tribunals Series (Oxford: Oxford University Press, 2005).

430 *Guyana v. Suriname*, Award, *op. cit. 315,* 156, para. 470.

431 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Order of 17 August 1972, Provisional Measures.

432 Sean D. Murphy, "Obligations of States in Disputed Areas of the Continental Shelf," in *New Knowledge and Changing Circumstances in the Law of the Sea* (Leiden: Brill Nijhoff, 2020) 201.

of it, could be construction of the Kerch Bridge that is going to be discussed later in the text.

Acknowledging Russia's disregard for international law, it is difficult to believe that the mentioned order or decision will have a significant impact or any impact at all. Relatively recently Russia showed and continues to show its non-compliance with the ICJ's provisional measures where it has ordered that "[t]he Russian Federation shall immediately suspend the military operations that it commenced on February 24, 2022, in the territory of Ukraine".[433] Additionally, Russia clearly and/or allegedly violates other norms of international law[434], such as those embodied in the UN Chapter, international humanitarian law, etc. This pattern of behaviour shows that currently there is a little to be expected for the Russian Federation's compliance with internationally binding decisions.

However, it is worth noting another situation. Despite Russia's non-participation and refusal to recognise the jurisdiction of ITLOS in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, it did release the detained Ukrainian naval vessels and the crew members that were on those ships. Moreover, one of the ITLOS judges believed that the situation between Ukraine and Russia improved after ITLOS issued its Order in May 2019, leading to a positive outcome.[435]

While the answer to the question whether the Russian Federation would comply within such an order remains unclear, this legally binding order itself might lead to the strengthening of the sanction regime over the Russian Federation. For instance, to prove such a statement, the practical impact of sanctions can be observed in the case of a pipeline between Russia and Turkey, where a foreign company involved in constructing the pipeline refused the entry of its vessels to the EEZ generated by

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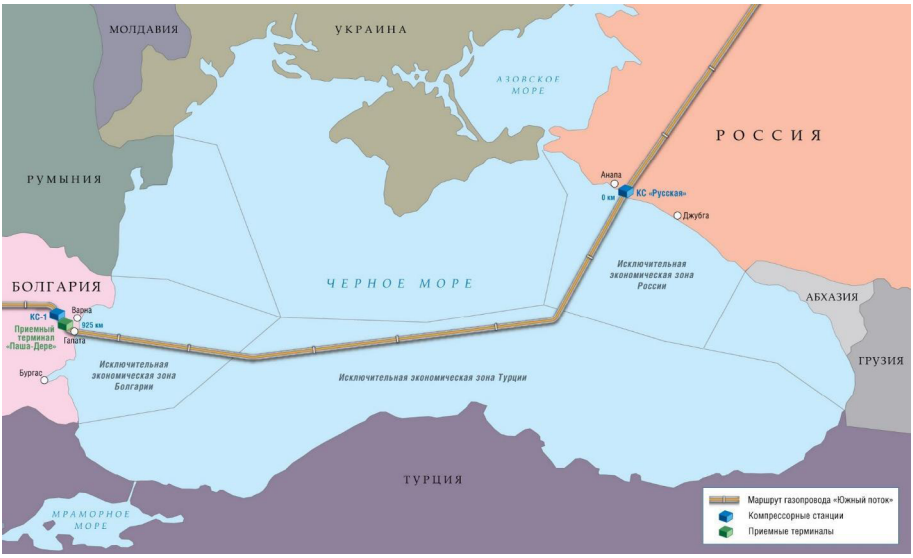
433 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, Request for the Indication of Provisional Measures, *op. cit. 182.* Also see, Kulick, *op. cit. 269*; Ori Pomson, "The ICJ's Provisional Measures Order: Unprecedented," *Lieber Institute West Point*, 17 March 2022, https://lieber.westpoint.edu/icj-provisional-measures-order-unprecedented/; Marko Milanovic, "ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe," *EJIL: Talk!* (blog), 16 March 2022, https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/.

434 Whether an action is considered an allegation, or a clear violation depends on the specific norms and provisions of international law. Regardless of whether it is an allegation or a clear violation, both of them must be substantiated and proven. Some violations, like acts of aggression and the use of force, are evident, while others, like claims of Russian genocide acts against Ukrainians, may require more substantial legal and factual evidence to be proven.

435 Judge Kittichaisaree also mentions that as a result of ITLOS decision, the Ukrainian President and his Russian counterpart had the opportunity to meet in Paris on December 9-10, 2019. During this meeting, they were joined by the French President and the German Chancellor to make renewed efforts in resolving the conflict between Ukraine and Russia. See, Kriangsak Kittichaisaree, *The International Tribunal for the Law of the Sea*, Elements of International Law (Oxford, New York: Oxford University Press, 2021) 177-178.

Crimea.

Thus, the map of the location of the pipeline looks like:



Picture 5. "Southern Stream".[436]

Thus, the application of Articles concerning coastal states regardless of who is the coastal state with focus on the states obligation to act in good faith and consider the rights and duties of other states could be seen as adaptation of the law of the sea provision to current dispute settlement challenges.

Peaceful purposes within EEZ and peaceful use of the sea

It is well-known that the EEZ is called as *sui generis* of the high seas. Article 58(2) UNCLOS states that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Article 88 UNCLOS provides the reservation of the high seas for peaceful purposes. Namely, "[t]he high seas shall be reserved for peaceful purposes."

436 Picture is taken from "Blue Stream." [in Russian: "Goluboy Potok"], *Pibig.info*, accessed 21 June 2022, https://pibig.info/144926-goluboj-potok.html. The same picture can be found in "Turkish Gas Hub Will Be Made from the Remnants of the 'Southern Stream'" [in Russian "Turetskiy Gazovyy Khab Sdelayut Iz Ostatkov 'Yuzhnogo Potoka'"], *Politnavigator (blog)*, 25 November 2022, https://www.politnavigator.net/tureckijj-gazovyjj-khab-sdelayut-iz-ostatkov-yuzhnogo-potoka.html. Note from the author: due to the fact that the map is taken from a Russian source, it also includes Abkhazia among the states on the map. Abkhazia is not recognised as a state by the international community. Abkhazia is as a part of Georgia within the internationally recognised borders of Georgia. More detailed about Abkhazia see, Gaga Gabrichidze, "The Legal Systems of Georgia's Breakaway Regions: International and European Considerations," in *Unrecognised Entities* (Leiden: Brill Nijhoff, 2021), 229–248.

Even though Article 88 UNCLOS states about peaceful purposes, it is commonly understood that this provision does not prohibit naval exercises and conventional weapons testing on the high seas.[437] Also, a strict interpretation of this Article is not universally supported. State practice and expert writings suggest that naval warfare on the high seas is not prohibited.[438] Therefore, the law of the sea allows for certain military uses of the oceans. However, such activities as military exercises in EEZ of another state can raise security concerns for coastal States.[439]

The concept of "peaceful purposes" is not explicitly mentioned in the 1958 Geneva Conventions on the Law of the Sea. The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof is one of the few international agreements that uses the term "for peaceful purposes". The term is included in the treaty's preamble. However, it was primarily a political compromise and does not provide a clear definition of the term. Nevertheless, "the early concepts of the common heritage of mankind and the use of the seabed for the benefit of mankind as a whole" can support the argument for excluding offensive and defensive national military activities from certain marine areas.[440] Meanwhile, the determination of peaceful purposes reservations in UNCLOS remains elusive the same way as the nature of military activities in EEZ remains controversial.[441]

Ensuring international peace and security is a crucial aspect of international law, including the law of the sea. Article 301 of the UNCLOS establishes a distinct obligation concerning the peaceful use of the sea.[442]

Article 301 UNCLOS is called "Peaceful uses of the seas" and establishes that

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

This governs the entire ocean space. If we assume that the definition of "peaceful

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437 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 188; Sohn et al., *Cases and Materials on the Law of the Sea, op. cit. 385*, 80.

438 Ben Saul et al., *The Oxford Guide to International Humanitarian Law* (Oxford, New York: Oxford University Press, 2020), 67.

439 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 452.

440 Boleslaw A. Boczek, "Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea," *Ocean Development & International Law* 20, 4 (1989): 363-364.

441 Henrique Marcos and Eduardo Cavalcanti de Mello Filho, "Peaceful Purposes Reservations in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone," *University of Pennsylvania Journal of International Law* 44, 2 (2023): 417–453. For the discussion during UNCLOS negotiations and further state opinions related to peaceful purposes/peaceful uses of the seas see, Ashley J. Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd ed., vol. 73, Publications on Ocean Development (Leiden: Brill Nijhoff, 2012), 30-32.

442 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 451.

uses of the seas" has the same meaning as in Articles 88 and 141 UNCLOS, then the entire ocean, without any geographical limitation, is covered by the reservation for peaceful uses. Additionally, UNCLOS provides the principles of conducting marine scientific research exclusively for peaceful purposes and promoting international cooperation in such research without any restrictions.[443] Commonly in the law of the sea, the word "use of force" is used to address such issues as hot pursuit, innocent passage, transit passage, boarding the vessel, piracy, etc.[444] It was also acknowledged that according to international law, using force for law enforcement can be acceptable as long as it's unavoidable, reasonable, and necessary.[445]

According to Bernard H. Oxman, Article 301 was inspired by Article 2, paragraph 4 of the UN Charter.[446] During the negotiations it was proposed to add the clause on use of force to the provisions on EEZ. However, it was rejected. But due to the support of the majority of delegates, it was agreed to include the general clause on the subject. Therefore, "the resulting provision repeats the Charter requirements without creating new rights or obligations: it cross-references all of the principles of international law embodied in the Charter and applies to all states, whether coastal or flag states, with respect to all parts of the sea."[447] Indeed, it does not create new rights or obligations but the rights and obligations under UNCLOS can be protected by its dispute settlement procedures under Part XV of UNCLOS and this should be taken into account.

All of these articles, Articles 88, 141 and 301 UNCLOS are very general in nature. States while acting in accordance with the provisions of the UNCLOS have direct rights and obligations that exclude any use of force or threat within such activity.

Article 301 is possible to interpret that it explicitly prohibits military activities

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443 However, a coastal state's approval for marine scientific research to be conducted in its EEZ or continental shelf by another state or international organisation is required if the research is intended solely for peaceful purposes. Boczek, *op. cit. 440,* 369.

444 Articles 111, 19(2)(a), 39(1)(b) UNCLOS. Also see, using excessive force and endangered human life before and after boarding the vessel: *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, 1356, paras. 158–159. For the scholarship discussion see, Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia," *European Journal of International Law* 20, 2 (1 April 2009): 402; Anna Petrig, "The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates", *International and Comparative Law Quarterly* 62, 3 (July 2013): 669; Keyuan Zou, "Maritime Enforcement of United Nations Security Council Resolutions: Use of Force and Coercive Measures', *The International Journal of Marine and Coastal Law* 26, 2 (1 January 2011): 235–261; Raul (Pete) Pedrozo, "Military Activities In And Over The Exclusive Economic Zone", in *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Leiden: Brill Nijhoff, 2009), 241.

445 Jinxing Ma and Shiyan Sun, "Restrictions on the Use of Force at Sea: An Environmental Protection Perspective", *International Review of the Red Cross* 98, 902 (August 2016): 522.

446 Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)", *The American Journal of International Law* 75 (1981): 237-238; Also see, Boczek, *op. cit. 440,* 370.

447 *Ibid.*

which are contrary to the UN Charter.[448] This article also reaffirms the applicability of the UN Charter's principles to the uses of the seas and oceans.[449] However, does this provision on peaceful uses of oceans have any further meaning beyond insisting on compliance with the UN Charter in conducting military activities at sea? It can be seen as aspirational at most, suggesting a goal for States to aim, particularly in the context of future arms control negotiations within the appropriate forums and context.[450] Also, this provision might not be defined solely on the interpretation of the "peaceful uses" based on Article 301 UNCLOS itself.[451]

It is believed that UNCLOS "does not equate warships and non-peaceful purposes". This is seen by the fact that Articles 95 and 236 of UNCLOS enshrine the long-standing principle of "complete immunity" for warships, meaning they are not subject to the jurisdiction of any state other than their flag state.[452]

A recent authoritative statement on naval warfare, the San Remo Manual on the International Law Applicable to Armed Conflicts at Sea, confirms that the high seas and the seabed beneath them are "legitimate theaters of war governed by international humanitarian law".[453] Also it confirms that hostile actions by naval forces may be conducted not only in the territorial sea, internal waters, the land territories, the EEZ and continental shelf and, where applicable, the archipelagic waters, of belligerent States but also in EEZ and the continental shelf of neutral States.[454]

It seems that applicability of Article 88 by itself or accompanied by Articles 58(2), 141 and 301 is only possible in the situations that do not constitute regulation by international humanitarian law or in cases where international humanitarian law recognises such rights and obligations provided by UNCLOS.

An example where international humanitarian law recognises such rights and obligations provided by UNCLOS can be seen within paragraph 34 of San Remo Manual. It states that

> If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed

448 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 188.

449 Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea*, (Dordrecht, Boston: Martinus Nijhoff Publishers, 1989), 110.

450 *Ibid.;* Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea", *Virginia Journal of International Law* 24 (1984): 832.

451 Kwiatkowska, *op. cit. 449.*

452 *Ibid*., 203-304.

453 Saul et al., *The Oxford Guide to International Humanitarian Law*, *op. cit. 438*, 67.

454 The San Remo Manual on the International Law Applicable to Armed Conflicts at Sea, Section IV: Areas of Naval Warfare, paragraph 10. In particular to EEZ and the continental shelf of neutral States, such activities have to be subject to paragraphs 34 and 35 of the Manual. Also see, Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea," *The American Journal of International Law* 89, 1 (1995): 192–208.

> conflict at sea, have due regard for the rights and duties of the coastal State, inter alia, for the exploration, exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.

Paragraph 35 of San Remo Manual provides that

> If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

So, when hostile actions occur within the EEZ or on the continental shelf of a neutral State, belligerent States are obligated to consider the rights and duties of the coastal state.[455] It directly includes the rights of exploration, exploitation of the economic resources of the EEZ and the continental shelf, the protection and preservation of the marine environment. They must also respect artificial islands, installations, structures, and safety zones established by the neutral State in the EEZ and on the continental shelf.

The use of different sea areas within the international humanitarian law was a significant innovation that had to consider the contemporary law of the sea, particularly provisions of UNCLOS. There are a lot of controversial issues that continue to remain nowadays. Such issues are related to environmental protection, freedom of navigation, the special rights of exploration and exploitation in the EEZ of neutral States. The discussion specifically concerns the lawfulness of creating "zones" (often known as exclusion zones) within international humanitarian law which affect the right of navigation of neutral states and provisions granted to UNCLOS to all states.[456]

It remains uncertain whether the neutral State can bring a claim under UNCLOS provisions for violations of its rights regarding the EEZ and continental shelf during an armed conflict between its neighbours. The jurisdiction of the court or tribunal to address such a question is yet to be established. While UNCLOS provisions are clear

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455 More detailed on the obligation of "due regard" see, Caroline E. Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* (Oxford, New York: Oxford University Press, 2021) 27-28, 89-99, 327-337; Mathias Forteau, "The Legal Nature and Content of 'Due Regard' Obligations in Recent International Case Law", *The International Journal of Marine and Coastal Law* 34, 1 (18 February 2019): 25–42.

456 Louise Doswald-Beck, "San Remo Manual on International Law Applicable to Armed Conflict at Sea," *op. cit. 454,* 592. Also see, Louise Doswald-Beck (ed.) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, *op. cit. 196.*

regarding the EEZ, high seas and peaceful use of the ocean, invoking Article 301 in the context of innocent passage within the territorial sea raises more questions than answers.

The escalation of Russian aggression against Ukraine on February 24, 2022,[457] has undoubtedly caused changes in the applicability of the law of the sea over the waters generated by Crimea. It also impacts the safety of navigation in the Black Sea and the Azov Sea. However, further analysis is required to fully understand the implications of these changes and this analysis goes beyond the scope of Crimean occupation and UNCLOS dispute settlement procedures.

In the context of the occupation of Crimea and the law of the sea dispute settlement, even without additional challenges like the ongoing Russian aggression against Ukraine, resulting in an international armed conflict between these two states, and the applicability of international humanitarian law, the violations of provisions provided by Articles of UNCLOS concerning peaceful use of the sea one way or another could involve activities characterised as military ones. Therefore, due to the optional exceptions to compulsory dispute settlement under UNCLOS chosen by both Ukraine and the Russian Federation, such dispute is unlikely to have a chance of passing within the limits of jurisdiction of a court or tribunal solely governed by Article 288(1) of UNCLOS.

2.1.4. Rights and obligations in the continental shelf

The legal framework governing the continental shelf was officially established in the 1958 Geneva Convention on the Continental Shelf. ICJ confirmed in the 1969 *North Sea Continental Shelf cases* that Articles 1 to 3 of this Convention by defining the continental shelf reflect or solidify customary international law regarding the continental shelf. Today, there is a widespread recognition that the rights and obligations of coastal states over the continental shelf are firmly established in customary international law.[458]

The coastal states' interest in rights over the continental shelf is mainly to use its own natural resources. The claims to the continental shelf were specifically aimed at economic purposes, while ensuring that the waters above the shelf remained as high seas. This compromise between economic rights and freedom of the seas was incorporated in both the 1958 Continental Shelf Convention and UNCLOS. Notably, the concept of "sovereign rights" is used to distinguish the allocation of maritime property from land territory. It implies rights that are less than full sovereignty and emphasises that exploration and exploitation rights over the seabed resources do not extend to the

457 Ewa Salkiewicz-Munnerlyn and Bartlomiej Zylka, "Russia's Aggression against Ukraine," *Ukrainian Journal of International Law* 2022, 1 (2022): 24-29; Claus Kreß, "The Ukraine War and the Prohibition of the Use of Force in International Law", *Torkel Opsahl Academic EPublisher*, Occasional Paper Series 13 (2022): 8-23.

458 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 162.

waters above or the airspace.[459] Consequently, the coastal states' rights over the continental shelf should not unreasonably interfere with navigation and other rights and freedoms provided in the EEZ or high sea.[460]

Consequently, the only possible method to avoid Crimean occupation as an obstacle to the jurisdiction under UNCLOS would be if the Russian Federation, acting as it claims to be a "coastal state," violates the rights of other states while exercising its purported coastal state rights within the continental shelf.

Between 2014 and 2020, Russia performed the unlawful hydrocarbon extraction activities in the waters of the Azov and Black Seas near the occupied Crimea, in clear violation of the rights of Ukraine as a coastal state under UNCLOS.[461] However, there is no available information whether such activities at any point caused violation of rights of other states. In this regard, the proper documentation of the evidence could be quite challenged with respect to the occupation status of these waters.

To sum up, while the connection between land and sea is represented by the saying "the land dominates the sea", it is clear that all coastal state's rights related to the sea appear from and rely on the sovereignty over land territory. UNCLOS incorporates this principle in two ways: (i) by defining the outer boundaries of maritime zones based on their distance from the baselines, or (ii) by applying the concept of natural prolongation and distance from the baselines, which indicates geological closeness.[462] Throughout history, it was always simpler to occupy land than water spaces and the main purpose of occupation of maritime zones are "for purposes of resource extraction".[463]

Rights and obligations of coastal states and all states in the waters generated by Crimea shows that Crimean occupation as an obstacle within the jurisdiction of a tribunal adjudicating on the basis of UNCLOS could potentially be avoided from the perspective that one of the states in the dispute is a coastal state without clarifying which one. This would require extremely carefully well-thought and well-balanced formulation of its claims. It gives certain hope about possible application of provisional measures where potentially there would be an order for Russia to cease all activities related to the disputed maritime areas generated by Crimea and followed by the award on merits.

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459 Lea Brilmayer and Natalie Klein, "Land and Sea: Two Sovereignty Regimes In Search of a Common Denominator", *New York University Journal of International Law & Politics* 33 (January 2001): 720.

460 S. Jayakumar, "The Continental Shelf Regime under the UN Convention on the Law of the Sea: Reflections after Thirty Years" in *The Regulation of Continental Shelf Development* (Leiden: Brill Nijhoff, 2013), 6.

461 The Monitoring Group of BlackSeaNews and the Black Sea Institute of Strategic Studies, "The 'Trophy Economy'. The Development of the Stolen Ukrainian Black Sea Shelf / 2014-2021", *BlackSeaNews*, November 20, 2021, https://www.blackseanews.net/en/read/181956. Regarding EEZ, see, The Monitoring Group of BlackSeaNews and the Black Sea Institute of Strategic Studies, "The 'Trophy Economy'. The Commercial Exploitation of Marine Biological Resources in the Black Sea and the Sea of Azov / 2014–2021", *BlackSeaNews*, November 23, 2021, https://www.blackseanews.net/en/read/181957.

462 Antunes and Becker-Weinberg, *op. cit. 378*, 68-69.

463 Brilmayer and Klein, *op. cit. 459,* 704.

The escalation of the Russian aggression against Ukraine has affected the applicability of the law of the sea around Crimea, also impacting navigation safety in the Black Sea and making navigation for foreign vessels in the Azov Sea nearly impossible. It would be logical to think that it is possible to invoke Articles 58(2), 88 and 301 UNCLOS. However, due to the common interpretation of such escalation it could be considered as regulated by international humanitarian law. Furthermore, and if it would not be considered so, then it could potentially involve military activities. Then, the optional exceptions to compulsory dispute settlement chosen by Ukraine and Russia would limit the possibility of the dispute involving such provisions being heard solely under jurisdiction under UNCLOS.

2.2. Rights and obligations of coastal states in the Azov Sea and the Kerch Strait

For the clarity, this doctoral dissertation as a whole or this part of Chapter II itself does not assert that the Azov Sea and/or the Kerch Strait does not have TS, EZZ or CS. The structure is made to address all issues that can be still covered under UNCLOS provisions regardless of the Crimean occupation as an obstacle to jurisdiction under UNCLOS. Therefore, this dissertation presents all options of the legal regulation of rights and obligations of coastal states in the Sea of Azov and the Kerch Strait. Thus, if the tribunal concludes that the Azov Sea and/or the Kerch Strait consists of TS, EZZ or CS, other options do not apply and can be used only from the theoretical scenario. However, if the tribunal concludes that the Azov Sea and/or the Kerch Strait are historical or/and internal waters, the analysis in this part helps to understand those regimes in those waters in relation to occupation of Crimea. Thus, this part begins with problems of the determination of the rights and obligations of coastal states applicable to the waters in the Azov Sea and the Kerch Strait and further evaluation of rights and obligations of coastal states in those different regimes.

2.2.1. Problems of the determination of the rights and obligations coastal states applicable to the waters in the Azov Sea and the Kerch Strait

To understand the rights and obligations of certain states within certain waters it is relevant to establish the legal status and legal regime applicable in those waters. The status and the legal regime of the Azov Sea and the Kerch Strait are currently under consideration in the *Coastal State Rights Dispute*. The arbitral tribunal in its the Award on Preliminary Objections acknowledges that both parties agree on the legal status of the Sea of Azov and the Kerch Strait as internal waters of the USSR before its dissolution. However, they disagree on whether this status continued after Ukraine became an independent state.[464] The Russian Federation also invokes the concept of historical title as an alternative basis for excluding the application of UNCLOS to these

464 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* para. 290.

waters.[465] The arbitral tribunal notes that objections related to the status of internal or/and historical waters are interconnected with the merits of the case. As a result, a comprehensive examination of the issues is required before any definitive conclusions can be reached. Therefore, the question of the status of the Azov Sea and the Kerch Strait will become clear only after the final award is issued. From this view, this part does not attempt to predict or foresee the decision, rather focuses on the question of what the rights and obligations of coastal states in the Sea of Azov and the Kerch Strait are.

Youri van Logchem in his book "The Rights and Obligations of States in Disputed Maritime Areas" states that

> Generally speaking, it is essential to make a distinction between when a State has undisputed title over land territory, which is used to claim maritime zones from its base points, and where an underlying land territory is involved over which title is disputed. This is because the applicable legal regime may be different for these two situations.[466]

Following this approach, Ukraine and Russia got "a jackpot" as both situations exist in the waters of the Azov Sea and the Kerch Strait. Thus, from one side, there is an underlying land territory dispute between these two states. From another side, before 2014 and till now, there was no clear delimitation in these waters. Due to this, Ukraine claims its maritime zones from its base points generated by Crimea and from its mainland territory in the Azov Sea.[467] This situation remained as stated above till 2022. In 2022 Russia occupied the so-called "land way" to the Crimea, so at the moment, there is only a situation when the territory that generates relevant maritime zones in the Azov Sea is occupied. Technically, according to the point of view by the Russian Federation, the dispute between Ukraine and Russia regarding waters of the Azov Sea and the Kerch Strait should not exist anymore because the coastal territories of Ukraine around these waters are claimed by Russia as its own territory. However, such claims are and should be considered as illegal, having no validity.

When a maritime boundary is not defined, two neighbouring coastal states may have conflicting claims to sovereignty, sovereign rights, and jurisdiction over the same maritime area. This can lead to competing interests and legal complexities until a clear delimitation line is established.[468] Due to the significant growth in coastal state's jurisdiction in the last 50–60 years, approximately 400 instances of "maritime areas with overlapping entitlements" occurred. This happens when a maritime area lacks clear boundaries, but there is a potential for a maritime boundary to be established because different states have entitlements to overlapping maritime zones in the same region.[469]

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465 *Ibid.,* para. 292.

466 Youri van Logchem, *The Rights and Obligations of States in Disputed Maritime Areas* (Cambridge: Cambridge University Press, 2021), 240.

467 Although, it should be mentioned that between 2014 and 2022, there was a small part of the coast of Ukraine in the Azov Sea closer to the Russian boarder that was not under de-facto control of Ukraine.

468 Logchem, *The Rights and Obligations of States in Disputed Maritime Areas*, *op. cit. 466,* x.

469 *Ibid.,* 1.

Among those states, those coastal state's jurisdiction has grown were Ukraine and Russia. After the dissolution of the USSR, the Azov Sea and the Kerch Strait found themselves boarded by two states instead of one.[470] Thus, after the dissolution, Ukraine started to draw and negotiate its borders. It adopted the Law of Ukraine on the State Border of Ukraine where it established its territorial sea and the Law of Ukraine on the Exclusive (Maritime) Economic Zone of Ukraine.[471] Also, Ukraine's Permanent Mission to the UN submitted the list of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov.[472]

In 1992, Ukraine urged Russia to start the delimitation of the Sea of Azov based on provisions of international law. However, it should be noted that after the dissolution of the USSR the relationship between Russia and Ukraine faced constant crises.[473] The disputes and controversies multiplied with issues relating denuclearization, dispute over the division of the Black Sea Fleet, issue of the Russian-Ukrainian border, mutual distrust, etc. The issue of the Russian-Ukrainian border consists the facts that "since the mid-1990s Ukraine has wanted to demarcate the border and tighten border controls towards Russian citizens, while Russia agrees only to draw the border on maps and to preserve the present liberal nature of border checks" and, as a result of this, "delimiting the maritime borders in the Azov Sea and the Strait of Kerch has turned out to be especially difficult".[474]

Despite numerous negotiations and meetings, the delimitation and drawing of the maritime border between Ukraine and the Russian Federation in the Azov Sea, Kerch Strait and the Black Sea never happened.[475] The proverb "good fences make good neighbours" is matching perfectly in this situation.[476]

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470 Vladimir Socor, "Azov Sea, Kerch Strait: Evolution of Their Purported Legal Status (Part One)," *Eurasia Daily Monitor*, December 3, 2018, https://jamestown.org/program/azov-sea-kerch-strait-evolution-of-their-purported-legal-status-part-one/.

471 Article 5 "Law of Ukraine on the State Border of Ukraine", *op. cit. 386*; Article 2 of "Law of Ukraine on the Exclusive (Maritime) Economic Zone of Ukraine" *op. cit. 416.*

472 "List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov, notified by note verbale dated 11 November 1992", *UN Law of the Sea Bulletin* 36 (1998) 51-52.

473 Arkady Moshes, "Littoral Statttes and Region Building Around the Black Sea," in *The Black Sea Region: Cooperation and Security Building*, edited by Oleksandr Pavliuk, Ivanna Klympush-Tsintsadze, (Abingdon, New York: Routledge, Taylor & Francis Group, 2016): 81, 94-96.

474 *Ibid.*

475 Bohdan Ustymenko, Tetiana Ustymenko, "Maritime Security of Ukraine. A Reference Work. (5) Ukraine's Maritime Borders with the Russian Federation," *BlackSeaNews*, December 12, 2021, https://www.blackseanews.net/en/read/183628.

476 It also was numerously used to refer to delimitation: Made Arsana, "Good Fences Make Good Neighbours: Challenges and Opportunities in Finalising Maritime Boundary Delimitation in the Malacca Strait Between Indonesia and Malaysia", *Indonesian Journal of International Law* 12, 1 (31 October 2014); Sam Bateman, "Good Fences or Good Neighbours: Implications for Maritime Boundaries", in *The South China Sea Disputes* (World Scientific, 2015), 419–422; David Anderson,

So, when in 2014 Russia occupied Crimea, it would be impossible to imagine the delimitation negotiations, because it would be no longer about the waters of the Azov Sea or the Kerch Strait. It would be about the land territories. The current map of the Russian occupation of Ukrainian territory can be seen below.

Picture 6. Interactive Map: Russia's Invasion of Ukraine (updated on September 18, 2023).[477]

During the existence of the USSR and after its dissolution, but before the occupation in 2014, some scholars were making their remarks and sharing views on the status of the Azov Sea and the Kerch Strait[478] After the *Coastal State Dispute* was submitted to the compulsory procedure of UNCLOS, some authors had a view that Ukraine and Russia currently share a "condominium" of internal waters in the waters in the Azov Sea. This opinion is based on 1992 judgement in the *Land, Island and Maritime*

"Negotiating Maritime Boundary Agreements: A Personal View", in *Maritime Delimitation* (Leiden: Brill Nijhoff, 2006), 129–150.

477 "Interactive Map: Russia's Invasion of Ukraine", Institute for the Study of War and AEI's Critical Threats Project, accessed 18 September 2023, https://storymaps.arcgis.com/stories/36a7f6a6f5a9448496de641cf64bd375. Last time updated on September 18, 2023.

478 See Joseph B. McDevitt, "The Law of the Sea," *Texas International Law Forum* 1 (January 1965): 62; Lewis M. Alexander, "Regionalism and the Law of the Sea: The Case of Semi-Enclosed Seas," *Ocean Development and International Law* 2 (1974): 170; Joseph J. Darby, "The Soviet Doctrine of the Closed Sea," *San Diego Law Review* 23 (May-June 1986): 690; Mark J. Valencia, "Law of the Sea in Transition: Navigational Nightmare for the Maritime Powers," *Journal of Maritime Law and Commerce* 18 (October 1987): 547; Olga Bogdan, "Establishing of the Status and Legal Regime of Azov Sea," *Ukrainian Journal of International Law* 2004, 1 (2004): 46-49; Tomasz Kaminski, "Some Remarks on the Legal Status of Bays according to Conventions on Law of the Sea Concluded under the Auspices of the United Nations," *Polish Review of International and European Law* 2 (2013): 30; Oleksandr Brylyov, "The Sea of Azov Agreement of 2003 as an Example of 'Excessive Maritime Claims'", *Ukrainian Journal of International Law* 4 (2016): 48-54.

Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) in relation to the Gulf of Fonseca.[479] In this case ICJ in the mentioned case, decided that

> the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment … the waters held in sovereignty jointly …
>
> the legal situation of the waters outside the Gulf is that, the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea;[480]

It can be said that after the dissolution of the USSR, Ukraine and Russia either explicitly or implicitly, agreed to the certain level of maintenance of the earlier existing regime and later codified this approach in the Agreement on Cooperation in the Use of the Azov Sea and the Kerch Strait. A couple things in this regard can be argued. Firstly, "whether both States consistently upheld their consent in light of the lack of any proper shared governance system and the continuing delimitation dispute in the Sea of Azov". Secondly, it looks like "Ukraine will distance itself from the bay regime (if any) in the light of waning chances of a return of Crimea".[481]

According to the arbitral tribunal's Award on Preliminary Objections in *Coastal State Rights Dispute*:

> 291. … the legal regime governing the Sea of Azov and the Kerch Strait depends, to a large extent, on how the Parties have treated them in the period following the independence of Ukraine. The positions of the Parties in respect of this question can be found or inferred from the subsequent agreements between them, including the Azov/Kerch Cooperation Treaty and the State Border Treaty, as well as their actual practice in those maritime areas. In order to determine whether the Sea of Azov and the Kerch Strait constitute internal waters, therefore, the Arbitral Tribunal must examine not only the subsequent agreements between the Parties but also how the Parties have acted vis-à-vis each other or vis-à-vis third States in the above areas. In particular, this would require the Arbitral Tribunal to scrutinize the conduct of the Parties with respect to such matters as navigation, exploitation of

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479 Schatz and Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov Part I: The legal status of Kerch Strait and the Sea of Azov," *op. cit. 119.*

480 *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening),* General List, No. 75, 11 September 1992, p. 616 (269), para. 432; *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 85, para 290.

481 Schatz and Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov Part I: The legal status of Kerch Strait and the Sea of Azov," *op. cit. 119.*

natural resources, and protection of the marine environment in the Sea of Azov and the Kerch Strait.

When the answer on the legal regime governing the Sea of Azov and the Kerch Strait is yet to be settled, the following section examines the regime created by the Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait.

2.2.2. Rights and obligations in accordance with the Azov/Kerch Cooperation Treaty

The Azov/Kerch Cooperation Treaty has its origins in a lengthy negotiation process between Ukraine and the Russian Federation.[482] However, since it did not delimit a maritime boundary between Ukraine and Russia, they kept having negotiations about the delimitation even after the conclusion of the agreement. It is estimated that it was around 36 negotiation rounds about demarcation of the Azov-Kerch waters between Ukraine and the Russian Federation that were made between October 16, 1996, and March 3, 2011.[483]

Some Ukrainian scholars believe that it is necessary to recognise the mentioned Agreement as null and void, as it was signed in 2003 as a result of the "Tuzla incident," during which Russia effectively threatened the territorial integrity of Ukraine.[484]

The "Tuzla incident" began on September 29, 2003. It constituted the process of building a sand-and-stone wall from the territory of Russia towards Tuzla. This wall path has started 4.5 kilometres away from the southwestern tip of Russia's Taman Peninsula and stopping just 100 metres before Ukrainian territory. The construction continued for almost two weeks before Moscow responded to Kyiv's two diplomatic

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482 Ridvan Bari Urcosta, "Russia's strategic considerations on the sea of Azov," *Warsaw Instutute Special Report*, March 12, 2018, https://warsawinstitute.org/wp-content/uploads/2018/12/Russias-Strategic-Considerations-on-the-Sea-of-Azov-Warsaw-Institute-Special-Report.pdf; Oleksandr Brylov, "Formation of the Territorial Sea of Ukraine" [in Ukrainian: "Stanovlennya terytorial'noho morya Ukrayiny"], *Ukrainian Journal of International Law* 4 (2022): 36-44. Also, a lot of information on negotiation process can be found in evidence submitted by parties to the arbitral tribunal in *Coastal State Rights Dispute*.

483 Bohdan Ustymenko and Tetiana Ustymenko, "On the Legal Status of the Sea of Azov and the Kerch Strait", *BlackSeaNews*, February 16, 2020, https://www.blackseanews.net/en/read/160827.

484 Bohdan Ustymenko and Tetiana Ustymenko, "Is the agreement on the Azov Sea and Kerch Strait, concluded by Kuchma and Putin, valid?" [in Ukrainian: Chy ye diysnym ukladennya Kuchmoyu ta Putinym dohovir pro Azovs'ke more ta Kerchens'ku protoku], *BlackSeaNews*, January 21, 2020. https://www.blackseanews.net/read/159604; Roman Honcharenko and V. Hordiychuk, "On the Issue of Protecting Ukraine's Economic Activities in the Azov Sea" [in Ukrainian: "Do pytannya zakhystu ekonomichnoyi diyal'nosti Ukrayiny v Azovs'komu mori"], paper presented at *Maritime Strategy of the State: Development and Implementation of Ukraine's Maritime Potential*, Kyiv (2021): 65; Bohdan Ustymenko, "Measures for the Legal Protection of Ukraine's National Interests at Sea" [in Ukrainian: "Zakhody pravovoho zakhystu natsional'nykh interesiv Ukrayiny na mori"], paper presented at *Maritime Strategy of the State: Development and Implementation of Ukraine's Maritime Potential*, Kyiv (2021): 90.

notes, asking for an explanation. Russia replied claiming that Tuzla does not belong to Ukraine, so its actions are legal.[485] Earlier, in 1999 Ukraine unilaterally proclaimed its boundary line in Kerch Strait that would have put Tuzla Island on the Ukrainian side of the strait.[486] Due to this, the Russians argued that Tuzla was not originally an island but a spit connected to the Taman Peninsula until the 1920s, making it a Russian territory. On the other hand, Ukraine presented documents showing that the island was officially attached to Crimea before becoming part of the territory of Ukrainian SSR in 1954.[487]

The situation was so critical that the Ukrainian parliament decided to establish a Temporary Special Commission of the *Verkhovna Rada* of Ukraine to ensure parliamentary control over the state border regime of Ukraine in the area of the Tuzla Island.[488] It is claimed that President of Ukraine Kuchma was forced to personally intervene in the conflict around the Tuzla Spit island and sign a Cooperation Agreement.[489]

It could be an argument in the court, because, indeed, according to Article 52 of VCLT[490] an international agreement is void if its conclusion was a result of the threat

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485 "Dispute over Tuzla Changes Ukraine's Stance toward Russia," *The Ukrainian Weekly* Vol. LXXI, 44. November 2, 2003, http://ukrweekly.com/archive/2003/The_Ukrainian_Weekly_2003-44.pdf.

486 Alexander Skaridov, "The Sea of Azov and the Kerch Straits," in *Navigating Straits: Challenges for International Law*, edited by David D. Caron and Nilufer Oral (Leiden: Brill Nijhoff, 2014), 222; Valentin J. Schatz and Dmytro Koval, "Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective," *Ocean Development & International Law* 50, 2–3 (3 July 2019): 278.

487 Tuzla Island formed in 1925 when a narrow sandbank connected to the Russian Taman Peninsula was naturally eroded. In 1941, the island, covering an area of 3 square kilometers, was transferred to the Crimean Autonomous Soviet Socialist Republic (within the RSFSR), and in 1954, along with the Crimean region, it became part of the Ukrainian SSR. Therefore, in 1991, Tuzla became a territory of independent Ukraine. See, "Half a step across the water: why denunciation of maritime agreements with Russia alone is not enough" [in Ukrainian: Piv kroku po vodi: chomu samoyi lyshe denonsatsiyi mors'kykh uhod z RF nedostatn'o], *Novynarnia*, February 16, 2023, https://novynarnia.com/2023/02/16/denonsacija-ugod-z-rf/; Tatiana Zhurzhenko, "Ukraine's Border with Russia before and after the Orange Revolution," in *Die Ukraine: Zerrissen zwischen Ost und West?* (Vienna: Schriftenreihe der Landesverteidigungsakademie, 2007), 73; Vladimir Socor, "Azov Sea, Kerch Strait: Evolution of Their Purported Legal Status (Part Two)," *Eurasia Daily* Monitor, December 5, 2018, https://jamestown.org/program/azov-sea-kerch-strait-evolution-of-their-purported-legal-status-part-two.

488 "Resolution of the Verkhovna Rada of Ukraine On the Establishment of the Temporary Special Commission of the Verkhovna Rada of Ukraine for Ensuring Parliamentary Oversight of the State Border Regime of Ukraine in the Area of Tuzla Spit Island" [in Ukrainian: "Postanova Verkhovnoyi Rady Ukrayiny Pro utvorennya Tymchasovoyi spetsial'noyi komisiyi Verkhovnoyi Rady Ukrayiny shchodo zabezpechennya parlament·s'koho kontrolyu za rezhymom derzhavnoho kordonu Ukrayiny v rayoni ostrova Kosa Tuzla"], *Verkhovna Rada of Ukraine*, accessed 14 September 2021, https://zakon.rada.gov.ua/laws/show/1235-15#Text; Ustymenko and Ustymenko, "Is the agreement on the Azov Sea and Kerch Strait, concluded by Kuchma and Putin, valid?", *op. cit. 484.*

489 Ustymenko and Ustymenko, "Is the agreement on the Azov Sea and Kerch Strait, concluded by Kuchma and Putin, valid?", *op. cit. 484.*

490 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

or use of force. Therefore, in accordance with international law, this Agreement could be considered as void as it was signed under the threat of the use of force. However, it was in force since it was ratified by both parties and continued to operate until 2023. On February 24, 2023, Ukraine adopted the Law On the Termination of the Treaty between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait. The reason was a fundamental change of circumstances, pursuant to Article 62 of VCLT and Article 24 of the Law of Ukraine on International Treaties of Ukraine.[491] The Russian Federation's aggression against Ukraine since 2014 could be seen as a valid reason to suspend or terminate the Cooperation Agreement automatically. However, it's important to note that according to Article 3 of the ILC Draft Articles on the Effects of Armed Conflicts on Treaties, the Cooperation Agreement should not automatically be considered terminated or suspended just because of the hostilities between Ukraine and Russia in 2014, even if assuming that dispute involving an armed conflict.[492] In particular, "[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties […] between States parties to the conflict."[493] This provision deals with the automatic application of law.[494] Thus, it means that the Cooperation Agreement was valid for nearly 20 years and it should be applied in regulation relations between Ukraine and Russia during its validity period.

From the perspective of Crimean occupation and dispute settlement of UNCLOS it is relevant to mention that the Cooperation Agreement does not refer to UNCLOS compulsory dispute settlement procedures. Thus, it excluded the possibility to use Article 288(2) UNCLOS, where a court or tribunal would have the jurisdiction to handle any dispute regarding the interpretation or application of this Cooperation Agreement.[495] Namely, the Article 4 of the Cooperation Agreement states that "[d] isputes between the Parties relating to the interpretation and application of this

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491 "Law of Ukraine on the Termination of the Agreement between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait" [in Ukrainian: "Zakon Ukrayiny Pro prypynennya diyi Dohovoru mizh Ukrayinoyu ta Rosiys'koyu Federatsiyeyu pro spivrobitnytstvo u vykorystanni Azovs'koho morya i Kerchens'koyi protoky"], *Verkhovna Rada of Ukraine*, accessed 22 August 2023, https://zakon.rada.gov.ua/laws/show/2948-20#Text.

492 Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 55; Article 3(a) and Article 18 of Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, *op. cit. 216,* 111 and 119. It acknowledges that treaties may be terminated, withdrawn from, or suspended for reasons other than those mentioned in the present draft articles. These reasons may include a material breach, supervening impossibility of performance, or a fundamental change of circumstances. According to the Commentary, Article 18 serves to ensure that other rules of international law may still apply, even in cases of armed conflicts. In particular, "[i]t was to dispel the possible implication that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal or suspension."

493 Article 3(a) of Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, *op. cit. 216,* 111.

494 *Ibid.,* 112.

495 Article 288(2) UNCLOS.

Agreement shall be resolved through consultations and negotiations, as well as other peaceful means chosen by the Parties."

The Cooperation Agreement provides such rights and obligations for Ukraine and the Russian Federation as coastal states:

- freedom of navigation for trade vessels and military ships, as well as other state-owned vessels engaged in non-commercial purposes under Ukraine's or the Russian Federation's flags;[496]
- cooperation, ensured through the implementation of existing agreements and the conclusion of new agreements, provided in different matters, including:
  - joint activities in the field of navigation;
  - regulation and navigation-hydrographic support;
  - fishing;
  - protection of the marine environment;
  - ecological safety;
  - search and rescue in the Azov Sea and the Kerch Strait.[497]

Other states' rights regarding entering the Azov Sea and passing through the Kerch Strait are as following:

- trade vessels under the flags of third states: only if they are heading to or returning from a Ukrainian or Russian port.[498]
- military ships or other state-owned vessels of third states: if they are on a visit or official visit to a port of one of the Parties, upon invitation or permission agreed with the other Party.[499]

This regime written in the Cooperation Agreement does not correspond directly with any of the maritime regimes mentioned in UNCLOS. Ukraine terminated this Agreement on February 24, 2023, which holds symbolic significance as it is exactly one year after the start of Russia's full-scale aggression against Ukraine.

The question of the status of bilateral agreements between Ukraine and the Russian Federation often occurred in Ukrainian news, among discussions in governmental levels and Ukrainian scholars since 2014.[500] Due to the tense relations between

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496 Article 2(1) of the Cooperation Agreement, *op. cit. 491*.

497 *Ibid.,* Article 3.

498 *Ibid.,* Article 2(2).

499 *Ibid.,* Article 2(3).

500 "Denunciation of the agreement with Russia on the Sea of Azov: 10 arguments for and against" [in Ukrainian: Denonsatsiya uhody z Rosiyeyu shchodo Azovs'koho morya: 10 arhumentiv za ta proty], *European Pravda*, October 4, 2018, https://www.eurointegration.com.ua/rus/articles/2018/10/4/7087769/; "Treaty on Friendship between Ukraine and the Russian Federation Stopped Being in Force" [in Ukrainian: "Dohovir pro druzhbu Ukrayiny z RF vtratyv chynnist"], *Ukrainska Pravda*, April 1, 2019, http://www.pravda.com.ua/news/2019/04/1/7210930/; Dmitry Runkevich and Malay Elena, "The Treaty on the Border with Ukraine is Proposed to Be Denounced" [in Russian: "Dogovor o granitse s Ukrainoy predlagayut denonsirovat"], *Izvestia*, July 2, 2015, https://iz.ru/news/588341; "Klimkin announced the termination of the agreement with Russia on the Sea of Azov," *Ukraina.ru*, February 21, 2019, https://ukraina.ru/news/20190221/1022769935.

Ukraine and the Russian Federation, it has been mentioned quite a lot of times that all agreements with Russia should either be terminated or denounced.[501]

One might assume that after the annexation of Crimea and the tense relations with Russia, Ukraine would attempt to limit all interactions or restrict all relationships with its neighbour. On July 16, 2015, a group of Ukrainian parliament members proposed a Draft Law on the Denunciation of the Cooperation Agreement, but it was not adopted.[502] A couple years later, in 2018, a similar draft law was made with the aim of further delimitation in the Azov Sea. However, it was also not adopted.[503]

During that time, there was a lot of debate about whether to terminate the Cooperation Agreement or not, similar to the famous "to be or not to be" question. Some experts believed that the Agreement should not be denounced. From one side it was that Ukraine relied on the Agreement to support "its claim that the construction of Kerch Strait Bridge is illegal and for its passage rights through Kerch Strait".[504] On the other side, some argued that denouncing the Cooperation Agreement would not make sense without a specific, concrete strategy for further action. Moreover, a significant number of claims advocating for the termination of the agreement lacked international legal analysis and a comprehensive examination of all factors.[505] Interestingly, in the news the fact that the Cooperation Agreement was in force was considered as "a big

html; Anastasia Zanuda, "Should Ukraine terminate the agreement with Russia on the Sea of Azov" [in Russian: Stoit li Ukraine rastorgnut' soglasheniye s Rossiyey po Azovskomu moryu], *BBC News Ukraine*, October 4, 2018, https://www.bbc.com/ukrainian/features-russian-45748353, etc.

501 *Ibid.* Also, it should be mentioned that the difference in wording arises depending on the various circumstances provided in VCLT. So, a treaty can be denounced or terminated by options mentioned in Part V, Articles 42 to 45 and 54 to 64 of VCLT. Denunciation usually means "a unilateral act by which a party seeks to terminate its participation in a treaty", while "termination … may only take place as a result of the application of the provisions of the treaty itself or Article 42 VCLT". Anthony Aust, "Treaties, Termination." *Max Planck Encyclopedias of International Law*. Oxford Public International Law. Oxford University Press, June 2006.

502 "The Draft Law 0051 on the Denunciation of the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait" [in Ukrainian: "Proekt Zakonu pro denonsatsiyu Dohovoru mizh Ukrayinoyu ta Rosiys'koyu Federatsiyeyu pro spivrobitnytstvo u vykorystanni Azovs'koho morya i Kerchens'koyi protoky"], 16 July 2015, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56077.

503 "The Draft Resolution 8583 on the Address of the Verkhovna Rada of Ukraine to the President of Ukraine, Minister of Defence of Ukraine concerning the Agreement between Ukraine and the Russian Federation on Cooperation on the Use of the Sea of Azov and the Kerch Strait" [in Ukrainian: "Proekt Postanovy pro Zvernennya Verkhovnoyi Rady Ukrayiny do Prezydenta Ukrayiny, Ministra oborony Ukrayiny stosovno Dohovoru mizh Ukrayinoyu ta Rosiys'koyu Federatsiyeyu pro spivrobitnytstvo u vykorystanni Azovs'koho morya i Kerchens'koyi protoky"], 10 July 2018. http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64400.

504 Schatz and Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov Part I: The legal status of Kerch Strait and the Sea of Azov," *op. cit. 119.*

505 Tymur Korotkyi and Natalia Hendel, "International-Legal Analysis of the Situation in the Azov Sea and the Kerch Strait," *Ukrainian Journal of International Law* 2 (2018): 51.

strategic mistake of [Ukrainian] diplomacy".[506]

It is possible to argue that the events on November 25, 2018 could be one of the reasons for terminating any agreements between Ukraine and Russia. Following this, on December 6, 2018, the President of Ukraine Petro Poroshenko signed a Law on the termination of the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation.[507] Even in 2021, two years before the Agreement's termination, there were still opinions suggesting that the Cooperation Agreement should be denounced.[508]

Meanwhile, European Parliament adopted its Resolution on October 25, 2018, on the situation in the Sea of Azov stated that "Russia is bound by international maritime law and the bilateral cooperation agreement with Ukraine not to hamper or impede transit passage through the Kerch Strait and the Sea of Azov."[509] And on January 24, 2019, the Parliamentary Assembly adopted Resolution on the escalation of tensions around the Sea of Azov and the Kerch Strait and threats to European security.[510] In this resolution the Assembly called to "respect both the Treaty on Cooperation in the Use of the Sea of Azov and the Kerch Strait and the agreed regulations for navigation through the canal".[511] These both provisions from the resolutions of the European Parliament and Parliamentary Assembly give a clear understanding that the Cooperation Agreement, before its termination, provides certain rights and obligations to the parties which are highlighted by international authorities.

Some experts believe that after denunciation, there will be nothing to appeal to regarding Russia, in the case of an international tribunal, since the agreements have already been terminated.[512] However, this is going to be argued and proved to be wrong in the following parts regarding the Azov Sea as an enclosed sea.

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506 "Is Russia preparing to occupy Mariupol and Berdyansk? Ukraine may be cut off from the Sea of Azov" [in Ukrainian: "Rosiya hotuye okupatsiyu Mariupolya i Berdyans'ka? Ukrayinu mozhut' vidrizaty vid Azovs'koho mori"], accessed 26 April 2021, https://www.stopcor.org/rosiya-gotuye-okupacziyu-mariupolya-i-berdyanska-ukrayinu-mozhut-vidrizaty-vid-azovskogo-morya/.

507 "Law of Ukraine on the termination of the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation" [in Ukrainian: "Zakon Ukrayiny Pro prypynennya diyi Dohovoru pro druzhbu, spivrobitnytstvo i partnerstvo mizh Ukrayinoyu i Rosiys'koyu Federatsiyeyu"], *Verkhovna Rada of Ukraine*, accessed 6 August 2022, https://zakon.rada.gov.ua/laws/show/2643-19#Text.

508 Dmytro Snegiryov, "Battle for the Sea of Azov: Why Ukraine Should Announce the Denunciation of The 2003 Agreement" [in Ukrainian: "Bytva za Azovs'ke more: chomu Ukrayina maye zayavyty pro denonsatsiyu uhody 2003 roku"], 13 May 2021. https://i-ua.tv/blogs/27675-bytva-za-azovske-more-chomu-ukraina-maie-zaiavyty-pro-denonsatsiiu-uhody-2003-roku.

509 Para 3 of European Parliament Resolution 2018/2870(RSP) On the Situation in the Sea of Azov, 25 October 2018, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0435_EN.html.

510 Parliamentary Assembly of the Council of Europe Resolution 2259 (2019) On the Escalation of Tensions around the Sea of Azov and the Kerch Strait and Threats to European Security, Assembly debate on 24 January 2019.

511 *Ibid*, para 7.

512 "Half a step across the water: why denunciation of maritime agreements with Russia alone is not enough", *op. cit. 487*.

The status of the Sea of Azov and the Kerch Strait appears to have some similarities to the decision made by the ICJ and the Central American Court of Arbitration regarding the legal status of the Gulf of Fonseca. However, when in the Azov Sea and the Kerch Strait military ships under the flags of other states according to the Cooperation Agreement can enter these waters only with the invitation and agreement of both Ukraine and Russia, the Gulf of Fonseca has application of "innocent passage" within its waters.[513]

The Cooperation Agreement establishes in Article 1 that:

> The Azov Sea and the Kerch Strait are historically internal waters of Ukraine and the Russian Federation.
>
> The Azov Sea is demarcated by the state border line agreed upon by the Parties.
>
> The regulation of issues related to the Kerch Strait is carried out by agreement between the Parties.

Thus, the following parts analyse what are coastal states rights and obligations in internal waters and historical sea within UNCLOS perspective.

2.2.3. Rights and obligations in internal waters

Internal waters form part of the coastal state's territory. In particular, they are defined as waters located "on the landward side of the baseline of the territorial sea form part of the internal waters of the State."[514] This provision repeats the respective provisions of the Convention on the Territorial Sea and the Contiguous Zone, in particular Article 5(1) which establishes that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."[515] The coastal state has full sovereignty and exclusive jurisdiction over these waters, allowing it to create and enforce its laws and regulations.[516] However, there is one exception to this rule, which allows foreign ships the right of innocent passage if the use of straight baselines results in enclosing areas that were not previously considered as internal waters.[517]

It is important to highlight that both the Convention on the Territorial Sea and the Contiguous Zone and UNCLOS specifically address the concept of internal waters belonging to a single state, but they do not provide provisions or guidelines for the possibility of two states sharing internal waters. This omission in these two conventions means that the issue of shared internal waters between two states is not explicitly

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513 Mitja Grbec, *The Extension of Coastal State Jurisdiction in Enclosed or Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective*, IMLI Studies in International Maritime Law (London: Routledge, Taylor & Francis Group, 2014) 150-151.

514 Article 8(1) UNCLOS.

515 Convention on the Territorial Sea and the Contiguous Zone. 29 April 1958.

516 Iva Parlov, *Coastal State Jurisdiction over Ships in Need of Assistance, Maritime Casualties and Shipwrecks* (Leiden: Brill Nijhoff, 2022), 47-48.

517 Article 8(2) UNCLOS.

regulated by these international agreements.

According to the Russian Federation the legal regime of the Azov Sea and the Kerch Strait either has historical title or its internal waters or even both at the same time. While the matters related to the historical title addresses in the next part below, this part deals solely with the rights and obligations of coastal states in the internal waters if the Azov Sea and the Kerch Strait are determined as such.

If the Azov Sea and the Kerch Strait are considered internal waters, granting full sovereignty to their coastal states, such as Ukraine and the Russian Federation, it might seem that compulsory dispute settlement procedures under UNCLOS would not apply. However, this is not entirely accurate.

The arbitral tribunal in the *Coastal State Rights Dispute* states that it has jurisdiction in internal waters concerning the obligation to protect and preserve the marine environment under Article 192.[518] This conclusion comes from the interpretation of Article 192 by the ITLOS in the *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries* Commission where it said that the mentioned Article "applies to all maritime areas".[519] The Advisory Opinion mentions that UNCLOS has " provisions concerning general obligations which are to be met by the flag State in all maritime areas" and specifies that such "general obligations are set out in articles 91, 92 and 94 as well as articles 192 and 193 of [UNCLOS]."[520]

Therefore, the Russian Federation's violation of its obligation to protect the environment and to cooperate with Ukraine involves rights and obligations under Part XII of UNCLOS about Protection and Preservation of the Marine Environment.[521] ITLOS in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* highlighted the importance of this obligation, namely, stating that "[w]hile article 192 imposes upon States a legal obligation, this provision is, at the same time, a statement of principle upon which the legal order for the protection and preservation of the marine environment under the Convention is based."[522] Together, Articles 192 and 193 UNCLOS, "reflect, in the context of the protection and preservation of the marine environment, a principle of international environmental law."[523] At the same time Article 193 UNCLOS also "places a constraint upon States' exercise of their sovereign right to exploit their natural resources, which has to be exercised in accordance with their duty to protect and preserve the marine environment."[524]

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518 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 86, para. 295.

519 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4 at 37, para. 120.

520 *Ibid.,* 34, para. 111.

521 Oral, *op. cit. 83,* 507.

522 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* Advisory Opinion, 21 May 2024, List of cases: No. 31, at 67. para. 184.

523 *Ibid.,* 67, para. 186.

524 *Ibid.,* 127, para. 360.

Therefore, it is possible to see a clear balance between sovereign rights of a coastal state and its international obligations. Assuming that the duty to protect and preserve the marine environment is *erga omnes*, then all states parties to UNCLOS could bring claims against the Russian Federation's violations in this regard. However, practically, the same as with the possible claims concerning freedom of navigation and warship immunity, a court or a tribunal established under provisions pf UNCLOS should find that these obligations are *erga omnes partes*. From the perspective of maintaining a balance between sovereign rights of a coastal state and its international obligations, such claims are more likely to succeed in the waters of EEZ than in internal waters.

Nevertheless, it should be differentiated that internal waters are not the same with inland waters. UNCLOS provisions govern what constitutes internal waters and they are considered as a part of maritime zones regulated by UNCLOS. As a result, "[t]hey should not be confused with inland fresh waters, which are subject to a completely different regime."[525]

Even with respect to the internal waters of one state – tribunal has jurisdiction over the matters related to protection and preservation of marine environment. In the case of the Azov Sea and the Kerch Strait the waters in question are managed by two states at the same time. So, these waters can be the internal waters of two states at the same time. It would be logical to assume that some additional obligations are involved on which the arbitral tribunal must have jurisdiction. Also, some examples of cooperation and regulation between states sharing the same waters can be found in regard to Gulf of Fonseca and Gulf of Piran. Therefore, practically, the claim concerning the violation to protect and preserve the marine environment brought by one of the state bordering such shared waters could succeed.

According to the Separate opinion of Judge Wolfrum in *MOX Plant Case* "the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake." Moreover, he expressed his view as "[t]he duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests."[526] However, it should be mentioned that in *the "ARA Libertad" Case*, Judge Wolfrum had a different view than the majority of the ITLOS Judges regarding application of provisions of UNCLOS to internal waters. In this case, Judge Wolfrum with Judge Cot believed that "immunity of warships in foreign internal waters, including ports, is a rule of customary international law which is not being

525 Marcelo G. Kohen, "Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?", in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (Leiden: Brill Nijhoff, 2015), 123.

526 *MOX Plant* (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, Separate opinion of Judge Wolfrum, 135.

incorporated in the Convention"[527]. However, it would also mean that if a rule of customary international law is incorporated in the UNCLOS, then there is a subject-matter jurisdiction of a court or a tribunal under UNCLOS to decide over this matter.

From the analysis of provision of UNCLOS, it is clear that Preamble, Article 2 and 123 and Parts XII, XIII, XIV and Part XV of UNCLOS are those that have general provisions that could be considered as those regulating internal waters shared by two states. However, internal waters regime shared between the two states are not directly mentioned in the provisions of the UNCLOS. The closest Articles of UNCLOS to the shared regime of certain waters is those involving enclosed and semi-enclosed seas, in particular, Article 123 UNCLOS. Thus, rights and obligations of coastal states are analysed after the part of the regime of historical waters.

2.2.4. Rights and obligations in historical waters

"Historic title" refers to a historical claim of sovereignty over land or maritime areas.[528] Historic waters are "waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community States."[529]

In 1927, Philip C. Jessup considered the Sea of Azov as a territorial sea of the USSR as well as any claim related to this "would not be contested".[530] The first Constitution of the USSR dated 1924 did not mention the Azov Sea. However, already in the New Constitution of the USSR dated 1936 in the Article 22 was stated that "the Azov-Black Sea" is a part of the Soviet Union.[531]

In 1958, the Azov Sea was mentioned in "Historic Bays: Memorandum by the Secretariat of the United Nations" as a bay the coasts of which belong to a single State. According to the document, the Azov Sea is among "bays, which are cited for the purpose of illustration, are regarded as historic bays or are claimed as such by the States concerned." It was given as an example of different scholars stating that waters of the Azov Sea are internal waters. Moreover, particularly in Gidel's opinion, the Azov Sea should not be considered as historic waters but forming internal waters. His

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527 *ARA Libertad*, Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Jean-Pierre Cot and Rüdiger Wolfrum, ITLOS Reports 2012, p. 365, para. 7.

528 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 266. Also see, *The South China Sea Arbitration*, Award, *op. cit. 330,* para. 225.

529 L. J. Bouchez, *The Regime of Bays in International Law* (1964) cited from Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (Leiden: Brill Nijhoff, 2019), 6.

530 Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction (1927),* (New York: Kraus Reprint Co, 1970), 382-383.

531 "Constitution of the Union of Soviet Socialist Republics (1924)" [in Russian: Konstitutsiya Soyuza Sovetskikh Sotsialisticheskikh Respublik], accessed 18 August 2021, http://museumreforms.ru/node/13920; "Text of the New Constitution of the U.S.S.R.," *International Conciliation* 18, (February 1937): 146.

argument was that "pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters."[532]

Additionally, the status of the Azov Sea was often mentioned related to the status of the Kerch Strait.[533] Janusz Symonides quoted in 1971 and 1988 that the waters forming the Strait of Kerch connecting the Sea of Azov with the Black Sea are internal waters and under exclusive sovereignty of the coastal State. It was cited as an example of the case of when "both coasts of a strait are those of one State only and it connects the high seas with a land-locked sea surrounded by the territory of this State".[534]

According to USSR legislation, navigation of foreign ships in the internal waters were prohibited and only allowed to the ships under the flags of the USSR and the Union republics.[535] Thus, foreign vessels were prohibited not only to navigate in waters of the Azov Sea but also to fish.[536] Moreover, in 1976 the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers of the USSR adopted the Resolution "On measures to prevent pollution of the Black and Azov Sea basins" where the specified authorities were obliged to terminate the discharge of untreated sewage into waters of the Azov Sea.[537]

The USSR declared "the Sea of Azov […] Soviet territory".[538] This declaration remained unchanged in 1958, when the Convention on the Territorial Sea and the Contiguous Zone was adopted and even after 1964, when it entered into force. Undoubtedly

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532 "Historic Bays: Memorandum by the Secretariat of the United Nations." United Nations Conference on the Law of the Sea Geneva, Switzerland. 24 February to 27 April 1958, document: A/CONF.13/1, extract from the Official Records of the United Nations Conference on the Law of the Sea, I (Preparatory Documents): 3, para 12.

533 *See* William E. Butler, "The Legal Regime of Russian Territorial Waters," *American Journal of International Law* 62, 1 (1968): 51–77; Kazimierz Rowny, "The Right of Passage through Straits Used for International Navigation and the United Nations Convention on the Law of the Sea," *Polish Yearbook of International Law* 16 (1987): 59; T. Haydabrus, "International Legal Aspects of Determining the Status of the Kerch Strait," *Law Review of Kyiv University of Law* (2012): 388; Katuoka and Klumbyte, *op. cit. 352*; Boren Petrinec and Leon Zganec-Brajsa, "Passage through Straits Using as an Example Russian-Ukrainian Relations regarding the Sea of Azov," *Poredbeno Pomorsko Pravo* 174 (2020): 39-74, etc.

534 Janusz Symonides, "Legal Status of the Baltic Straits," *Polish Yearbook of International Law* 4 (1971): 123; Janusz Symonides, "Freedom of Navigation in International Straits," *Polish Yearbook of International Law* 17 (1988): 214.

535 With exception to ships belonging to foreign diplomatic and consular missions which navigation was allowed in accordance with applicable international agreements and customs law. Article 5 of "Charter of Internal Water Transport of the USSR," *Verkhovna Rada of Ukraine*, accessed 10 August 2021, https://zakon.rada.gov.ua/laws/show/v1801400-55#Text.

536 Butler, *op. cit. 533,* 55.

537 "Central Committee of the Communist Party of the Soviet Union, Council of Ministers of the USSR, Resolution of January 16, 1976, No. 42 On Measures to Prevent Pollution of the Black Sea and Azov Sea Basins" [in Russian: "Tsentral'nyy Komitet KPSS Sovet Ministrov SSSR, Postanovleniye ot 16 yanvarya 1976 goda N 42 O merakh po predotvrashcheniyu zagryazneniya basseynov Chernogo i Azovskogo morey"], accessed 10 August 2021, https://docs.cntd.ru/document/765709406.

538 "Soviet Union-Japan," *Digest of International Law* 4 (1965): 1151.

the Azov Sea met the requirements to be considered as internal waters under para 4 of Article 7 of the mentioned Convention. According to it:

> "If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."

The width of the Kerch Strait varies from 4 to 15 km,[539] meaning approximately from 2 to 8 nautical miles, and even with regard to miles it is still between 2.5 to 9 miles. Moreover, when the Soviet Union was the only coastal state in the Sea of Azov, the Kerch Strait did not connect the high seas and inland sea waters. So back then, according to customary law criteria, it could not be open for international navigation.[540]

Another argument that could be used is that "the Sea of Azov does not lie in the immediate vicinity of Ukrainian and Russian coasts and thus cannot be considered as a historic bay under customary international law".[541] The maximum length of waters that covers the Azov Sea is over 60 nautical miles while the maximum width is over 90 nautical miles.[542] However, due to other states' practices there are even bigger historic bays that are claimed historic ones.[543]

In the opinion of Captain Joseph B. McDevitt, the Azov Sea is an example of the USSR's "unjustifiably claimed" body of high seas. According to him:

> if you can draw a line across the mouth of the bay and have that line be 24 miles or less long, then the state is entitled to enclose that water as internal waters. The term "internal waters" also includes those gulfs and bays which, regardless of the width of their mouths, a state has historically claimed as being under its exclusive jurisdiction. In the case of the United States for example, the Delaware and the Chesapeake Bays are historic bays. The Soviet Union has abused the concept of historic bays. They have unjustifiably claimed many large bodies of high seas ringing the Soviet Union as historic gulfs, bays, or seas under their exclusive jurisdiction. They include, for example, the Sea of Azov, the White Sea, Kara Sea, Laptev Sea, East Siberian Sea, Chukchi Sea, Sea of Okhotsk and Bay of Peter the Great.[544]

Considering that the Kerch Strait serves as the entrance to the Sea of Azov and its widest part is less than 24 miles, it is unclear why the Sea of Azov claim is named as an example of an unjustifiable claim. The only explanation that can be given that USSR

539 "Kerch Strait," *Internet Encyclopedia of Ukraine,* accessed 7 August 2023, https://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CK%5CE%5CKerchStrait.htm.

540 Petrinec and Zganec-Brajsa, *op. cit. 533,* 43-44.

541 Alexander Lott, "The Passage Regimes of the Kerch Strait—To Each Their Own?" *Ocean Development & International Law* 52, 1 (2 January 2021): 85.

542 *Ibid.*

543 *Ibid.*

544 McDevitt, *op. cit. 478,* 62.

mistakenly claimed Azov Sea as historical waters,[545] as due to the international law those days it would be justified as internal waters.

Some believe that the provisions of UNCLOS and the characteristics of the bays mentioned in it do not apply to what are known as "historical bays". Consequently, the historical waters are excluded from the scope of regulation of UNCLOS. Some say that UNCLOS does not "directly regulate historic bays (Article 10(6) of the Convention). However, both agree that the status of historical waters is governed by customary international law.[546]

The jurisprudence did not provide a clear explanation whether provisions concerning the obligation to protect and preserve the marine environment can be applied in the historic waters, but it does so towards internal waters. These general obligations that are provided in Articles 91, 92 and 94 and Articles 192 and 193 of UNCLOS have "to be met by the flag State in all maritime areas".[547] From this perspective it is possible to assume that such general obligations are also applicable in historical waters.

The existence of a title to historic waters, including historic bays, is to a large extent a matter of appreciation depending on specific circumstances. It seems, therefore, that the claim to a historic bay must be evaluated on a case-by-case basis. The existence of a historic title largely depends on specific circumstances. Therefore, asserting a historic bay claim should be examined case by case.[548]

Thus, because of the nature of the general obligations under UNCLOS, the fact of unsettled dispute because of the Crimean occupation in the light of law of the sea arbitral tribunal does not have its impact on dispute settlement under UNCLOS. The significant factor that does have its impact is the optional exception concerning historical title provided in Article 298 of UNCLOS. This particular aspect is further examined in part 3 of Chapter II of this doctoral dissertation. Meanwhile the next part deals with rights and obligations of coastal states in the Azov Sea as an enclosed sea.

2.2.5. Rights and obligations of coastal states in the Azov Sea as an enclosed sea

The legal regime of enclosed sea is provided in Articles 122 and 123 UNCLOS. These Articles invoke an obligation to cooperate within the regime of "enclosed or

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545 Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, *op. cit. 529,* 431: "Some 'claims' categorised as being 'historic' today – such as the Sea of Azov – were probably misnamed or at least loosely entitled as 'historic', because they were – even at the time of the inception of the 'claim' – in any case internal waters in the light of then-existent international law or at least constituted 'ancient rights'."

546 Olexandr Brylov, "Historic Maritime Waters (General Remarks)," *Ukrainian Journal of International Law* 2 (2022): 53; Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 60.

547 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, *op. cit. 519,* 34, para. 111.

548 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 70.

semi-enclosed sea". Enclosed or semi-enclosed sea is defined in the Article 122 UNCLOS as

> a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

The wording of this Article gives a possibility to assume that by using "or" the drafters of the UNCLOS had intention to include two different meanings in regard to waters surrounded by two or more States. One is that "enclosed or semi-enclosed sea" is waters connected to another sea or the ocean by a narrow outlet. Another one is waters consisting entirely or primarily of the territorial seas and EEZ-s of two or more coastal States.[549]

The Azov Sea can be used as an example of the first or the second meanings of "enclosed or semi-enclosed sea" regime depending on the arbitral tribunal's decision in its merits in the *Coastal State Rights Dispute*. In all scenarios, it is a sea that is surrounded by Ukraine and the Russian Federation as its coastal states. The Azov Sea is connected to the Black Sea by the Kerch Strait. Thus, it is possible to say that regardless of whether the Azov Sea consists of internal waters and/or historical ones or it consists of territorial sea and EEZ, it is still surrounded by two states. Therefore, it is a requirement for these bordering states to comply with obligation to cooperate in such waters.

Article 123 UNCLOS includes such obligations as:

> "(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article."

The problematic aspect of this Article is that the language of it is blurred. Mainly because "[t]he desirability of cooperation is expressed by a mere 'should' (cooperate) rather than a more concrete 'shall'."[550] Even taking into account the possible not obligatory character of the duty to cooperate under Article 123, three out of four subject matters provided in the Article, such as about living resources, marine environment, and scientific research, find themselves in the other provisions of UNCLOS.[551] Thus, for example, the conservation and management of living resources is provided by Article

549 Article 122 UNCLOS.

550 I. Winkelmann, Commentary on Art. 123 UNCLOS, in Proelß et al., *United Nations Convention on the Law of the Sea: A Commentary*, *op. cit. 222.*

551 Erik Franckx and Marco Benatar, "The 'Duty' to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas," *Chinese (Taiwan) Yearbook of International Law and Affairs*, 31 (January 2016): 81.

61(2) UNCLOS, the obligation to cooperate is included in relation to the development and transfer of technology by Article 144 UNCLOS, in relation to marine scientific research by Articles 143(3) and 242 UNCLOS, and in relation to search and rescue service is included by Article 98 UNCLOS. This way, such obligation to cooperate has a compulsory character, and it is applicable under the jurisdiction of the arbitral tribunal without requiring direct or indirect determination of a coastal state over Crimea.

Moreover, the duty to cooperate is a fundamental principle in preventing pollution of the marine environment, as outlined in Part XII UNCLOS and general international law.[552] The principle of cooperation in international environmental law was established in Principle 24 of the Stockholm Declaration and Principle 27 of the Rio Declaration.[553] The duty to cooperate is recognised "in virtually all international environmental agreements of bilateral and regional application and global instruments".[554]

Law of the sea jurisprudence has examples when ITLOS required the States in the dispute to cooperate for different purposes, including for such purposes as exchanging information, monitoring or assessing risks and effects of their activities, and devising measures to prevent pollution.[555] The duty to cooperate in this context serves as a procedural requirement for safeguarding the marine environment.[556] It is also should be noted that ITLOS also stated regarding the obligation "to ensure" when referred to the problem of illegal, unreported and unregulated fishing.[557] In particular, it is states that

> while under the Convention the primary responsibility for the conservation and management of living resources in the exclusive economic zone, including the adoption of such measures as may be necessary to ensure compliance with the laws and regulations enacted by the coastal State in this regard, rests with the coastal State, flag States also have the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the exclusive economic zones of the SRFC Member States.[558]

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552 Alan Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea", *International Journal of Marine and Coastal Law* 22, 3 (September 2007): 378; Klein and Parlett, *Judging the Law of the Sea*, *op. cit. 67,* 354.

553 Principle 27, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), *The United Nations Conference on the Human Environment,* Stockholm, 16 June 1972; Principle 24, Rio Declaration on Environment and Development (adopted 13 June 1992) UN Doc A/Conf.151/26 (Vol. I).

554 Philippe Sands et al., *Principles of International Environmental Law*, 4th ed. (Cambridge: Cambridge University Press, 2018), 214.

555 *MOX Plant*, Provisional Measures, para. 82; *Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, para. 92.

556 Klein and Parlett, *Judging the Law of the Sea*, *op. cit. 67,* 354.

557 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, *op. cit. 519,* 38, para. 123.

558 *Ibid.*, p. 38, para. 124.

By this, the "duty to ensure" could be considered as "a central specification of the general duty to cooperate embodied in Part XII UNCLOS" along with the due diligence obligation and the precautionary approach/principle.[559]

Therefore, it could be used as another confirmation that this obligation to cooperate applies regardless of the determination of the coastal state between Ukraine and the Russian Federation.

The example of the cooperation between Ukraine and the Russian Federation could be the Cooperation Agreement. Even now when the Cooperation Agreement is terminated, it does not release neither Ukraine nor Russia from their duty "to fulfill any obligation embodies in the treaty to which it would be subject under international law independently of that treaty."[560] Thus, Ukraine and the Russian Federation still have the obligation to cooperate with each other. However, due to the ongoing Russian aggression against Ukraine, it is obvious that there could not be any cooperation at the moment.[561] Moreover, this puts a question of applicability of the norms of the law of the sea during the international armed conflict, and this, as already established in Chapter I, outside of the scope of this doctoral dissertation. Therefore, the next part addresses the rights and obligations of Ukraine and the Russian Federation in the waters of the Kerch Strait.

2.2.6. Rights and obligations of states in the Kerch Strait as an international strait

The rights and obligations of coastal states in the Kerch Strait if the strait consists of internal water and/or historical waters discussed in earlier parts of this dissertation in the light that applicability of such rights and obligations in the waters of the Azov Sea and the Kerch strait is the same. However, the Kerch Strait can have a different regime because it potentially can be considered as an international strait with either governed or not by UNCLOS.

International navigation in international straits is guaranteed by international

559 Alexander Proelss, "The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment", in *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, ed. Angela Del Vecchio and Roberto Virzo (Cham: Springer International Publishing, 2019), 98.

560 Article 10, Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, *op. cit. 216,* 115-116.

561 Following the start of the new wave of the Russian aggression against Ukraine, Ukraine unilaterally denunciated agreements with the Russian Federation related to their cooperation. See, "Decree by The Cabinet of Ministers of Ukraine On the Denunciation of the Agreement between the Government of Ukraine and the Government of the Russian Federation on Cooperation in the Field of Fisheries from April 29, 2022, No. 500" [In Ukrainian: "Postanova Kabinetu Ministriv Ukrayiny Pro denonsatsiyu Uhody mizh Uryadom Ukrayiny ta Uryadom Rosiys'koyi Federatsiyi pro spivrobitnytstvo v haluzi rybnoho hospodarstva"], *Verkhovna Rada of Ukraine*, accessed 21 August 2023, https://zakon.rada.gov.ua/laws/show/500-2022-%D0%BF#Text. Denunciation happened as of April 29, 2022; however, the agreement will lose its force for Ukraine on September 24, 2027.

agreements, such as the UNCLOS and long-standing international conventions in force specifically relating to straits. Therefore, the reference to straits used for international navigation in UNCLOS does not make it equal to international or non-international straits.[562]

Differentiating between international and non-international straits is crucial. In non-international straits, the state controlling the strait can restrict passage based on its domestic laws. Moreover, vessel traffic in such straits is not protected by the UNCLOS Part III and IV.[563] Although, there is a difference between international straits. Even within international straits, there can be those where provisions of Part III of UNCLOS are applicable and those that are not the subject to the regulations under Part III of UNCLOS.[564]

The status of the Kerch Strait depends on a lot of factors. Ukraine claims that the Sea of Azov includes various maritime zones, such as internal waters, territorial sea, contiguous zone, EEZ, and continental shelf. However, the Russian Federation maintains that the Sea of Azov is part of the internal waters of both Russia and Ukraine. If the Sea of Azov is indeed considered part of Ukraine's normal maritime zones as defined in UNCLOS, then the Kerch Strait meets the criteria for the regime of transit passage under Article 37 of UNCLOS.[565] According to Article 35 of UNCLOS, an exception could apply if:

(a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;	**if** the waters within the Kerch Strait are recognised as internal waters. However, the exception does not explicitly address the possibility of internal waters being shared by two states. Instead, it focuses on situations where the establishment of straight baselines encloses areas that were not previously considered as internal waters. In the case of the Azov Sea and the Kerch Strait, it has been previously recognised that the Azov Sea was internal waters during the existence of the USSR. Therefore, the shift in the legal regime could potentially move from internal waters to those regulated by UNCLOS and not vice versa. Thus, the exception to exception does not apply.

562 Alexander Lott, *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage* (Leiden: Brill Nijhoff, 2018), 7-8.

563 *Ibid.,* 7.

564 Articles 35, 36, 38(1) UNCLOS.

565 Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 51-52.

(b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or	The width of the Kerch Strait varies significantly, ranging from 4.5 kilometres to 15 kilometres.[566] The Kerch Strait does not have waters beyond the territorial seas of its bordering states. The calculation is straightforward: 12 nautical miles from Ukrainian territorial sea plus 12 nautical miles from the Russian territorial sea equals a total distance of around 44 kilometres.[567] Therefore, there could not be any EEZ or high seas in the Kerch Strait.
(c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.	The legal regime in the Kerch Strait used to be governed by the provisions of the Cooperation Agreement[568], which is no longer in force. Even if the Agreement were still in force, it is unclear whether it would be considered as a long-standing agreement or not because it was adopted in 2004 and operated till 2023.

Furthermore, as the Kerch Strait is the only way connecting the Black Sea and the Azov Sea, there is no alternative route. As a result, the exception mentioned in Article 36 of UNCLOS, which refers to situations where there is another route available through the high seas or through an EEZ of similar convenience, does not apply in this case.

The main challenge to the existence of the transit passage in the Kerch Strait is whether such passage exists within waters of the Kerch Strait in practice and whether the Azov Sea includes the EEZ and territorial sea of its bordering states. Moreover, the Kerch Strait still could be a strait used for international navigation but with the legal regime on innocent passage.

The legal regime of innocent passage, rather than transit passage, is applicable in straits used for international navigation, which connect a part of the high seas or EEZ with the territorial sea of a coastal State.[569] In these straits, innocent passage cannot be

566 See, Olga Y. Lavrova et al., "Long-Term Monitoring of Sea Ice Conditions in the Kerch Strait by Remote Sensing Data," in *Remote Sensing of the Ocean, Sea Ice, Coastal Waters, and Large Water Regions*, paper presented at SPIE (Warsaw, Poland, 2017), 23; Ivan Zavialov et al., "Water Exchange between the Sea of Azov and the Black Sea through the Kerch Strait," *Ocean Science* 16, 1 (7 January 2020): 15-16; "Kerch Strait," *Internet Encyclopedia of Ukraine, op. cit. 539.* Also, some claim that the width of the Kerch Strait varies significantly, ranging from 3.7 kilometers to 42 kilometers. See, "Environmental Monitoring for the Black Sea Basin: Monitoring and Information Systems for Reducing Oil Pollution," Kerch Report Contribution Agreement No 07.0203/2008/518960/SUB/D2, accessed 6 July 2021, www.blacksea-commission.org/_publ-KerchReport.asp.

567 Calculation is made by "24 Nautical Miles to Kilometers | 24 n Mile to Km," accessed 6 July 2021, http://convertwizard.com/24-n_miles-to-kilometers.

568 The Cooperation Agreement, which regulated navigation in the Azov Sea and the Kerch Strait, had an impact on the regime of passage within the Kerch Strait, as it influenced the rights and obligations of coastal states and other parties using the strait for navigation.

569 Article 45(1) UNCLOS.

suspended.[570] Such straits are called "dead end" ones. The Kerch Strait, connecting the Black Sea to the Sea of Azov, could be potentially considered as a "dead end" strait.[571]

In the arbitration proceedings in the *Coastal State Rights Dispute* Ukraine presented the examples that the transit passage regime in the Kerch Strait occurred in 2001 and 2002, before the Cooperation Agreement was concluded. It is believed that this Agreement designated the Azov Sea and the Kerch Strait as internal waters of Ukraine and Russia and established a restrictive passage regime in the strait. This restrictive regime conflicts with the right of transit passage. Moreover, the 2002 draft law proposing a Ukrainian territorial sea in the Sea of Azov was never adopted, and instead, the 2003 bilateral treaties were concluded, applying the internal waters regime to the Sea of Azov. Therefore, neither treaty law nor Ukraine's past practices necessarily support its claim that the Kerch Strait is subject to the transit passage regime under UNCLOS.[572] However, it is up for the arbitral tribunal to put here the definitive conclusion on the status of the Kerch Strait.

While it may seem that both bordering states could use the Kerch Strait equally, that assumption is incorrect. The Russian Federation faced a significant disadvantage after the collapse of the Soviet Union as the Kerch-Yenikale Canal, a shipping canal built to improve navigation, was closer to Crimea than the Taman Peninsula. Moreover, since Tuzla is considered Ukrainian territory, a major part of the Canal is located within the territorial sea of Ukraine. As a result, Ukraine possessed the canal until 2014, leading to Russia having to pay fees for its ships' passage through the strait. These fees amounted to around 16 million dollars per year, totalling in 100 million dollars over a decade.[573] Since the occupation of Crimea, the passage through the strait is fully subject to the laws and regulations of the Russian Federation. The occupation of Crimea has resulted in Russia assuming complete illegal authority over the navigation and passage rights in the strait.

The occupation has its significant impact as according to the Russian Federation there are no two states bordering the Kerch Strait anymore. Therefore, the provision of Article 41(5) UNCLOS could not be applicable:

> In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the competent international organization.

The interpretation or application of this Article unavoidable requires determining that there are two states bordering the Kerch Strait. Such determination means that it would be necessary to decide over the coastal state within waters of the Kerch Strait.

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570 Article 45(2) UNCLOS.

571 Roach and Smith, *op. cit. 441*, 306.

572 Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 54.

573 Urcosta, *op. cit. 482,* 9-10.

Picture 7. The Kerch Strait.

Taking into consideration that the Azov Sea is bordered by two states, Ukraine could invoke provisions related to the land-locked state in the part of the Azov Sea. For sure, it would lead to a lot of questions. However, regardless of the occupation of Crimea, the Kerch Strait is the only way how Ukraine and the Russian Federation could reach their ports in the Azov Sea. It is an international strait even if it would not be regulated by Part III of UNCLOS. Therefore, in the light of the award of the arbitral tribunal in the *Coastal State Rights Dispute*, regardless of whether it is one coastal state bordering the strait or two, both coastal states in the Azov Sea shall have access to its own ports. However, considering the current situation where all Ukrainian coastal territory in the Azov Sea is occupied, there is no possibility of applying such provisions of UNCLOS.

2.2.7. The legal evaluation of the Kerch bridge construction

After the annexation of Crimea, during its occupation, the Russian Federation constructed a bridge over the Kerch Strait. This bridge, known as the Crimean Bridge or Kerch Bridge, consists of a road bridge used since 2018 and a railway bridge used since 2019.[574] The construction of Kerch Strait Bridge led to the creation of a land

574 Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 41. For the general overview on straits, see: Tuerk, *op. cit. 413,* 167-168; David D.

connection between Crimea and Russia's Krasnodar region. According to Ukraine, the construction of the bridge is to block Ukraine's access to its ports in the Azov Sea and therefore it is an economic blockade. According to Russia the bridge is crucial for its supplies to and from Crimea.[575] Meanwhile the EU, USA and other states have imposed sanctions related to the construction of the Kerch Bridge.[576]

Ukraine has requested the Annex VII Arbitral Tribunal to make a ruling on the legality of the Crimean Bridge over the Kerch Strait, in particular, regarding unauthorised and unilateral construction of the Kerch Strait bridge by the Russian Federation.[577] This anticipated award from the Arbitral Tribunal will be the first judgement to address the compliance of bridge construction with the legal regime of straits.[578] However, the dispute between Ukraine and the Russian Federation is not the first dispute that involved matters regarding the construction of a bridge over a strait. A past example of such a dispute is Finland's case against Denmark in 1992 in ICJ, involving a Danish bridge in the Great Belt that harmed Finnish navigation interests. After Denmark paid compensation to Finland, Finland discontinued the case. As a result, the dispute was settled. However, it serves as an example demonstrating how bridge construction over straits can lead to disputes.[579]

Caron, "The Great Straits Debate: The Conflict, Debate, and Compromise That Shaped the Straits Articles of the 1982 United Nations Convention on the Law of the Sea," in *Navigating Straits: Challenges for International Law*, edited by David D. Caron, Nilüfer Oral (Leiden: Brill Nijhoff, 2014), 9–32.

575 Schatz and Koval, "Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective", *op. cit. 486,* 282-283. For more detailed history over the building of the Kerch Bridge, see, Andriy Klymenko, "The Blocking of the Kerch Strait through the Construction of the Bridge Is a New Stage of Russia's Economic War Against Ukraine. What Should We Do?" [In Ukrainian: "Perekryttya Kerchens'koyi Protoky Cherez Budivnytstvo Mostu – Novyy Etap Ekonomichnoyi Viyny RF Proty Ukrayiny. Shcho Robyty?"], *Maidan of Foreign Affairs*, August 21, 2017, https://www.mfaua.org/uk/publications/perekryttia-kerchenskoi-protoky-cherez-budivnytstvo-mostu-novyi-etap-ekonomichnoi-viiny-rf-proty-ukrainy-shcho-robyty.

576 "The EU has imposed new sanctions via the bridge to Crimea. What will be the consequences?" [in Ukrainian: "YES vviv novi sanktsiyi cherez mist do Krymu. Yaki budut' naslidky?"], *BBC News Ukraine*, July 31, 2018, https://www.bbc.com/ukrainian/news-45021124; "Ukraine: Two Persons and Four Entities Involved in the Construction of the Kerch Railway Bridge Added to EU Sanctions List," accessed 8 December 2021, https://www.consilium.europa.eu/en/press/press-releases/2020/10/01/ukraine-two-persons-and-four-entities-involved-in-the-construction-of-the-kerch-railway-bridge-added-to-eu-sanctions-list/; Jack Stubbs and Yeganeh Torbati, "U.S. Imposes Sanctions on 'Putin's Bridge' to Crimea," *Reuters*, September 1, 2016, https://www.reuters.com/article/us-ukraine-crisis-russia-usa-sanctions-idUSKCN1175E0; "Australia Sanctions 1 Individual, 4 Russian Companies over Construction of Crimean Bridge," *Interfax*, accessed 8 August 2023, https://interfax.com/newsroom/top-stories/71456/.

577 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8*, 6, para. 17(l).

578 Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Strait, op. cit. 75,* 41-42.

579 *Ibid.,* 41. *Case concerning Passage through the Great Belt* (Finland v. Denmark), Order of 29 July 1991, Provisional Measures, ICJ Reports 1992, p. 12. Also see, Said Mahmoudi, "The Baltic Straits," in *Navigating Straits: Challenges for International Law*, edited by David D. Caron and Nilüfer Oral (Leiden:

In general, Ukrainian initial submissions regarding the Kerch bridge can be summarised that Russia violated different UNCLOS provisions by:

- impeding transit passage through the Kerch Strait as a result of the Kerch Strait bridge;
- failing to share information with Ukraine concerning the risks and impediments to navigation presented by the Kerch Strait bridge;
- failing to cooperate and share information with Ukraine concerning the environmental impact of the Kerch Strait bridge.[580]

In these submissions, Ukraine invoked various UNCLOS articles. However, if invoked Articles 2, and 44 seems highly unlikely to be ruled on by the arbitral tribunal. Such articles as Articles 38, 43, 123, 192, 194, 204, 205, and 206 of UNCLOS concerning rights of transit passage and failing to cooperate and share information with Ukraine about the environmental impact of the Kerch Strait bridge could seem unaffected by the Crimean occupation.[581] Additionally, there is already some research that states that building of the Kerch Strait Bridge is setting the stage for a potential gradual change in the Sea of Azov, making it more like the Black Sea Gulf. This shift could lead to significant environmental harm in both the Black and Azov Seas, resulting in devastating losses.[582]

UNCLOS is recognised as "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[583] Thus, the provisions of UNCLOS seek to find a balance between the major flag States, which advocate for maximum freedom of navigation, and the coastal States, which aim to modify this freedom by acknowledging certain environmental powers of the coastal and port State.[584] Exactly this search for balance is untouched by occupation as the provisions related to the protection and preservation of the environment are still applicable regardless of the occupied Crimea. But do they also apply to the Kerch Bridge construction?

Brill Nijhoff, 2014), 123–137; Alex G. Oude Elferink, "The Regime of Passage Through the Danish Straits", *The International Journal of Marine and Coastal Law* 15, 4 (1 January 2000): 555–566; Martti Koskenniemi, "Case Concerning Passage through the Great Belt", *Ocean Development & International Law* 27, 3 (1 January 1996): 255–289.

580 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8*, 6, para 17(m), (n), (o).

581 The potential Ukrainian passage rights that would definitely come under the Arbitral Tribunal's jurisdiction are those based in UNCLOS Articles 37, 38(1), or Article 45(1)(b). See, Schatz and Koval, "Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective", *op. cit. 486,* 288-289.

582 Mykhailo Romashchenko et al., "About Some Environmental Consequences of Kerch Strait Bridge Construction," *Hydrology* 6, 1 (March 2018): 9; Mykhailo Romashchenko et al., "The Effect of the Construction of a Bridge in the Kerch Strait on the Hydroecological State of Adjacent Parts of the Black and Azov Sea" [in Ukrainian: "Naslidky budivnytstva mostovoho perekhodu v Kerchens'kiy prototsi na hidroekolohichnyy stan prylehloyi chastyny Chornoho ta Azovs'koho moriv"], *Land Reclamation and Water Management* 108, 2 (21 November 2018): 92.

583 Tuerk, *op. cit. 413,* 28.

584 Kwiatkowska, *op. cit. 449,* 170.

Article 43 UNCLOS in this regard stood out due to its formulation. While Articles 38 and 44 involves States bordering the strait, Article 43 says about user states and states bordering the strait. Therefore, regardless of Russia's claim that it's the only one state on both sides of the strait, Ukraine can be considered by the arbitral tribunal as a user state. Thus, the tribunal will avoid direct or indirect ruling over the issue that it lacks its jurisdiction – who is or are state boarding the strait.

The Article 43 reads as following:

> User States and States bordering a strait should by agreement cooperate:
> (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
> (b) for the prevention, reduction and control of pollution from ships.

Even though Article 43 is located within Part III, Section 2 of UNCLOS concerning the transit passage in straits used for international navigations, the language of the article could be imagined to apply even to the straits that do not govern by Part III, Section 2 of UNCLOS. However, to rule so, it would place the tribunal under certain pressure because it would certainly mean that the interpretation of Article 42 in this way, could be considered as a very broad interpretation. It also raises a lot of questions from other states bordering straits, for example, Turkey (although it is not a party to UNCLOS), whether they could be affected by such a broad interpretation of Article 43 UNCLOS or not.

It is believed that there are six potential sources of passage rights believed to exist:

- Ukraine's rights as a coastal state;
- navigational rights according to the Cooperation Agreement;
- navigational rights under the 1997 Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation;
- navigational rights under the 2012 Agreement on Navigation Safety in the Sea of Azov and the Kerch Strait;
- passage rights outlined in UNCLOS Part III;
- passage rights recognised in customary international law.[585]

From the issued Award in the *Coastal State Rights Dispute*, it is clear that Ukraine's rights as a coastal state could not be decided by the tribunal. Navigational rights according to the different agreements between Ukraine and the Russian Federation could be decided by the tribunal, but among three agreements regulating so, only one remains in force.[586] It is the Agreement on Navigation Safety in the Sea of Azov and the Kerch Strait.[587] Thus, for the future violations only one bilateral agreement could be applicable.

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585 Schatz and Koval, "Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective", *op. cit. 486,* 284.

586 As of 15 September 2023.

587 "Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Measures to Ensure Maritime Safety in the Azov Sea and the Kerch Strait," *op. cit. 120.*

Interestingly, by applicability of the bilateral agreements, the Kerch Strait can potentially be considered as opposite to a *sui generis* strait. This can be done by applying Article 311 UNCLOS concerning the relation of UNCLOS to other international agreements.[588] Article 311(2) UNCLOS enhances connections between different types of straits as governed by Part III of UNCLOS. Unlike Article 311(2), Article 311(3), does not concern the ability of states to exempt themselves from specific UNCLOS provisions between parties. Instead, it clarifies how states can modify the legal regulations related to a specific strait while staying within the legal framework of Part III of UNCLOS.[589] For instance, strait-bordering states might agree to limit their territorial sea's outer boundary in a certain strait to establish an EEZ or a high seas corridor, thereby altering the legal regime applied to that strait (like transit or non-suspendable innocent passage) to align with Article 36 of UNCLOS.[590] But then, whether bilateral agreements between Ukraine and the Russian Federation can be related to UNCLOS in the light of Article 311(2) or 311(3) depend on the decision of the arbitral tribunal regarding the status of the Kerch Strait.

588 On definition of a *sui generis* strait see, Lott, *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage*, *op. cit. 562,* 34-39.

589 *Ibid.,* 34.

590 *Ibid*.

2.3. Limitation and exceptions to compulsory dispute settlement under UNCLOS in the light of the Crimean occupation

2.3.1. Limitations to compulsory dispute settlement under UNCLOS

When Article 288 UNCLOS gives the arbitral tribunal jurisdiction to settle disputes concerning its interpretation or application, Article 297 consists of automatic limitations to the applicability of section 2.[591] It provides an exhaustive list of matters that are not subject to the compulsory dispute settlement mechanism.[592] The purpose of such limitation arose during the Third United Nations Conference of the Law of the Sea while negotiating the text of the current version of UNCLOS. It occurred due to the wishes of many coastal States that wanted to exclude certain types of disputes arising out of the exercise by the coastal States of their sovereign rights or jurisdiction in the EEZ from the compulsory procedure entitling binding decisions.[593]

Even though Article 297 UNCLOS is devoted to pose limitations to the jurisdiction, only paragraphs 2 and 3 serve this purpose. Paragraph 1 consists the exceptions from the limitations provided by this Article.[594] So to apply the provisions of Article 297 there is a need to solve at least two issues. The first one is considered the determination of the dispute by whether such dispute falls under the scope of Article 297 or not. The second is whether such disputes can be exempt from limitation or not.[595]

From the drafting history, it is clear that Article 297 aims to protect a coastal state. Thus, Article 297 gives a list of cases that could not be unilaterally submitted under the jurisdiction of a court or tribunal adjudicating on the basis of UNCLOS. To be precise such disputes could be submitted, but UNCLOS court or tribunal will find its lack of jurisdiction. The award in the *Coastal State Rights Dispute* precisely defines that there would be no decision on interpretation or application of provisions of UNCLOS if such interpretation or application is requiring to decide explicitly or implicitly regarding the coastal state over Crimea. Therefore, as there is no determination of a coastal state, then Article 297 is not applicable.

Even though the *Coastal State Rights Dispute* is compared to *Chagos Marine Protected Area Arbitration* and *South China Sea Arbitration* they are different in regard to interpretation and application of Article 297 UNCLOS.

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591 For the jurisprudence that has arisen with respect to Articles 281–283 of section 1 of Part XV UNCLOS see, Nigel Bankes, "Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention," *Ocean Development & International Law* 48, 3–4 (2 October 2017): 239–268.

592 Kunoy, *op. cit. 56*, 82.

593 "Article 297. Limitations on Applicability of Section 2," in *United Nations Convention on the Law of the Sea: A Commentary*, *op. cit. 222,* 1908.

594 Bernard H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals," *op. cit. 65,* 404-405.

595 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 507.

In the *Chagos Marine Protected Area Arbitration*, one of four[596] submissions by Mauritius were challenged by the United Kingdom in relation to a sovereign rights element mentioned as one of the limitations in Article 297 UNCLOS.

This submission by Mauritius reads as follows:

> The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including inter alia Articles 2, 55, 56, 63, 64, 194, 300, as well as Article 7 of the 1995 Agreement.

Both applicant and respondent consider this submission in light of the automatic limitations to compulsory jurisdiction set out in Article 297 UNCLOS but different paragraphs. The United Kingdom challenged the jurisdiction of the tribunal involving Article 297(3)(a) in a way to limit the tribunal's jurisdiction, by addressing the MPA as a measure in regards to "sovereign rights with respect to living resources" in EEZ. Mauritius claims that the "MPA is an environmental measure and that the jurisdiction of this Tribunal is therefore established by Article 297(1)(c) concerning the protection of the environment".[597]

In this regard, the arbitral tribunal analysed the scope and character of the MPA as well as the scope and character of Mauritius's rights to be able to evaluate it under Article 297(3)(a). It also scrutinises Article 297(1)(c) and its jurisdiction by interpreting the relationship between Article 288(1) and Article 297(1)(c) as well as the relationship between Article 297(1)(c) and the MPA. In para 323 of the Award, the arbitral tribunal finds that it has jurisdiction over this submission by Mauritius. As a result, the arbitral tribunal was able to deliver its merits on Mauritius's fourth submission. Briefly, the arbitral tribunal reasons that the relevant submission by Mauritius is not concerning

> "fishing rights, in light of the Convention's prohibition in Article 297 on the compulsory settlement regarding disputes over sovereign rights with respect to the living resources in the exclusive economic zone, but rather a right to the eventual return of the Chagos Archipelago when no longer needed for defence purposes and a right to the benefit of any oil or minerals discovered in or near the Chagos Archipelago"[598].

The *Coastal State Rights Dispute* is also different from the *South China Sea Arbitration* in the way that there was established a coastal state – the Republic of Philippines. That is why the tribunal interprets Article 297(3)(a) and the law enforcement exception in Article 298(1)(b) of UNCLOS in such manner that '[t]hese provisions serve to

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596 *Chagos MPA Arbitration*, Award, *op. cit. 27,* 139, para. 350.

597 *Ibid.,* 93, 111, paras. 232, 284, etc. Although, the different approach towards interpretation of Article 297(3) UNCLOS was taken in *Southern Bluefin Tuna* (Arbitral Tribunal). See, Kunoy, *op. cit. 56,* 104-107. *Southern Bluefin Tuna Case* (Australia v. Japan; New Zealand v. Japan), Award on Jurisdiction and Admissibility Decision of 4 August 2000 not to be confused with decision on provisional measures by ITLOS (*Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280.)

598 *The South China Sea Arbitration,* Award, *op. cit. 330,* 111, para 260.

limit compulsory dispute settlement where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its own exclusive economic zone'. However, such limitation does not apply "where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State".[599] It further notes that Articles 297 and 298 of UNCLOS "have no application in the Territorial Sea and thus impose no limitation on the Tribunal's jurisdiction".[600]

The revised Memorial of Ukraine is not available at the moment, but according to the procedural order, it should already be submitted on or before the 20th of May 2021[601]. The arbitral tribunal sets procedural timetables for the case on various dates after considering applications from both Ukraine and the Russian Federation. The Russian Federation later applied to suspend the submission of the documents, but Ukraine requested the Arbitral Tribunal to reject this request.[602] Nevertheless, all documents submitted by the parties will only become public during the oral pleadings that are not even scheduled yet.

Considering the already available the Award on Preliminary Objections in *Coastal State Rights Dispute*, it's likely that no claims will be made based on neither Ukraine nor the Russian Federation as a coastal state over Crimea. Due to leaving the determination of the coastal state as a consequence of the Crimean occupation away, the possibility of application of Article 297 UNCLOS as limitation to jurisdiction under UNCLOS is very low.

However, Article 297 is not the last Article that excludes the jurisdiction of the law of the sea dispute settlement body over a dispute related to the interpretation or application of UNCLOS. Consequently, the next part talks about optional exceptions provided in Article 298.

2.3.2. Optional exceptions to compulsory dispute resolution under UNCLOS

When Article 288 UNCLOS establishes *ratione materiae* jurisdiction, Article 298 provides for optional exceptions in such jurisdiction.[603] Article 298 was established as a compromise between the principle of state sovereignty and the compulsory dispute resolution outlined in UNCLOS. It can be seen as a "safety valve" that permits state parties to exempt specific disputes linked to sensitive matters of sovereignty from the application of Section 2 of Part XV. This provision was introduced to ensure widespread approval of UNCLOS by addressing concerns around sensitive issues.[604]

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599 *Ibid*, 279, para. 695.

600 *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, *op. cit. 311,* 145, para 407.

601 *Coastal State Rights Dispute*, Procedural Order 7 Regarding the Revised Procedural Timetable for Further Proceedings, (November 17, 2020): 2, para 1(a). The information is last time updated in May 2024.

602 See Procedural Orders 9 and 10 from *Coastal State Rights Dispute.*

603 UNCLOS.

604 Keyuan Zou and Qiang Ye, "Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal," *Ocean Development & International Law* 48,

Currently, it is still unclear how exactly Article 298 of UNCLOS has to be interpreted or applied.[605] According to this Article, states are entitled to opt-out from any compulsory procedures entailing binding decisions under Section 2 of Part XV UNCLOS in respect of the certain category of the disputes. There are these types of disputes that could be exempted:

- maritime boundary delimitations, or disputes involving historic bays or titles;
- disputes concerning military activities and disputes concerning law enforcement activities invoked in Article 297(2) and Article 297(3);
- disputes that are dealt with by the Security Council of the United Nations.

While declaring a dispute to be exempted, the state parties to UNCLOS are not exempt from their own obligations under UNCLOS. It means that such a declaration should be made in conformity with obligations imposed by Section 1 Part XV of UNCLOS.[606] Ukraine and the Russian Federation both made such declarations.[607] Ukraine does not accept the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities. The Russian Federation does not accept all mentioned disputes in the Article 298(1) UNCLOS.

Considering these declarations, further assessment is done in relation to interpretation and application of provisions of Article 298 UNCLOS providing optional exceptions divided into 4 parts: maritime boundary delimitations, disputes involving historic bays or titles, disputes concerning military activities and certain law enforcement activities, and disputes that are dealt with by the Security Council of the United Nations.

2.3.2.1. Disputes related to the delimitation of maritime boundaries

The provision of Article 298(1) reads as it prevents the jurisdiction of a court or tribunal in regard to the disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations. Nonetheless, this does not prevent the interpretation or application of Article 298 itself.[608] Therefore, it is possible

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3–4 (2 October 2017): 331-332.

605 Christine Sim, "Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options," *Asia-Pacific Journal of Ocean Law and Policy* 3, 2 (1 November 2018): 234.

606 Philippe Gautier, "The Settlement of Disputes," in *The IMLI Manual on International Maritime Law: The Law of the Sea* (Oxford: Oxford University Press, 2014), 551.

607 "Declarations and Reservations of State Parties to UNCLOS," *United Nations Treaty Collection*, accessed 2 July 2022, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

608 Sim, "Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options," *op. cit. 605,* 272. For the relationship between Article 298 and Articles 74 and 83, see Robert Beckman and Christine Sim, "Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues," in *Legal Order in the World's Oceans* (Leiden: Brill Nijhoff, 2018), 236-238.

to expect that the future arbitral tribunals can provide more light on understanding of this provision.

Maritime boundary disputes are considered as the most controversial ones.[609] Therefore, "of the world's 512 potential maritime boundaries, fewer than half have been agreed."[610] It is admitted that in the world practice of international law, there are very contradictory approaches to resolving the issues of delimitation of maritime borders and most of such disputes remain unregulated for a long time. Almost a third of international disputes pending before the ICJ involve the delimitation of the borders. [611] Some of such disputes are solved by agreements of two states, some of them are solved by the decision of ICJ or ITLOS.

– ***overlapping entitlements***

In its initial submissions in the *Coastal State Rights Dispute*, Ukraine does not mention any provisions from Articles 15, 74, and 83 of UNCLOS. However, the Russian Federation's view is that the dispute involves maritime delimitation, that is why it should be excluded from the jurisdiction of the arbitration tribunal.[612] The Russian Federation considers that as a part of optional exception provision of UNCLOS, the arbitral tribunal cannot resolve disputes relating to Articles 15, 74 or 83 of UNCLOS, or "any dispute having a bearing on the delimitation of the territorial sea, exclusive economic zone, and continental shelf."[613] This argument's primary aim was to cover "issues of overlapping entitlements" within the exception outlined in Article 298(1) of UNCLOS.[614] As a result, the arbitral tribunal would not have the jurisdiction to decide on this matter.

The tribunal decides that the decisive question in determining the applicability of the delimitation exception under UNCLOS is the existence of entitlements and the areas where they overlap. If there is such an overlapping area, it is inevitable that the issue of boundary determination will arise, and this could possibly trigger the exception related to boundary delimitation.[615]

In the *South China Sea Arbitration,* the arbitral tribunal states that "a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute

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609 Michael Byers and Andreas Østhagen, "Settling Maritime Boundaries: Why Some Countries Find It Easy, and Others Do Not," in *The Future of Ocean Governance and Capacity Development* (Leiden: Brill Nijhoff, 2019) 167-168.

610 Clive Schofield, "No Panacea? Challenges in the Application of Provisional Arrangements of a Practical Nature," in *Maritime Border Diplomacy* (Leiden: Brill Nijhoff, 2012), 155; Md. Monjur Hasan et al., "Protracted Maritime Boundary Disputes and Maritime Laws," *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 2, 2 (8 February 2019): 90.

611 It is cited from somewhere but the author could not find the source of this citation.

612 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* chapter VI, section C.

613 *Ibid.,* para. 360.

614 *Ibid.,* para. 364-367.

615 *Ibid.,* para. 381.

concerning the delimitation of those zones in an area where the entitlements of parties overlap."[616]

It is important to keep in mind that the dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap directly depends on the determination of the status of Crimea. As "the Arbitral Tribunal has decided that it cannot rule on any claims of Ukraine which would require it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea", then "[t]he Arbitral Tribunal therefore cannot determine whether there are entitlements of either Party to the maritime areas around Crimea, let alone whether such entitlements overlap".[617] Thus, there are no overlapping entitlements left for the Tribunal to decide on and this means that the dispute cannot be excluded under the Article 298(1) UNCLOS.

– ***Articles 74(3) and 83(3)***

While trying to exclude overlapping entitlements, the Russian Federation gives its own interpretation of applicability of Article 298(1) UNCLOS. In particular,

> The Russian Federation argues that the phrases, "concerning" and "related to" in Article 298, paragraph 1, subparagraph (a)(i) mean "in connection with" and cover both the immediate subject of a dispute and connected matters. On that basis, the Russian Federation submits that the phrase "relating to sea boundary delimitations" thus covers "not only disputes involving the determination of sea boundaries but all matters connected with the entire delimitation process […]"[618]

It shows a broad interpretation of Article 298(1) UNCLOS. The Russian Federation claims that anything connected to delimitation within a dispute falls under the optional exception in Article 298 UNCLOS.[619] However, it is possible to disagree with this interpretation. Therefore, it is interesting to consider whether Articles 74(3)[620] and 83(3)[621] could be excluded from the exception in Article 298(1) of UNCLOS. Neither party invoked exactly these parts of UNCLOS provisions. From a first glimpse, it is

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616 *The South China Sea Arbitration,* Award, *op. cit. 330,* 59-60, para 156. More detailed on this Arbitral Award and the optional exception in Article 298 UNCLOS see, Beckman and Sim, "Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues," *op. cit. 608,* 238-240.

617 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* paras. 197, 382-383.

618 *Ibid.,* para. 360. Emphasis is added by the author.

619 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 109-110, para. 360.

620 UNCLOS. Article 74(3): "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

621 UNCLOS. Article 83(3): "3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

possible to preliminarily conclude that the obligations of states parties pending the conclusion of a delimitation agreement consisting in the mentioned paras as part of the articles relating to sea boundary delimitations are subject to optional exceptions to the jurisdiction of the arbitral tribunal, and by this to agree with the argument of the Russian Federation. However, contrary to the Russian Federation's interpretation of Article 298, the arbitral tribunal states

> the interpretation of the terms "concerning" and "relating to" does not necessarily clarify the question whether the optional exception is triggered only by a dispute directly implicating the three enumerated articles and involving a delimitation exercise or, alternatively, also by a dispute that necessarily implies a delimitation, partial or full, of maritime areas, or a finding that a specific location belongs to one or other Party.[622]

It should be noted that the way the law of the sea dispute settlement body interprets the term "concerning" in one situation may appear contradictory to its understanding of the same word in another context.[623] The interesting part here is the wording that the interpretation of the relevant Article UNCLOS does not have an answer on whether the optional exception can be triggered only by a dispute directly implicating the three enumerated articles and involving a delimitation exercise or not. However, a more detailed examination is needed.

The wording of para 3 of Article 74 and para 3 of Article 83 of UNCLOS is identical.[624] The relevant paragraphs introduce obligations "to enter into provisional arrangements of a practical nature" and an "obligation not to jeopardise or hamper the reaching of a definitive boundary agreement".[625]

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622 *Ibid.,* para 378.

623 Zou and Ye, "Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal", *op. cit. 604,* 335-336. The examples of interpretation of the wording "concerning" are given in such cases as *the South China Sea Arbitration*, *M/V "Louisa" Case*, *the Aegean Sea Continental Shelf Case*, *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*.

624 The wording is the following: "3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

625 "Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas," *The British Institute of International and Comparative Law*; Robin Churchill, "International Law Obligations of States in Undelimited Maritime Frontier Areas", *op. cit. 49*. Also see interpretation of these Articles in UNCLOS commentaries: Yoshifumi Tanaka, Commentary on Article 74 UNCLOS, in *United Nations Convention on the Law of the Sea: A Commentary*, *op. cit. 222,* 564-584; Yoshifumi Tanaka, Commentary on Article 83 UNCLOS, in *United Nations Convention on the Law of the Sea: A Commentary*, *op. cit. 222,* 651-667; "Article 74 - Delimitation of the Exclusive Economic Zone between States with opposite or Adjacent Coasts (II)", in Center for Oceans Law and Policy, University of Virginia, *United Nations Convention on the Law of the Sea* (Leiden: Brill, 2014): 796-816; "Article 83 - Delimitation of the Continental Shelf between States with opposite or Adjacent

The draft history of these Articles shows that during the negotiation of UNCLOS, some states had concerns about the possibility of making reservations related to the articles concerning the sea boundary delimitations.[626] For example, Cape Verde "believed that the wording of articles 74 and 83 was the best compromise yet attended and, since it considered the question of delimitation definitively settled, it could not accept any reservations to the articles concerned."[627] Columbia, in particular, considered that including the possibility of reservations to Article 74(3) and Article 83(3) would result that "States felt that they were not obliged to refrain from jeopardizing or hampering the reaching of the final agreement."[628]

There are conflicting views on whether a declaration under Article 298 excluding disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations may also exclude obligations of restraint and cooperation under Articles 74(3) and 83(3) of UNCLOS from compulsory dispute settlement procedure.[629]

In *Delimitation of the maritime boundary in the Indian Ocean* where the Special Chamber states that "maritime delimitation disputes […] may arise in various other forms and situations."[630]

According to the view of Youri van Logchem the provisions of paragraphs 3 of Article 74 and Article 83 of UNCLOS consist "two obligations for claimant States that apply prior to EEZ or continental shelf delimitation."[631] Furthermore, these paragraphs are "a constituent part of the delimitation provisions of Articles 74 and 83 UNCLOS."[632]

In *Timor Sea Conciliation* between Timor-Leste v. Australia, the Conciliation

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Coasts (II)", in Center for Oceans Law and Policy, University of Virginia, United Nations Convention on the Law of the Sea (Leiden: Brill, 2014): 948-985.

626 For detailed information see, "Diplomatic Conferences — Codification Division Publications," *Third United Nations Conference on the Law of the Sea* (1973–1982), accessed 12 April 2023, https://legal.un.org/diplomaticconferences/1973_los/vol16.shtml; Logchem, *The Rights and Obligations of States in Disputed Maritime Areas*, *op. cit. 466,* 120-136.

627 "Official Records of the Third United Nations Conference on the Law of the Sea." Doc.A/CONF.62/SR.172, 172nd plenary meeting. Vol. XVI, 114, para 2.

628 *Ibid.,* 117, para 33.

629 See, Sim, "Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options," *op. cit. 605,* 234-254. And for another view, see, Xuexia Liao, "The Road Not Taken: Submission of Disputes Concerning Activities in Undelimited Maritime Areas to UNCLOS Compulsory Procedures," *Ocean Development & International Law* 52, 3 (3 July 2021): 297–324. The view that combines both options is by Andrew Gou, "Delimitation as an Exception to the UNCLOS Compulsory Dispute Settlement Procedures," *SSRN Electronic Journal* (16 September 2015): 1-43.

630 *Delimitation of the maritime boundary in the Indian Ocean* (Mauritius/Maldives), Preliminary Objections, Judgment, ITLOS, 28 January 2021, para. 333.

631 Logchem, *The Rights and Obligations of States in Disputed Maritime Areas*, *op. cit. 466,* 118.

632 Although in some of his works he explains both possible ways. Thus, for discussion see, Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas," in *The Limits of Maritime Jurisdiction* (Leiden: Brill Nijhoff, 2014), 195; Logchem, *The Rights and Obligations of States in Disputed Maritime Areas*, *op. cit. 466,* 164-165.

Commission finds that of Articles 74 and 83 "address not only the actual delimitation of the sea boundary between States with opposite or adjacent coasts, but also the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that the Parties are called on to apply pending delimitation".[633] That could be interpreted as not including interpretation and application of the UNCLOS provisions Article 74 and 83 as a part of a dispute concerning maritime delimitation. The reason for this is interpretation of paras 3 of these Articles as a different matter of a sea boundary delimitation dispute.

Christine Sim refers to the Cooperation Agreement between the Russian Federation and Ukraine as a joint development agreement for their disputed maritime areas. She also in a view that Article 298 declaration should not be capable of excluding obligations of restraint and cooperation from dispute settlement.[634] The delimitation agreement constitutes matters concerning maritime delimitation. Meanwhile, paras 3 in Articles 74 and 83 of UNCLOS are rather the obligation of states to cooperate in maritime delimitation than a part of a dispute over maritime boundary delimitation.

The Cooperation Agreement can be considered as a joint development agreement for Ukraine's and the Russian Federation's disputed maritime areas or as a provisional arrangement of a practical nature before the final delimitation. Potentially it can be considered as even to be both at the same time. Articles 74(3) and 83(3) UNCLOS by itself are a kind of support of the idea that these paragraphs are not excluded by the optional exception. It can be seen from the wording of the relevant paras that provisional arrangements shall not affect the final delimitation.[635]

Also, such a view can be supported by the fact that even despite the Cooperation Agreement was concluded, the parties still were trying to delimit the waters of the Azov Sea and the Kerch Strait. This can be clearly seen from the Joint Declaration of the Presidents of Ukraine and the Russian Federation on the Delimitation of the Maritime Boundaries of the Azov and Black Seas and the Kerch Strait.[636] In particular,

> Ukraine and Russia deem it important to [handwritten underline]

633 *Timor Sea Conciliation* (Timor-Leste v. Australia), Decision on Australia's Objections to Competence (September 19, 2016), para. 97. For the detailed analyses of the case, see Xuexia Liao, "The Timor Sea Conciliation under Article 298 and Annex V of UNCLOS: A Critique," *Chinese Journal of International Law* 18 2 (1 June 2019): 281–325; Alfredo Crosato, "Conciliation between Timor-Leste and Australia," *Max Planck Encyclopedias of International Law.* Oxford Public International Law. Oxford University Press, March 2019.

634 Sim, "Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options," *op. cit. 605,* 238-240.

635 At the same time, it is also difficult not to agree on the argument that "would it not have been logical that explicit reference was made to paragraph one of Articles 74 and 83?" in respect the applicability of optional exception towards only the process of the delimitation itself. See, Logchem, "The Scope for Unilateralism in Disputed Maritime Areas," *op. cit. 632,* 195.

636 "Joint Declaration of the Presidents of Ukraine and the Russian Federation on the Delimitation of the Maritime Boundaries of the Azov and Black Seas and the Kerch Strait," Yalta, July 12, 2012. https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/01.%20Exhibits/UA-95.pdf.

> delimit the maritime boundaries of the Azov and Black Seas and the Kerch Strait in a spirit of friendship, good neighborly relations, and strategic partnership, taking into account the legitimate interests of both states.[637]

Maritime boundary delimitation is an integral and complicated process. The provisions of delimitation under UNCLOS includes an "equitable solution" and "special circumstances" in respect of the territorial sea, and of "relevant circumstances" in respect of the EEZ and continental shelf.[638] Such provisions may include a wide variety of potential issues arising between the parties to a delimitation. "It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself."[639]

It should be also noted that the obligations of restraint and cooperation under paras 3 Articles 74 and 83 of UNCLOS can constitute "a matter of customary international law, or at least 'emerging' customary international law."[640] According to Lagoni "[e]ven cautious observers could agree that paragraph 3 of Article 74 and 83 sets forth an emerging customary rule". This paragraph can be paraphrased as including an obligation to seek agreement in good faith and an obligation to cooperate. The obligation to cooperate is also involved in the case of enclosed or semi-enclosed seas under Article 123 UNCLOS.[641]

The British Institute of International and Comparative Law identifies that the future state practice is considered to be a source for further interpretation and application of paras 3 Articles 74 and 83 UNCLOS as a customary international rule itself or that it belongs as a part of another customary international rule.[642]

Therefore, if provisional arrangements for delimitation fail, the obligation to make

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637 *Ibid.*

638 See, Article 15, 74 and 83 UNCLOS.

639 Emphasis was made by the author, *The South China Sea Arbitration*, Award, *op. cit. 330,* para 155.

640 Sim, "Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options," *op. cit. 605,* 238. Also, for the legal discussion on this, see: Robin Churchill, "International Law Obligations of States in Undelimited Maritime Frontier Areas", *op. cit. 49*; "Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas," *op. cit. 625*; Enrico Milano and Irini Papanicolopulu, "State Responsibility in Disputed Areas on Land and at Sea", *ZaöRV 71* (2011): 587 – 640; Nicholas A. Ioannides, "The Legal Framework Governing Hydrocarbon Activities in Undelimited Maritime Areas," *International & Comparative Law Quarterly* 68, 2 (April 2019): 345–368; David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims," *The South China Sea Disputes and Law of the Sea* (2014): 192–228; David M. Ong, "The International Legal Obligations of States in Disputed Maritime Jurisdiction Zones and Prospects for Co-Operative Arrangements in the East China Sea Region," *Asian Yearbook of International Law* 22, 2016 (Leiden: Brill, 2019), 109–130; Murphy, "Obligations of States in Disputed Areas of the Continental *Shelf*," *op. cit. 432.*

641 Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," *American Journal of International Law* 78, 2 (April 1984): 355, 367.

642 "Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas," *op. cit. 625,* 4. para 20.

every effort to enter into provisional arrangements and not to jeopardise or hamper the reaching of the final agreement will be applicable regardless of the declaration made under Article 298(1) UNCLOS. However, if there is a relevant declaration and if Article 298 would be interpreted in a way including Articles 74(3) and 83(3) UNCLOS under its scope of application, then the compulsory dispute settlement procedure under UNCLOS is not applicable in this case.

Namely, according to the view of Judges Wolfrum and Cot, "[a] dispute concerning the interpretation and application of a rule of customary law […] does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention."[643] And if such rule of customary law incorporated in Articles 74(3) and 83(3) UNCLOS *is to be excluded as a part of optional exception* to compulsory dispute settlement procedure, then it has to be excluded from the compulsory dispute settlement procedure under UNCLOS.

The question remains: whether all paras of the Articles 15, 74, 83 UNCLOS must be excluded from the jurisdiction of the Tribunal because those Articles are mentioned in the exceptions?

In the author's view, only those paragraphs directly linked to sea boundary delimitations should fall under this exception. The argument behind this is that while these Articles are mentioned in the context of the sea boundary delimitations, this does not include the optional exception to the obligations to make every effort to enter into provisional arrangements of a practical nature and not to jeopardise or hamper the reaching of the final agreement.[644]

The interpretation of Article 298 makes a significant impact on establishment whether it excludes the whole Articles 15, 74, 83 UNCLOS or only parts of these Articles that according to Article 298 "relating to sea boundary delimitations". However, it should be noted that in order to secure the applicability of the obligation to cooperate, it is still possible to apply Article 123 UNCLOS, as a source of incorporation of this customary rule that has its detailed description in Articles 74(3) and 83(3) UNCLOS. It is also possible to add, securing the applicability of the obligation to cooperate, a general provision by Article 300 UNCLOS[645] where the States Parties shall fulfil their obligations in good faith.

This conclusion could be highly criticised. However, only "[a] future court or tribunal, as anticipated by the wording of paragraph (1) of Articles 74 and 83 referring to 'international law, as referred to in article 38 of the Statute of the International Court of Justice', would have the mandate to interpret the scope of an Article 298 declaration

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643 *ARA Libertad*, Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Jean-Pierre Cot and Rüdiger Wolfrum, ITLOS Reports 2012, p. 332 at 365, para. 7.

644 The same opinion has Christine Sim in Sim, "Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options," *op. cit. 605,* 249–250.

645 Article 300 UNCLOS: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right."

by considering paragraphs (1), (2) and (3) of Articles 74 and 83 independently."[646]

At the moment, it is unknown whether Ukraine or the Russian Federation involved interpretation or application of Article 298(1) UNCLOS in the light of provisions under Articles 74(3) and 83(3) UNCLOS in the Memorial or the Counter-Memorial. Meanwhile, the Award on Preliminary Objections in the *Coastal State Rights Dispute* states only about correlation between existence of overlapping maritime entitlements, question of delimitation and delimitation exception.[647] Because the arbitral tribunal asked Ukraine to resubmit its Memorial according to the adopted Award, there is still a possibility that one of the resubmitted submission could focus on the obligation of states to cooperate and make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement on delimitation. However, while this issue remains uncertain, there is no doubt that the Arbitral Tribunal will have a closer look at other optional exceptions to the jurisdiction in the merits. Thus, the next part addresses the historic title argument presented by the Russian Federation as an objection to the Arbitral Tribunal in respect of the status of the waters of the Azov Sea and the Kerch Strait.

2.3.2.2. Disputes related to historical bays or titles

The Convention on the Territorial Sea and the Contiguous Zone as well as UNCLOS contain no definition of historic bays.[648] The term "historic title(s)" is mentioned twice in UNCLOS. It is used in the context of territorial sea delimitation (Article 15) and in the dispute settlement provisions (Article 298).[649] The views on interpretation of historic titles within Article 298 are divided. There's one view that suggests the phrase means historic rights in their broad interpretation and application. This means that the meaning in Article 298 must be broader than, for instance, to what is presented in Article 15 UNCLOS. The other view defines historic titles more narrowly, including only historic waters. This was seen in the ICJ's statements in the *Anglo-Norwegian Fisheries case*.[650]

In the *South China Sea Arbitration*, the tribunal determined that "historical title" can be interpreted as "a reference to claims of sovereignty over maritime areas derived from historical circumstances".[651] The arbitral tribunal's conclusions make it clear that the optional exception on jurisdiction under Article 298 UNCLOS regarding "historic

646 *Ibid.,* 250.

647 *Coastal State Rights Dispute,* Award on Preliminary Objections, *op. cit. 8,* 110, para 381.

648 Tanaka, *The International Law of the Sea*, *op. cit. 44,* 67. Also see, its footnote 60: "The doctrine of historic bays acquired its full relevance in the dissenting opinion of Judge Drago appended to the 1910 North Atlantic Coast Fisheries case".

649 UNCLOS; Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, *op. cit. 529,* 19.

650 Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, *op. cit. 529,* 19-20.

651 *South China Sea Arbitration,* Award, *op. cit. 330,* para. 226.

bays or historic titles" has a significant impact. Article 298 only excludes claims to historic waters in a specific context related to historic bays, as explicitly mentioned. Thus, it does not exclude any lesser historic rights – often named as "historic rights in the narrow sense". Additionally, it implies that the term "historic title" means the same in Article 15 of territorial sea delimitation.[652]

The arbitral tribunal in the *South China Sea Arbitration* defines that

> The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "general international law . . . does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognised cases of 'historic waters' or 'historic bays.'" Finally, a 'historic bay' is simply a bay in which a State claims historic waters.[653]

From this perspective, it seems that the exception in Article 298(1)(a) UNCLOS applies only to disputes concerning historical sovereignty.[654]

There is no law of the sea jurisprudence where the court or tribunal determines the historical bay or title over a certain area of water apart from *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras with Nicaragua intervening. The dispute was decided by the ICJ Chamber formed upon the request provided by the Special Agreement between El Salvador and Honduras before the UNCLOS became in force. In this case, the ICJ's Chamber acknowledges that the waters of the Gulf of Fonseca, excluding the three-mile maritime belt, have a historical status and are subject to shared sovereignty among El Salvador, Honduras and Nicaragua.[655]

The Chamber establishes that

> the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821

652 Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, *op. cit. 529,* 23-24. Also see, Clive R. Symmons, "Historic Rights and the 'Nine Dash Line' in relation to UNCLOS in the Light of the Award in Philippines v China concerning the Supposed Historic Claims of China: What Now Remains of the Doctrine?" in *The South China Sea: the Legal Dimension* (Cheltenham, Northampton: Edward Elgar Publishing, 2018).

653 *South China Sea Arbitration,* Award, *op. cit. 330,* 96, para 225.

654 Klein, "Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions", *op. cit., 45,* 413.

655 *Land, Island and Maritime Frontier Dispute, op.sit.,* 616 – 617, para 432.

> to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf … are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected.[656]

Consequently, the Chamber recognises that the waters of the Gulf, except for the three-mile maritime belt, are historical waters that fall under the joint sovereignty of the three coastal states. It is also noted that there was no attempt to divide the waters based on the principle of *uti possidetis juris*.[657]

In disputes between Ukraine and the Russian Federation as states bordering the Azov Sea and the Kerch Strait, the presence or absence of historical title to the waters within the Azov Sea and the Kerch Strait holds significant importance. This not only influences the legal status of these waters but also impacts the arbitral tribunal jurisdiction in the compulsory dispute resolution under UNCLOS.[658]

In the *Coastal State Rights Dispute*, it is anticipated that the arbitral tribunal will assess factors regarding the Azov Sea and Kerch Strait waters. The wording in the Award on Preliminary Objection does not precisely follow the elements for determination of historic title stated in the Study prepared by International Law Commission on the

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656 *Ibid*. Also, there has been an increase in the number of bays shared by multiple countries. The question is whether states neighbouring such bays can establish a closing line at the bay's entrance or not. Two differing views exist: one suggests mutual agreement among coastal states for a closing line, as example, by the 1988 Tanzania-Mozambique Agreement concerning the Ruvuma Bay. The other view argues that bays shared by multiple states should follow standard baseline rules. In this perspective, these bays cannot be closed by a mouth line; the low-water mark along the bay's shores becomes the baseline. Legally, waters enclosed by a bay's closing line are considered internal waters under territorial sovereignty. This concept creates a contradiction as one state's internal waters cannot be simultaneously claimed by another. See in Tanaka, *The International Law of the Sea*, *op. cit. 44,* 71. Thus, also see, Opinion of Judge Oda. While the ICJ Chamber ruled that the Gulf of Fonseca is a historic bay, Judge Oda disagreed by stating historic bay waters are internal waters of one state, not shared. He believed that no legal concept existed for "multi-State bays."

657 *Land, Island and Maritime Frontier Dispute, op.sit.,* para. 401, 405.

658 Olesia Gorbun, "The Azov Sea and the Kerch Strait in the Light of Exceptions under Article 298(1) UNCLOS regarding Disputes Concerning Maritime Delimitation and Historical Titles" in *Modern Paradigm of Public and Private Law amidst Sustainable Development. Volume 1* (Riga: Baltija Publishing, 2023): 146-147.

Juridical Regime of Historic Waters, including Historic Bays.[659] However, it provides practical understanding how in practice the determination of historic title is carried out. According to the Study of the International Law Commission, to determine if a state has a historic claim over certain waters, it is relevant to consider three things:

1. the exercise of authority over the area by the State claiming the historic rights;
2. the continuity of this exercise of authority for a considerable time;
3. the attitude of foreign States: either the acquiescence of other States or absence of opposition is sufficient.[660]
4. possible involvement of "particular circumstances" such as geographical configuration, requirements of self-defence or other vital interests of the coastal State in its claimed water area.[661]

In practice, the tribunal in the *Coastal State Rights Dispute* mentions that the legal regime of the Azov Sea and the Kerch Strait depends "on how the Parties have treated them in the period following the independence of Ukraine."[662] The evaluation includes agreements, actual practice, and conduct of parties to each other and to the third states.[663]

While the view of the Russian Federation claims the Azov Sea and Kerch Strait waters as historically internal waters of the Russian Empire, USSR, and, since 1991, common internal waters of Ukraine and Russia,[664] the arbitral tribunal in this regard states that it will be necessary to establish "whether historic title to the waters in question existed, whether such title continued after 1991, and, if so, what the contents of the regime applicable to such waters has been."[665] Thus, it is possible to interpret that if the historical title did not exist before the USSR dissolution, it could not emerge after.[666] The clarity on this regard is anticipated with the merits of the dispute.

There is a question that would mostly like not find its answer in the merits: if to assume that such historic title existed, whether it could end due to fundamental changes between the coastal states? Like, would the full-scale invasion of Russia be considered as a fundamental change according to VCLT and thus, the regime of historic title has to end? However, the answer to this question is outside of the scope of this dissertation.

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659 "Juridical Regime of Historic Waters, including Historic Bays," *United Nations Yearbook of the International Law Commission.* The Study of International Law Commission (1962), http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf. Also, it is worth mentioning the earlier relevant document in this regard: "Historic Bays: Memorandum by the Secretariat of the United Nations" *op. cit. 532.*

660 *Ibid.,* 13, para 80.

661 *Ibid.,* 19-20, para 134. This view was supported by some scholars and mentioned in the Study of International Law Commission.

662 *Coastal State Rights* Dispute, Award on Preliminary Objections, *op. cit. 8,* 85, para. 291.

663 *Ibid.*

664 *Ibid*., 59-60, para. 199.

665 *Ibid*., 85, para. 292; 112, para. 388.

666 Gorbun, "The Azov Sea and the Kerch Strait in the Light of Exceptions under Article 298(1) UNCLOS regarding Disputes Concerning Maritime Delimitation and Historical Titles," *op. cit. 658,* 153.

There is an important remark to be made. Apart from finding or not finding the historic title within the waters of the Azov Sea and the Kerch Strait, the tribunal has also a possibility to find that coastal states have historic rights within its waters. If these waters would be considered to fall under the historic rights of the coastal states, then the submissions related to these waters can be decided by the arbitral tribunal. Such historic rights could not arise under the general rules of international law without particular historical circumstances. However, if the Azov Sea and the Kerch Strait would be considered as owning a historic title, then the submissions related to these waters would be excluded under the Article 298(1) UNCLOS. Consequently, the impact to the compulsory dispute settlement under UNCLOS is caused not by the occupation of Crimea but by earlier Russian Federation's declaration to optional exemptions under jurisdiction under UNCLOS.

The fact that Crimea is occupied itself should not affect the arbitral tribunal's decision about the status of the Azov Sea and the Kerch Strait. The main reason for this is that the arbitral tribunal would lack its jurisdiction over this matter because it would be as a consequence of the sovereignty dispute. Moreover, according to the principle of non-recognition, the activity of the Russian Federation due to the occupation should not have any legal impact on the determination of the status of these waters.

2.3.2.3. Disputes relating to military activities and certain law enforcement disputes

Twenty-seven states have submitted declarations based on Article 298(1)(b) concerning the military activities exception. This indicates the delicate nature of this issue.[667]

The term "uncertainty" is likely the most suitable word to describe the current state of "military activity" within modern law of the sea.[668] The concept of "military activities" has not been extensively discussed in case law by international courts and tribunals since UNCLOS came into force.[669] In 2015 Bernard Oxman pointed out that up until that time, no state had used the military activities exception.[670] However, later this exception was invoked in several cases, so the recent decisions have somewhat established a potential measurement that states could use to invoke the exception outlined in Article 298(1)(b), although this has not been done consistently.[671]

In *the South China Sea Arbitration*, the arbitral tribunal seems to establish a lower

667 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS, *op.cit, 23,* Separate Opinion of Judge Gao, 3, para. 11.

668 Alexander Skaridov, "Military Activity In The EEZ: Exclusive Or Excluded Right?" in *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Leiden: Brill Nijhoff, 2009), 249, 258, 262.

669 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS, *op.cit, 23,* Separate Opinion of Judge Gao, 5, para. 18.

670 Bernard H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals," *op. cit. 65.*

671 Kunoy, *op. cit*. 56, 117.

requirement than the requirement established in the *Coastal State Rights Dispute* for determining when activities constitute "military activities".[672] Thus, in *the South China Sea Arbitration* it's clear that the tribunal leans towards establishing a criteria where any use of force would be covered by the exception for military activities.[673] The tribunal observes that Article 298(1)(b) applies to "disputes concerning military activities" and not solely to the concept of "military activities". Therefore, the crucial aspect to consider is "whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute".[674] In particular, in the *South China Sea Arbitration,* the arbitral tribunal clarifies that

> Article 298(1)(b) applies to "disputes concerning military activities" and not to "military activities" as such. Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute. Where a State Party has initiated compulsory dispute settlement under the Convention in respect of a dispute that does not concern military activities, Article 298(1)(b) would not come into play if the other Party were later to begin employing its military in relation to the dispute in the course of proceedings. Nor does the Tribunal see that Article 298(1)(b) would limit its ancillary jurisdiction to prescribe provisional measures in respect of military activities taking place in relation to a dispute that does not, itself, concern military activities.[675]

However, it should be noted that the reason for the establishing the lower criterion can be seen from the perspective that "[a]s these facts fall well within the exception, the Tribunal does not consider it necessary to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b)."[676] Therefore, it is not about the lower requirement, it is rather about the irrelevance and lack of necessity to the dispute to establish a more detailed explanation of the military activities exception.

In the *Coastal State Rights Dispute* the arbitral tribunal states that the exception for military activities in Article 298(1)(b) should only apply to conflicts directly connected

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672 *Ibid.,* 132. Also, on a low threshold for the application of Article 298(1)(b) see, Zou and Ye, "Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal", *op. cit. 604,* 340.

673 Kunoy, *op. cit*. 56, 132.

674 *The South China Sea Arbitration*, Award, *op. cit. 330,* para. 1158.

675 *Ibid.*

676 *Ibid.,* 1161. Also see, Lori Fisler Damrosch, "Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS," *AJIL Unbound* 110 (January 2016): 276-277.

to military operations.[677] The same approach was taken by ITLOS in its preliminary measures in *the Case Concerning the Detention of Three Ukrainian Naval Vessels.*[678]

In particular, Ukraine made the argument that if the States Parties to UNCLOS had an intention for the military activities exception to apply to any dispute with a connection to military activities, they would have worded Article 298(1)(b) to include all disputes that "arising from or in connection with" or "arising out of" military activities.[679] The Tribunal agrees that the term "concerning" used in Article 298(1)(b) limits the scope of disputes that could be exempted. Thus, according to the tribunal "a mere 'causal' or historical link between certain alleged military activities and the activities in dispute cannot be sufficient to bar an arbitral tribunal's jurisdiction" provided by Article 298(1)(b) UNCLOS.[680]

The important note to be taken is that in the light of Russian full-scale invasion of Ukraine, those activities would not trigger the applicability of this exception. It could be well supported by the arbitral tribunal in the South China Sea,

> Where a State Party has initiated compulsory dispute settlement under the Convention in respect of a dispute that does not concern military activities, Article 298(1)(b) would not come into play if the other Party were later to begin employing its military in relation to the dispute in the course of proceedings. Nor does the Tribunal see that Article 298(1)(b) would limit its ancillary jurisdiction to prescribe provisional measures in respect of military activities taking place in relation to a dispute that does not, itself, concern military activities.[681]

Also, as the tribunal in the *Coastal State Rights Dispute* already established the existence of a sovereignty dispute over Crimea[682], the fact of occupation of Crimea could not be brough under this exception as the occupation itself is not part of the jurisdiction under UNCLOS. Moreover, the arbitral tribunal believes that in the current case, the military activities exception is not applicable solely because the actions of the Russian Federation, which Ukraine is complaining about, are related to, or happened within the context of "a broader alleged armed conflict". Instead, the crucial question, according to the arbitral tribunal, is whether the "certain specific acts subject of Ukraine's complaints" can be categorised as military activities or not.[683]

The law enforcement activities, the same as military activities, have a minimal

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677 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 95, para 330; Kunoy, *op. cit*. 56, 132.

678 *Detention of Three Ukrainian Naval Vessels*, Provisional Measures, ITLOS*, op.cit, 23,* Separate Opinion of Judge Gao, 5, para 18; Kunoy, *op. cit*. 56, 132.

679 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 92, para. 317.

680 *Ibid.,* 95, para 330. Also see, Klein and Parlett, *Judging the Law of the Sea*, *op. cit. 67,* 133.

681 *The South China Sea Arbitration*, Award, *op. cit. 330,* para. 1161.

682 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 55, para. 178.

683 *Ibid.,* 96 para. 331.

normative regulation under UNCLOS.[684] Therefore, for its interpretation and application the best source of information is also law of the sea jurisprudence.

In the *Arctic Sunrise case*, the arbitral tribunal examines whether Russia's arrest of Greenpeace protestors was excluded from jurisdiction due to the optional exception in Article 298 UNCLOS.[685] The tribunal recognises that the provision in Article 298(1)(b) is specifically for law enforcement actions concerning fishing or marine scientific research in the EEZ. Thus, the law enforcement related to artificial structures or activities related to exploring and utilising resources on the continental shelf could be addressed under Part XV, Section 2.[686] It also states about the scope of this exception within the state's declaration of excluding law-enforcement disputes from UNCLOS compulsory dispute settlement. Thus, according to the tribunal,

> Declaration cannot exclude from the jurisdiction of the procedures in Section 2 of Part XV of the Convention "every dispute" that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction." It can only exclude disputes "concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" which are also "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3." Accordingly, the Declaration cannot and does not exclude from the jurisdiction of the procedures in Section 2 of Part XV of the Convention any dispute that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction" unless the dispute is also excluded from the jurisdiction of a court or tribunal under paragraph 2 or 3 of article 297.[687]

In the *South China Sea,* the arbitral tribunal points out that "the law enforcement activities exception concerns a coastal State's rights in its exclusive economic zone and does not apply to incidents in a territorial sea."[688] Therefore, the scope of the application of this exception is limited to EEZ of a coastal state.

To sum up, military activities and certain law enforcement activities were excluded from the UNCLOS compulsory dispute settlement procedures by Ukraine or the Russian Federation before the occupation of Crimea occurred. Thus, the status of Crimea does make the situation more complicated. However, it does not interfere with the fact that some issues could be excluded from the dispute settlement under UNCLOS as a part of optional exceptions. These military activities and the certain law enforcement activities may relate to particular maritime zones where the rights and obligations of coastal states differ from those of flag states.

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684 Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, *op. cit. 45,* 313.

685 For some detailed analysis, see, James Harrison, "The Arctic Sunrise Arbitration (Netherlands v. Russia)", *The International Journal of Marine and Coastal Law* 31, 1 (29 February 2016): 145–159.

686 Klein, "Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions", *op. cit., 45,* 414.

687 *Arctic Sunrise Arbitration*, Award on Jurisdiction (26 November 2014), 13, para. 69.

688 *The South China Sea Arbitration*, Award, *op. cit. 330,* 370, para. 929.

Nevertheless, these activities could also be considered irrespective of whether the state is a coastal state or not, with the condition that even a coastal state would not have the jurisdiction to interfere with a ship of the flag state in the manner it did. An illustrative example is the dispute between Ukraine and the Russian Federation concerning *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*.

So, while provisions about military activities and the certain law enforcement activities could potentially apply to the waters surrounding Crimea and be resolved by a law of the sea court or tribunal, this possibility is precluded by the optional exception declarations made by both Ukraine and the Russian Federation. Thus, the occupation of Crimea does not limit the jurisdiction provided by UNCLOS in these situations. Similar situation is within the disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations that is analysed in the following part.

2.3.2.4. Dispute over the Crimean occupation within the UN Security Council

The exception provided in Article 298(1)(c) includes "disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention."

During the negotiation of UNCLOS, the wording of Article 298 was slightly different. It stated that the disputes involving the Security Council would include "those before the Security Council of the United Nations, except in any case where it has determined that proceedings under the Convention would not interfere with the exercise of its functions under the Charter of the United Nations."[689] Thus, as the jurisdiction of the law of the sea courts or tribunals applies to any dispute concerning interpretation and application of UNCLOS, it seems logical to assume that the relevant functions of the Security Council of the United Nations also should be related to a dispute concerning interpretation and application of UNCLOS.

The UN Security Council's functions are provided by the UN Charter. They are:

- maintenance of international peace and security in accordance with the principles and purposes of the United Nations: Article 24(1);
- formulation of plans for the establishment of a system to regulate armaments: Article 26;
- investigation of any dispute or situation which might lead to international friction: Article 34;
- recommendations of methods for dispute settlement: Articles 36, 37, 38;

689 UNCLOS III, Informal Single Negotiating Text (Part IV), UN Doc. A/CONF.62/WP.9 (1975), OR V, 111, 115 (Art.18) cited from Commentary on Art. 298 UNCLOS, in *United Nations Convention on the Law of the Sea: A Commentary*, *op. cit. 222,* 1922.

- take account of failure to comply with the recommendations of methods for dispute settlement: Article 40;
- determining threats to the peace, breach of the peace, or act of aggression and recommending or deciding what action should be taken: Article 39;
- economic sanctions and other measures not involving the use of force to prevent or stop aggression: Article 41;
- measures involving the use of force to maintain or restore international peace and security: Article 42;
- recommending a state to membership in the United Nations: Article 4;
- trusteeship functions relating to political, economic, social, and educational matters in the strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment: Article 83;
- recommendation to the General Assembly the appointment of the Secretary-General: Article 97;
- request ICJ to give an advisory opinion on any legal question: Article 96;
- election together with the General Assembly the Judges of the ICJ: Article 8 of the Statute of ICJ.

From the perspective of the most direct reference to the sea it is the UNSC function to establish economic sanctions and other measures not involving the use of force. In particular, Article 41 of the UN Charter states:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[690]

It's reasonable to believe that Article 41 of the UN Charter was initially created as one of the primary methods to push states into altering policies that disrupt international peace and security.[691]

From 1990 onwards, the UN Security Council has issued several resolutions urging member states to engage in different types of actions that could potentially affect States' navigation rights under UNCLOS.[692] The UNSC resolutions that invoked the most attention from the scholarship in the law of the sea were those related to

690 Article 41 Charter of the United Nations, *op. cit. 220.*

691 Machiko Kanetake, *The UN Security Council and Domestic Actors: Distance in International Law* (London and New York: Routledge, Taylor & Francis Group, 2017), 100.

692 Robin Churchill, "Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution," *International Law Studies* 84 (2008): 143; Angelos M. Syrigos, "Developments on the Interdiction of Vessels on the High Seas," in *Unresolved Issues and New Challenges to the Law of the Sea* (Leiden: Brill Nijhoff, 2006), 161, 168-173, 178-180; Stuart Kaye, "Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction," in *The Law of the Sea: Progress and Prospects*, edited by David Freestone et.al. (Oxford University Press, 2006), 358.

the waters and pirates in the Somali.[693] UNSC issued recommendations to parties of the disputes to refer the dispute to the ICJ in two well-known as a law of the sea cases.[694] These cases are *Corfu Channel case*[695] and the *Aegean Sea Continental Shelf case*.[696] The general trend of the interaction between UNSC resolutions and UNCLOS goes without contradiction or confrontation between each other. Moreover, while the UNSC has played a significant role in shaping the law of the sea, it is also very careful on how its actions can impact the overall framework of the law of the sea. Therefore, it is possible even to state that UNCS "is affecting the scope of its own contribution in order to preserve the fundamental balances of the law of the sea."[697]

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693 Maximo Q. Mejia et al. (eds.), *Piracy at Sea*, vol. 2, WMU Studies in Maritime Affairs (Berlin, Heidelberg: Springer, 2013); Douglas Guilfoyle (ed.), *Modern Piracy* (Cheltenham, UK: Edward Elgar Publishing, 2013); Douglas Guilfoyle, "Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts," *The International and Comparative Law Quarterly* 57, 3 (2008): 690–699; and many others. Also see, Sherif Elgebeily, *The Rule of Law in the United Nations Security Council Decision-Making Process: Turning the Focus Inwards* (Abingdon, New York: Routledge, Taylor & Francis Group, 2017), 64.

694 Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (Abingdon, New York: Routledge, Taylor & Francis Group, 2014). 132.

695 Security Council Resolution 22 (1947) [on incidents in the Corfu Channel] states: (emphasis is present in the original text)
"The Security Council,
Having considered statements of representatives of the United Kingdom and of Albania concerning a dispute between the United Kingdom and Albania arising out of an incident on 22 October 1946 in the Straits of Corfu in which two British ships were damaged by mines, with resulting loss of life and injury to their crews,
Recommends that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court."

696 UNSC resolution 395 (1976) states: (emphasis is present in the original text) "*The Security Council,*
Expressing its concern over the present tensions between Greece and Turkey in relation to the Aegean Sea,
Bearing in mind the principles of the Charter of the United Nations concerning the peaceful settlement of disputes, as well as the various provisions of Chapter VI of the Charter concerning procedures and methods for the peaceful settlement of disputes,
Noting the importance of the resumption and continuance of direct negotiations between Greece and Turkey to resolve their differences, […]
3. Calls upon the Governments of Greece and Turkey to resume direct negotiations over their differences and appeals to them to do everything within their power to ensure that these negotiations will result in mutually acceptable solutions;
4. *Invites* the Governments of Greece and Turkey in this respect to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connexion with their present dispute."

697 Kiara Neri, "Security Council's Contribution to the Evolution of the Law of the Sea: Avant Garde or Self-Limitation?" in *Global Challenges and the Law of the Sea* (Cham: Springer International Publishing, 2020), 188.

UNSC resolutions relevant to the law of the sea could be classified into groups:[698]

- **Sanctions Enforcement:** it involves resolutions that enforce sanctions under Article 41 of the Charter. Examples include Resolution 221 (1966), Resolution 665 (1990), Resolutions 787 (1992), 820 (1993), 875 (1993), 917 (1994), and Resolution 1132 (1997). These resolutions may call on States to take measures, including maritime actions, to uphold sanctions.
- **Preventing Weapons Trafficking**: it addresses the prevention of trafficking in weapons of mass destruction. Notable resolutions include Resolution 1540 (2004) and Resolution 1718 (2006), urging States to establish effective border controls to prevent such trafficking and inspect cargo consistent with international law.
- **Materials Transfer Prevention**: Resolutions like Resolution 1695 (2006) and Resolution 1696 (2006) aim to halt the transfer of specific materials to certain States. While not explicitly mentioning sea actions, their language is broad enough to include measures affecting ships at sea.
- **Counterterrorism Measures**: Resolution 1373 (2001) addresses counterterrorism, mandating States to take necessary steps to prevent terrorist acts. Such steps could potentially involve actions against ships while at sea.
- **Authorization for Force**: Resolutions like 678 (1990), 794 (1992), 940 (1994), and 1264 (1999) permit States to use "all necessary means" to achieve specific goals. This might include using force against ships at sea in addition to land and air action.

In these resolutions, the language does not explicitly suggest potential measures affecting ships at sea.[699] Therefore as it deals with the sea, it is possible to involve the dispute settlement procedure under UNCLOS.

In the majority of cases when disputes between UN Security Council resolutions and UNCLOS exist or are likely to occur, such disputes can be prevented, especially concerning provisions related to navigational rights. It may happen due to the wording of the Security Council resolution (namely, if it specifies that actions should align with international law) or because a situation allows for interference with shipping in accordance with Security Council resolutions as permitted by UNCLOS.[700] Additionally, UN Security Council resolutions use such wording that supports the implementation of UNCLOS.[701] When there is a dispute between interpretation and application of UNCLOS and UN Security Council resolution, a court or tribunal

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698 For detailed classification of these groups see, Churchill, "Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution," *op. cit. 692,* 143-145.

699 Churchill, "Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution," *op. cit. 692,* 143-145.

700 *Ibid.,* 154.

701 Neri, *op. cit. 697,* 180-181. In particular, "Part 2.1 Resolutions Supporting the Implementation of the Law of the Sea".

under Article 288(1) UNCLOS must have jurisdiction to address it.[702] Thus, if a court or tribunal establishes the existence of such dispute, further decision is whether such dispute shall be excluded from the jurisdiction under Article 298(c) UNCLOS or not.

From the perspective of UNCLOS dispute settlement and the Crimean occupation, it was already established that to decide on this matter is outside of the scope of the jurisdiction provided by UNCLOS within its Article 288(1). Thus, if the UN Security Council would exercise its function and adopt the resolution related to the Crimean occupation[703] it would not trigger the optional exception. The dispute that can be excluded from the compulsory procedure under this provision is a dispute concerning interpretation and application of UNCLOS and the dispute that involves UNSC exercising the functions assigned to it by the UN Charter. Thus, solely the dispute that involves UNSC exercising the functions assigned to it by the UN Charter is outside of the jurisdiction under Article 288(1) UNCLOS itself.

To sum up, UNCLOS establishes the legal framework for conducting activities in oceans and seas. It balances the rights of coastal States and the international community, and, as a result, limiting the traditional freedoms of the seas.[704] Within UNCLOS, Part XV gives the jurisdiction of a court or tribunal to cases involving the interpretation and/or application of UNCLOS.[705] This implies that to initiate proceedings, the applicant must allege a violation of particular provision of UNCLOS.[706] The problem with categorising disputes within the exceptions of Part XV is that this categorising is not based on practical reasons but rather on politics. This also narrows down the effectiveness of Part XV in safeguarding the overall interests mentioned in UNCLOS.[707]

How a conflict is presented by the party making the complaint can create difficulties for courts and panels in labelling the conflict, defining the scope of exceptions, and thus how much jurisdiction a court or tribunal have over it. Parties by making submissions will naturally shape their arguments to influence how a tribunal or a court interprets the subject matter of the dispute.[708]

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702 Churchill, "Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution," *op. cit. 692,* 154.

703 What is highly unlikely as the Russian Federation is a permanent member of Security Council.

704 Tuerk, *op. cit. 413,* 181.

705 Article 288 UNCLOS.

706 Philippe Gautier, "Some Reflections on the 'New Law of the Sea'" *International Law Studies* 99 (2022): 1060.

707 Holst, *op. cit. 390,* 143-144.

708 *Ibid*. It should be also noted that a court or a tribunal is not bound by the formulation presented to it by the parties of a dispute. It was confirmed by a couple of cases. For example, in the *Nuclear tests case* ICJ held that ""it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so." See, *Nuclear Tests* (Australia v. France), Judgement, I.C.J. Reports 1974, p. 253, at 262, para. 29. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* it is stated that "[t]he Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute." Moreover, "[t]he Court will itself determine

While it is obvious that the Crimean occupation is not a part of the dispute under UNCLOS procedure, it is also not the reason why some issues between Ukraine and the Russian Federation cannot be solved by Part XV UNCLOS. Thus, it is clear from the section of limitations and optional exceptions that regardless of the status of Crimea, such disputes would not be decided as they were previously excluded from such jurisdiction. Also, while UNCLOS is considered as "not a finished work of art: it is a living document",[709] "[i]t has proven to be solid yet flexible, constant yet adjustable, massive yet subtle – old and yet so new…"[710] The function of the dispute resolution bodies in UNCLOS is not solely to resolve disputes between states that are parties to UNCLOS. It also plays a role in safeguarding from endangering the unity and strength UNCLOS by individual interpretations.[711] Therefore, even in the situation when it seems there is no possibility of dispute settlement, UNCLOS offers a mechanism of compulsory conciliation. It applies only to certain disputes but still provides states the opportunity to settle their dispute under provisions of UNCLOS. Thus, the next part addresses the compulsory conciliation under UNCLOS.

2.3.3. Disputes subject to resolution by the compulsory conciliation

UNCLOS mentions conciliation in a number of its Articles UNCLOS, in particular in Articles 279, 284, 297, and 298. Annex V of UNCLOS provides the procedural rules concerning conciliation. The conciliation can be of two types: the first is a voluntary conciliation procedure established in Articles 279 and 284, and the second is a compulsory submission to conciliation procedure discussed in Articles 297 and 298.[712]

There are three cases when compulsory conciliation can be established:

- Article 297(2) – disputes related to marine scientific research (when it happens in EEZ or continental shelf);
- Article 297(3) – fisheries management (inside EEZ);
- Article 298 (1)(a) – maritime delimitation and historic titles.

The scope of the conciliation procedures is the same as that of the procedures for resolving disputes, like arbitration and adjudication. This means that a dispute has to

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the real dispute that has been submitted to it". See, *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction of the Court, Judgment, I. C.J. Reports 1998, p. 432, at 448-449, paras. 30-31.

709 Thomas A. Mensah, "Foreword," in *Navigational Rights and Freedoms and the New Law of the Sea* (Leiden: Brill Nijhoff, 2000), vii–x.

710 Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Leiden: Brill Nijhoff, 2007), 178.

711 Hao Duy Phan, "International Courts and State Compliance: An Investigation of the Law of the Sea Cases," *Ocean Development & International Law* 50, 1 (2 January 2019): 71.

712 Rüdiger Wolfrum, "Conciliation under the UN Convention on the Law of the Sea," in *Conciliation in International Law* (Leiden: Brill Nijhoff, 2017): 179-181; Sienho Yee, "Conciliation and the 1982 UN Convention on the Law of the Sea," *Ocean Development & International Law* 44, 4 (1 October 2013): 316.

deal with the interpretation and application of UNCLOS.[713] Each of the compulsory conciliation commissions has its limitations due to the dispute it was established for.[714]As a process, compulsory conciliation does not have the same level of political and legal impact as a binding decision made through court's judgement or arbitration's award. At the same time, compulsory conciliation is seen as not having the same informalities and political flexibility that are present in direct negotiations between the parties.[715]

The most relevant conciliation commission in regard to the occupation of Crimea is the one that could be possibly established under Article 298 (1) (a) regarding dispute involving maritime delimitation and (possibly) historic title. It can be established if the involved states are unable to reach a consensus through direct negotiations within a reasonable timeframe, then any of these states has the right to institute the proceedings within the compulsory conciliation. Thus, when there is an exception under Article 298 UNCLOS – there is an option for the conciliation commission. However, "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission". Thus, until the issue of Crimea would not be solved elsewhere, the dispute settlement procedure under UNCLOS related to a conciliation commission falls into a trap of lack of jurisdiction.

International dispute settlement is definitely a complicated process that involves examining many factors and making different predictions about the likely outcome in each particular situation.[716]

There are some recommendations from the Ukrainian scholars that this compulsory conciliation procedure shall be used in respect of the delimitation in the Azov Sea and the Kerch Strait. The reference is made to the first precedent for such a case when in 2016 East Timor successfully applied the compulsory conciliation procedure to resolve its delimitation with Australia. It effectively forced Australia to sign an agreement on the delimitation of maritime space in the Timor Sea in 2018.[717] Therefore, it was

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713 Wolfrum, *op. cit. 712*, 182; Sienho Yee, "Conciliation and the 1982 UN Convention on the Law of the Sea," *op. cit. 712,* 321-326.

714 In particular, Articles 297(2), 297(3), and 298(1)(a) UNCLOS.

715 Natalie Klein, "Timor Sea Conciliation: A Harbinger of Dispute Settlement under UNCLOS?" in *A Bridge over Troubled Waters* (Leiden: Brill Nijhoff, 2020): 139-140.

716 *Ibid.,* 141.

717 Ustymenko, "Measures for the Legal Protection of Ukraine's National Interests at Sea," *op. cit. 484,* 90. It is also should be noted that conciliation between Timor Leste and Australia is not the only one in the law of the sea but the only one under provisions of UNCLOS. There were a few cases where states used conciliation outside of UNCLOS. For example, Belize and Guatemala turned to conciliation through the Organization of American States for their 'territorial differendum', including a maritime aspect. An example of successful law of the sea conciliation before the adoption of UNCLOS in 1982 is the Jan Mayen (Iceland/Norway) Conciliation from 1980-1981. In this case, Norway and Iceland chose voluntary conciliation to address the boundary in the continental shelf region between Iceland and Jan Mayen. See, Wolfrum, *op. cit. 712,* 188-189; S Jayakumar, "Compulsory Dispute Settlement and Conci-

recommended that Ukraine and Georgia should synchronise their efforts based on UNCLOS to establish maritime borders with Russia.[718] The problem here as it was rightly stated is that "Georgia faces similar issues in the Black Sea as Ukraine: the absence of a maritime border with Russia and Russia's occupation of a larger part of Georgian waters."[719] Thus, the status of land as occupied prevents the possibility of the state to pursue the dispute settlement under UNCLOS in relation to the compulsory conciliation. The commission would most likely find a lack of its jurisdiction unless Ukraine and/or Georgia could prove that there is no sovereignty dispute.

It should be emphasised for avoiding any confusion that despite the fact that the conciliation is compulsory, the report presented by the conciliation commission is not binding upon the parties.[720]

Thus,

> after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree.[721]

Practically it means that after the commission issues its report, the states have to negotiate a binding agreement. If the negotiations fail, there is not any binding option what could be possible done in this regard. The states have to mutually agree to transfer the dispute between them to a court or tribunal. It is obvious that the success of the commission depends on the willingness of the parties to cooperate as well as their good faith. It is essential that the parties are able to negotiate in good faith. Clearly, it is extremely difficult to imagine with the perspective of application of these provisions between Ukraine and the Russian Federation in the near future.

To summarise, even the establishment of compulsory conciliation under UNCLOS requires the determination of the Crimean occupation. Thus, to be able to apply the dispute settlement procedures under UNCLOS, either compulsory dispute settlement entailing binding decision or compulsory conciliation, in regard of the solving the disputes affected by the Crimean occupation, it is necessary to determine the status of Crimea as occupied. And as a result, to solve a sovereignty dispute as an obstacle to jurisdiction under UNCLOS. Therefore, Chapter III deals with it.

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liation Under UNCLOS," in *The Timor-Leste/Australia Conciliation A Victory for UNCLOS and Peaceful Settlement of Dispute* (World Scientific, 2019), 11-12; Yee, "Conciliation and the 1982 UN Convention on the Law of the Sea," *op. cit. 712,* 326-327.

718 Ustymenko, "Measures for the Legal Protection of Ukraine's National Interests at Sea," *op. cit. 484,* 90.

719 *Ibid.*

720 Article 7(2), Annex V, UNCLOS.

721 Article 298(1)(a)(ii) UNCLOS.

CHAPTER III. REMOVING THE OBSTACLE TO JURISDICTION UNDER UNCLOS

This Chapter III aims to propose ways of resolving the lack of jurisdiction within and outside UNCLOS provisions and procedures. So, the violations related to Ukraine as a coastal state can be further resolved.

3.1. Resolving the Crimea Occupation Dispute under UNCLOS Provisions

3.1.1. Deciding over the matters related to the Crimean occupation by using a conditional decision

Applying the conditional decision within the dispute between Ukraine and the Russian Federation would not include the Crimean occupation in the jurisdiction under UNCLOS but still provide an opportunity to decide over the submissions related to coastal state rights and obligation within waters generated by Crimea. This decision would not determine the status of Crimea. It would do quite the opposite. The conditional decision would allow the UNCLOS dispute settlement body to avoid the determination of the occupation of Crimea at all.

Such an alternative way of settlement of the dispute was proposed by Peter Tzeng. According to him, a conditional decision can be a solution for the dispute between Ukraine and the Russian Federation, although, he admits that while discussing this idea with colleagues, their reactions have been mixed, ranging from "brilliant" to "ridiculous" as well as himself he is not entirely sold on the idea either.[722]

In particular, he proposes:

> an alternative solution that neither the tribunal nor the parties appear to have considered: a conditional decision. That is, the dispositif of the award on the merits could read something along the following lines: "If Ukraine has sovereignty over Crimea, then Russia has violated the Convention. If, on the other hand, Russia has sovereignty over Crimea, then Russia has not violated the Convention." This way, the tribunal would arguably be exercising its jurisdiction over Ukraine's claims, without needing to determine whether Ukraine or Russia has sovereignty over Crimea.

Thus, he believes that applicability of the conditional decision is worth considering, as it is similar to what the ICJ did in *the Pedra Branca case* between Malaysia and Singapore. Namely, in this case it states that "sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located."[723] The

722 Tzeng, "Conditional Decisions: A Solution for *Ukraine v. Russia* and Other Similar Cases?", *op. cit. 90.*

723 See more detailed analyses in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment of 23 May 2008, 91-93, paras. 291-299.

decision was as a consequence of the lack of granted jurisdiction by parties to establish sovereignty over this low-tide elevation. In particular, the jurisdiction of parties to the dispute was given only to establish sovereignty over three maritime features but not to draw the line of delimitation. Therefore, it could be used from the perspective of the Crimean occupation when due to the necessity to directly or implicitly determine the coastal state, there was an established lack of jurisdiction under UNCLOS.

Ukraine initially submitted numerous claims related to waters generated by Crimea and being a coastal state itself. From a first glimpse, it seems that making such a conditional decision with too many options would be difficult. Moreover, such a conditional decision could also lead to more disagreements between the parties. As well as comparing the conditional decision regarding a low-tide elevation to the occupation of the whole peninsula seems an overwhelmingly big decision. Therefore, it could easily be considered as not realistic or not a viable solution.

However, from the perspective of scrutiny and orientation to details by a court or tribunal while solving the dispute, this option could be theoretically applicable in practice. Why so? A dispute settlement body under UNCLOS can divide its award into two parts. Thus, the first part would be named and dealing with Ukraine as a coastal state over Crimea and the second part as the Russian Federation as a coastal state over Crimea. This way, the tribunal would present one award with a conditional requirement that once the determination of a coastal state would be done, then either the first or second part of the award applies. Even though this situation is possible to imagine in practice, part two of the award would violate the provisions of the UNGA resolution GA/11493 of March 27, 2014, by not recognizing changes in the status of Crimea. Even though the argument could be that it would not be considered as recognition as well as referring to unclarity in determination of what exactly means non-recognition in practice, nevertheless, it could give the possibility of a doubt that Crimea could be legally acquired by the Russian Federation. Indirectly such an award of the arbitral tribunal could affect the status of Crimea and the tribunal does not have such jurisdiction to do so.

Apart from the legal reason why such an option does not seem so realistic, it is the willingness of the arbitrators to deliver such an award. Whatever has been said, such a conditional decision in practice means double work and writing for the arbitrators. And it depends only on the selected arbitrators whether they would agree to do so or not. Moreover, while reading jurisprudence, it is clear that in the vast majority of cases, the judges or arbitrators are providing answers and doing interpretations of provisions only if asked and related to particular circumstances of the case. Thus, issuing a conditional decision would mean that it would require additional determination of one part that would never be implemented as there is only one possible state over Crimea.

Consequently, since the conditional decision with UNCLOS is not an option, there is a need to explore other ways to settle the issues related to the waters generated by Crimea within UNCLOS.

3.1.2. Determination of the occupation of Crimea by using supplemental jurisdiction under Article 288 (2) UNCLOS

Jurisdiction under UNCLOS has its limits in Article 288(1) but what if we can use the possible situation of extension of the *ratione materiae* jurisdiction as provided in Article 288(2) UNCLOS?

Namely,

> A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

Can the establishment of the fact of the occupation of Crimea be given to the jurisdiction under UNCLOS based on so-called "supplementary jurisdiction"[724] provided by Article 288(2) UNCLOS?

Article 288(2) UNCLOS has a broad scope but not unlimited one. It applies to agreements related to the purposes of UNCLOS. It mentions the jurisdiction of the "court or tribunal" in Article 287 UNCLOS, but it does not specify how parties can submit to this court or tribunal - whether by agreement or unilaterally. It also does not clarify if submission to this court or tribunal means applying Article 287 and related provisions.[725]

The purposes of an agreement under Article 288(2) UNCLOS can be determined from its own objective or purpose clause, overall content, including the preamble as well as UNCLOS provision and preamble. UNCLOS's Preamble outlines several goals, such as establishing a legal order for the seas and oceans, promoting peaceful ocean use, equitable resource utilisation, conservation of marine resources, and protection of the marine environment.[726] Given the comprehensive nature of these goals, the requirement that an agreement be related to UNCLOS's purpose can encompass a wide range of agreements.[727]

A dispute referred in Article 288(2) UNCLOS must be related to the interpretation or application of another agreement. This dispute's existence and nature are determined by the tribunal itself, following established jurisprudence. Importantly, this provision does not grant the tribunal an advisory opinion role concerning the other

724 Peter Tzeng, "Supplemental Jurisdiction under UNCLOS", *Houston Journal of International Law* 38, 2 (2016): 499-575.

725 Tullio Treves, "Dispute-Settlement in the Law of the Sea: Disorder or System?" in *Promoting Justice, Human Rights and Conflict Resolution through International Law / La Promotion de La Justice, Des Droits de l'homme et Du Règlement Des Conflits Par Le Droit International* (Leiden: Brill Nijhoff, 2007), 936.

726 Preamble, UNCLOS.

727 Nigel Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *Ocean Development & International Law* 52, 4 (2 October 2021): 348-349.

agreement, as it specifically mentions a "dispute" as the basis for jurisdiction.[728]

The arbitral tribunal in the *Arctic Sunrise Arbitration* issued a decision, relying on the established jurisdiction provided by Article 288(2) of UNCLOS. This decision recognised that Article 288(2) could be used as a basis for jurisdiction even over a non-UNCLOS dispute.[729] It is also supported by the authors of UNCLOS Commentary and scholars.[730]

Peter Tseng directly confirms that "the text of Article 288(2) expressly grants UNCLOS tribunals jurisdiction over non-UNCLOS disputes. The context supports this interpretation: the language of Article 288(2) parallels that of Article 288(1), which grants UNCLOS tribunals jurisdiction over UNCLOS disputes".[731]

The Agreements that are usually mentioned under Article 288(2) are those directly involving application of provisions of UNCLOS and regulation of the usage of the sea.[732] The rules for settlement of the disputes in those agreements apply regardless of whether the parties are part of UNCLOS or not. Some of these agreements specifically mention this, but it applies the same for other agreements as well because none of them require states to be part of UNCLOS to join those agreements.[733]

While Article 288 of UNCLOS mentions disputes concerning the interpretation or application of the other agreement, Article 21 of the ITLOS Statute has a broader scope, encompassing "all matters specifically provided for in any other agreement." This broader interpretation allowed ITLOS to assert jurisdiction in its IUU Advisory Opinion and provide an advisory opinion under the MCA Agreement.[734]

To establish jurisdiction, the dispute must be submitted in accordance with the

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728 Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *op. cit. 727,* 348.

729 *The Arctic Sunrise Arbitration*, Award on the Merits, (14 August 2015), 44, para 192, note 184.

730 Center for Oceans Law and Policy, University of Virginia, Article 288 - Jurisdiction (V)'. (2013). In *United Nations Convention on the Law of the Sea*, ed. by Center for Oceans Law and Policy, University of Virginia. p. 47-48; Alexander Proelß et al., *United Nations Convention on the Law of the Sea: A Commentary*, *op. cit. 222,* 1859; Peter Tseng directly confirms that "the text of Article 288(2) expressly grants UNCLOS tribunals jurisdiction over non-UNCLOS disputes. The context supports this interpretation: the language of Article 288(2) parallels that of Article 288(1), which grants UNCLOS tribunals jurisdiction over UNCLOS disputes", see, Tzeng, "Supplemental Jurisdiction under UNCLOS," *op. cit. 724,* 516.

731 Tzeng, "Supplemental Jurisdiction under UNCLOS," *op. cit. 724,* 516.

732 See the list provided by Treves, "Dispute-Settlement in the Law of the Sea: Disorder or System?" *op. cit. 725,* 367; For more resent update see, Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *op. cit. 727,* 353-355. Also, it is mentioned in "International Tribunal for the Law of the Sea: International Agreements Conferring Jurisdiction on the Tribunal," *The International Tribunal for the Law of the Sea,* accessed 23 August 2023, https://www.itlos.org/en/main/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal.

733 Treves, "Dispute-Settlement in the Law of the Sea: Disorder or System?" *op. cit. 725,* 368.

734 Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *op. cit. 727,* 357.

provisions of the other agreement. The terms of the other agreement determine whether a dispute can be submitted upon the request of any party or if it requires the consent of all parties involved. Article 288(2) UNCLOS alone cannot create compulsory jurisdiction under the other agreement.[735] Several agreements, such as the FAO agreements and the Galapagos Agreement, do not specify applicable law in cases of disputes. While they mention possible forums like the ICJ, ITLOS, or arbitration, they do not explicitly incorporate Part XV of UNCLOS.[736] This silence on applicable law has led to differing interpretations.

Some argue that applicable law includes the relevant instrument, general international law, and UNCLOS provisions related to interpreting the agreement.[737] However, a cautious view suggests that applicable law may only encompass the specific agreement, background international law, and UNCLOS provisions necessary for interpreting the agreement. It is essential for parties to address applicable law in their dispute resolution consent.[738]

Applicable law within the law of the sea dispute settlement already raised some level of discussion. As an example, in *the Chagos MPA Arbitration*, the Dissenting and Concurring Opinion of Judges Kateka and Wolfrum talks about Article 293 UNCLOS as the source of the jurisdiction to apply the international law rules concerning decolonization. Also, such cases, as *M/V "SAIGA" (No. 2)*[739], *Guyana v. Suriname,*[740] and *The M/V "Virginia G" case*[741] address and decide over issues that do not have its bases in the Articles of UNCLOS but are applied as a part of applicable law.

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735 *Ibid.,* 349. Also see, Tullio Treves, "A System for Law of the Sea Dispute Settlement" in *The Law of the Sea: Progress and Prospects* (Oxford, New York: Oxford University Press, 2006), 418; Treves, "Dispute Settlement in the Law of the Sea: Disorder or System?" *op. cit. 725,* 936.

736 Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *op. cit. 727,* 372

737 For example, Treves takes an expansive view. He concludes by referring to the FAO Compliance Agreement and the Galapagos Agreement, as well as to the UCH Convention and the London Protocol, that these agreements do not include provisions on applicable law. However, "it must, nevertheless, be assumed that the applicable law will include the provisions of the relevant instrument, and because of the reference to Part XV or to the ITLOS, the LOSC and other rules of international law not incompatible with it, according to Article 293 of the LOSC." Treves, "A System for Law of the Sea Dispute Settlement" *op. cit. 735,* 427–428. It is cited from Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *op. cit. 727,* 372.

738 Bankes, "The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties," *op. cit. 727,* 372.

739 *M/V "SAIGA" case (No. 2), op. cit. 444,* 61-62, paras. 155-156. The issue involved: the use of force in the arrest of ships.

740 *Guyana v. Suriname*, *op. cit. 315,* paras. 402-406. The issue involved: the Tribunal's jurisdiction over claims relating to the Charter of the United Nations and general international law.

741 *M/V "Virginia G"* (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, paras. 359-362. The issue involved: the use of force in enforcement activities at sea.

However, *in the M/V "Norstar" case*[742] ITLOS believes that there is a difference between its jurisdiction and applicable law that it can apply. ITLOS states that Article 293 UNCLOS cannot be used to expand its jurisdiction. In such cases as *the Arctic Sunrise Arbitration* and *Duzgit Integrity Arbitration*, the Tribunals conclude that a court or a tribunal under Part XV UNCLOS cannot decide claims based on obligation that find a source outside of UNCLOS in analogous circumstances.[743] By this ITLOS believes that it's important to distinguish between two issues: jurisdiction and applicable law. It interprets Article 293 of UNCLOS differently as in the previous case. According to ITLOS, the applicable law cannot be used to expand its jurisdiction. The tribunal can use other provisions of UNCLOS or other international laws that do not conflict with UNCLOS, in addition to Articles 87 and 300, to determine the applicable law for the case.

These cases are clearly showing the inconsistency in interpretation of Article 293 UNCLOS and bringing more questions about extending the jurisdiction of a court or tribunal under UNCLOS. However, by taking an already established approach in the law of the sea jurisprudence, Article 293 UNCLOS seems inappropriate to be used to strengthen the jurisdiction given by the parties. The question, although, remains: whether the establishment of the fact of the occupation of Crimea can be referred to the jurisdiction under UNCLOS based on so-called "supplementary jurisdiction"[744] provided by Article 288(2) UNCLOS?

The easy answer could be "it depends". Indeed, it depends on the wording of such an agreement. It is obvious that the determination of the sovereign state over Crimea itself cannot be considered as the dispute related to the purposes of UNCLOS. Theoretically, an emphasis can be put on the establishment of the coastal state within the dispute between Ukraine and the Russian Federation. From the perspective of violations of the coastal state rights over the Crimea, the determination is required for the establishing a coastal state in the case. Even though sovereignty over land is not governed by UNCLOS, it says that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law."[745] By concluding such agreement under Article 298(2) UNCLOS states would willingly provide extended jurisdiction to UNCLOS dispute settlement bodies without raising concerns about an excessive expansion of jurisdiction for other states. Thus, the agreement, as outlined in Article 288(2) is relevant only to the parties of the agreement.

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742 *M/V "Norstar"* (Panama v. Italy), Judgment, ITLOS Reports 2018–2019, paras. 301-302. The issue involved: the question of the admissibility of an application with its assessment in the light of the well-established principles of international law governing acquiescence, estoppel and extinctive prescription. *M/V "Norstar"* (Panama v. Italy), Judgment, paras. 136-137 and 139-145. These paragraphs involved claims regarding human rights violations by Italy, but Panama does not include those claims in its final submissions. So, the Tribunal does not decide on this issue.

743 Klein and Parlett, *Judging the Law of the Sea*, *op. cit. 67,* 146.

744 Tzeng, "Supplemental Jurisdiction under UNCLOS," *op. cit. 724,* 516.

745 Saulius Katuoka and Olesia Gorbun, "A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea" (forthcoming 2024).

Given the background of the dispute and the ongoing war by the Russian Federation against Ukraine, it is not feasible for these two states to establish an agreement that would serve as a basis for supplemental jurisdiction. Therefore, the next part elaborated on removing the Crimean occupation as an obstacle to UNCLOS's jurisdiction outside the provisions of UNCLOS.

3.2. Resolving the Crimea occupation dispute outside of UNCLOS

3.2.1. Determination of the occupation of Crimea through a bilateral agreement

It is clear that the consent and mutual agreement of the parties resulting in referring their dispute to a dispute settlement body solves a lot of issues between them as well as enriching the jurisprudence of international law. For example, states concluded agreements and referred their dispute to the ICJ in quite a few cases.[746]

For example, in the case *Sovereignty and Maritime Delimitation in the Red Sea*, Eritrea and Yemen both claimed sovereignty over a group of islands in the Red Sea and disagreed as to the location of their maritime boundary.[747] If in the case of Eritrea and Yemen, both states were claiming sovereignty over the different islands, then in the other case called as *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening) two states were claiming sovereignty over part of the mainland territory. In this case it was the Bakassi peninsula.[748] Another dispute that was resolved is the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.[749]

However, even within a bilateral agreement there is a possibility that certain questions may fall outside the jurisdiction defined the scope of *ratione materiae* jurisdiction granted to the relevant court or tribunal. An example of this can be found

746 *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea, Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh/Myanmar), *Case concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), *Case concerning the Maritime Delimitation between Guinea-Bissau and Senegal, Sovereignty over Palau Litigan and Palau Sipadan* (Indonesia/Malaysia), *Territorial and Maritime Dispute* (Nicaragua v. Colombia), and others.

747 *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea*, Permanent Court of Arbitration, accessed 28 June 2023, https://pca-cpa.org/en/cases/81/. The case deals with the acquisition of territorial sovereignty and factual occupation matters and the interesting thought arises after analysing mentioned case as one of the parties' arguments was – effective occupation – is there any period of time could pass after which the tribunal or court could possibly state that Crimea can be considered as Russian?

748 *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), accessed 28 June 2023, https://www.icj-cij.org/en/case/94.

749 *Delimitation of the maritime boundary in the Bay of Bengal* (Bangladesh/Myanmar), Merits, Judgment, 14 March 2012 ITLOS Reports 2012, 51.

in *the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge case*[750] that earlier was referenced as an example of the award with conditional decision.

The jurisdiction to ICJ was granted on the basis of the special agreement between Malaysia and Singapore. States asked ICJ to determine which State had sovereignty over three maritime features: (a) Pedra Branca/Pulau Batu Puteh; (b) Middle Rocks; (c) South Ledge. ICJ faced a challenge by deciding over the sovereignty of South Ledge. South Ledge is not an island but a low-tide elevation so the sovereignty over it belonged to the State in whose territorial sea it was located. However, the ICJ did not have jurisdiction to delimit territorial sea. The Court decided that "sovereignty over South Ledge belongs to the State in the territorial waters of which it is located".[751] It serves as an example where there were grounds for the incidental determination, however, the ICJ avoided to do so.

The disputes brought by the agreements may also include disputes over the jurisdiction granted by such agreements. For example, there were known cases of a disagreement between the state parties as to whether the special agreement allows to delimit a maritime boundary or not[752], a disagreement between the state parties to a special agreement regarding the tasks to be ruled about by the court or tribunal[753], etc.[754]

One of the disputes submitted by the agreement between the parties involved Ukraine. It was the case regarding *Maritime Delimitation in the Black Sea* between Romania and Ukraine. In particular, Article 4(h) of the Additional Agreement to a Treaty of June 2, 1997, on Relations of Cooperation and Good-Neighborliness between Romania and Ukraine provided that

> If . . . negotiations . . . [do] not determine the conclusion of the above-mentioned agreement . . . in a reasonable period of time, but not later than 2 years since their initiation, . . . the problem of delimitation . . . shall be solved by the UN International Court of Justice.

The good question is why such a provision was not in the agreement between Ukraine and Russia? The Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation as well as the Cooperation Agreement do not consist of any means of possible solution for the dispute that would involve the possibility of unilateral submission by one of the parties to adjudicatory or arbitrary procedures. Both treaties are not in force anymore, but even if they would be in force, the only possible dispute settlement prescribed by these agreements are consultations

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750 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p. 12.

751 *Ibid.*, para. 300.

752 *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992, p. 351.

753 *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgement of 3 June 1985, I.C.J. Reports 1985, p. 13.

754 For more examples, see Tanaka, *The Peaceful Settlement of International Disputes, op. cit. 44,* 143–144; 116–117.

and negotiations, as well as other peaceful means chosen by the Parties.[755]

Given the ongoing full-scale war by the Russian Federation against Ukraine, it does not seem possible to consider the possibility of a bilateral agreement regarding the status of Crimea at this time. However, it could appear in the future.

3.2.2. Establishment of COI to clarify the fact of occupation of Crimea

Another option that could solve the question of the Crimean occupation is the establishment of the International Commission of Inquiry (further COI). Recently, the Independent COI was established by the Human Rights Council to investigate all alleged violations of human rights in the context of the Russian Federation's aggression against Ukraine.[756] However, its mandate includes investigating human rights violations and violations of international humanitarian law during the Russian Federation's aggression against Ukraine. The COI is tasked with collecting, analysing, and preserving evidence, identifying those responsible, making recommendations for accountability measures, and ensuring access to justice for victims. Additionally, they have a special mandate to investigate events in specific regions during late February and March 2022.[757] There is no acknowledgment or reference to the 2014 and occupation of Crimea.

The idea of the establishment of COI with the lights of dispute settlement of UNCLOS is not a new one. Such a commission was proposed to be established by Ryan

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755 Article 37 "Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Cooperation in Maritime and Aviation Search and Rescue in the Black and the Azov Seas," *op. cit. 120*; Article 4 of "Agreement between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait" [in Ukrainian: "Dohovir mizh Ukrayinoyu ta Rosiys'koyu Federatsiyeyu pro spivrobitnytstvo u vykorystanni Azovs'koho morya i Kerchens'koyi protoky"], *Verkhovna Rada of Ukraine*, 24 December 2003, https://zakon.rada.gov.ua/laws/show/643_205#Text. Also see, "Law of Ukraine on the termination of the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation," *op. cit. 507*; "Law of Ukraine on the Termination of the Agreement between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait," *op. cit. 491.*

756 "Human Rights Council Establishes an Independent International Commission of Inquiry to Investigate All Alleged Violations of Human Rights in the Context of the Russian Federation's Aggression against Ukraine," *The Office of the High Commissioner for Human Rights, United Nations Human Rights Council*, 4 March 2022, https://www.ohchr.org/en/press-releases/2022/03/human-rights-council-establishes-independent-international-commission. Detailed information see, "Independent International Commission of Inquiry on Ukraine," *The Office of the High Commissioner for Human Rights, United Nations Human Rights Council*, accessed 2 September 2023. https://www.ohchr.org/en/hr-bodies/hrc/iicihr-ukraine/index.

757 *Ibid.* Also see, Human Rights Council Resolution A/HRC/RES/49/1 On Situation of Human Rights in Ukraine Stemming from the Russian Aggression, 4 March 2022; Human Rights Council Resolution A/HRC/RES/S-34/1 On the Deteriorating Human Rights Situation in Ukraine Stemming from the Russian Aggression, 12 May 2022. Also see, Charles Garraway, "Fact-Finding in Ukraine: Can Anything Be Learned from Yemen?", *Lieber Institute West Point*, 14 March 2022, https://lieber.westpoint.edu/fact-finding-ukraine-anything-learned-yemen/.

Mitchell in his article "An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace". He believes that Commission of Inquiry

> would acknowledge, as the UNCLOS arbitration does not, the centrality of the legal issue of territorial sovereignty to the dispute. Yet by limiting its findings to the islands' contested status during the period of European and Japanese colonialism in Asia, rather than determining current ownership, a COI could nonetheless avoid exacerbating tensions or alienating claimants.

Therefore, he proposes a supplemental legal mechanism that could keep states in the dispute over the South China Sea and at the same time the dispute would be solved.[758]

The concept of "commissions of inquiry" was firstly introduced during the Hague Peace Conferences. It was aimed to establish facts in international disputes without binding states to a judicial body. This approach was seen as a way to facilitate peaceful solutions by clarifying facts through impartial investigations. The commission's role was limited to presenting factual statements, and it did not have the power to make binding decisions. This mechanism respected state sovereignty and reciprocity, serving as a mediator to enhance relations between sovereign states if they chose peace over war. The commission relied on the goodwill of the disputing parties and had no independent authority, except for its impartiality.[759]

While COI were successful in many cases[760], they also faced failures in areas where states have significant concerns. Two situations illustrate this. First, in 1967, the Netherlands proposed creating a permanent commission of inquiry in the UN General Assembly, but this idea was rejected. Instead, General Assembly Resolution 2329 (XXII) asked the UN Secretary-General to establish a "register of experts" that disputing states could use, with mutual agreement, for fact-finding related to their disputes. Second, the International Fact-Finding Commission, established under Article 90 of First Additional Protocol I, exists only in theory. States have never activated it, primarily

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758 Ryan Mitchell, "An International Commission of Inquiry for the South China Sea?" *Vanderbilt Journal of Transnational Law* 49, 3 (1 January 2016): 749.

759 Antonio Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding," in *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), 296.

760 Various international commissions and inquiries have been established in the past to investigate a range of issues, including serious violations of human rights and international humanitarian law. These inquiries have been set up by different bodies, such as the Security Council, the General Assembly, the Human Rights Council, and the Secretary-General. Some notable examples include the Commission of Experts on the former Yugoslavia (1992-1994), the International Commission of Inquiry on Darfur (2004), and the International Commission of Inquiry on the Libyan Arab Jamahiriya (2011-2012). See, "Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice" (New York and Geneva: United Nations, Office of the United Nations High Commissioner for Human Rights, 2015), 2-3.

due to its complex structure and its similarity to arbitration mechanisms.[761]

The main goal of fact-finding mechanisms is to impact international politics by addressing issues. Multipurpose fact-finding offers flexibility, but it can also present challenges. The specific mandate, methods, selection of legal and factual aspects, and the resulting conclusions and recommendations can vary significantly depending on whether the primary goal is prevention, accountability, reconciliation, or a combination of these objectives.[762]

Antonio Cassese suggests replacing the outdated mechanisms for dealing with armed conflicts with more flexible ones, such as impartial monitoring bodies. These bodies, namely, COI, composed of experts, would assess belligerents' conduct and report on it. They could keep initial reports confidential and to make them public in cases of repeated violations of international humanitarian law.[763] Indeed, fact-finding mechanisms play a crucial role in addressing international issues. However, it's important to note that they are not meant for formal adjudication.[764] Although, they could be considered as alternatives to judicial review.[765]

Due to the fact that such Commissions can be established by different bodies, it is possible to assume that such a Commission can be given a mandate to facilitate the establishment of facts regarding the Crimean occupation. One of the bodies that could establish it, could be the General Assembly. It is already adopted Resolution 68/262 on March 27, 2014 on Territorial integrity of Ukraine, where it acknowledges 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"[766].

It is uncertain whether the findings of the COI would be seen as binding and applicable within a court or tribunal established in accordance with UNCLOS. At the end of the day, it is rather a fact-finding institution than a legal institution. The Arbitral Tribunal in the *Coastal State Rights Dispute* already rejected adopting the view of the UNGA Resolutions. Therefore, relying on a COI's findings might be considered a risky approach.

The same conclusion is possible to reach about the idea presented by Borys Babin,

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761 Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding," *op. cit. 759,* 297.

762 Cecilie Hellestveit, "Quasi-Judicial Mechanisms: International Fact-Finding," in *Research Handbook on International Law and Peace* (Cheltenham, Northampton: Edward Elgar Publishing, 2019), 375.

763 Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding," *op. cit. 759,* 301-302.

764 Hellestveit, *op. cit. 762*, 375.

765 "(D) Supervision and fact-finding as alternatives to judicial review." It is the name of the chapter before Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding," *op. cit. 759,* 295–303.

766 General Assembly Resolution A/RES/68/262 on Territorial Integrity of Ukraine, 27 March 2014; Emily Crawford, *op. cit. 127,* 927-930.

Andrii Chvaliuk and Olexiy Plotnikov. They advised to initiate the Consultative Committee of Experts under Article 5(2) of 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques.[767]

The establishment of the Consultative Committee of Experts involves various stages, starting with the UN Security Council's decision to initiate an investigation procedure.[768] The Committee formed during this process is likely to include both Russia and other states that support Russia, along with experts from other states worldwide.[769] The Committee's document can reflect the views of civilised states on the maritime environment challenges in the Black Sea and Sea of Azov related to the Crimea's occupation.[770] However, despite that the idea is very similar to the idea of establishment of COI, the Consultative Committee of Experts requires the UN Security Council's decision to initiate such investigation procedure. The more detailed analysis of the activities of the UN Security Council's in respect of the Crimean occupation is presented in the following part of this chapter. For now, such a requirement means that the Russian Federation shall agree on the UN Security Council's decision to establish such a Committee. But even if it would theoretically agree, still, the decision of this Committee is consultative. Therefore, the same problem applies as earlier to COI.

3.2.3. The UN Security Council as an institution that can confirm the fact of the occupation of Crimea.

Article 24(1) of the United Nations Charter assigns the "primary responsibility for the maintenance of international peace and security" to the Security Council. Exactly the Security Council could be the body that has power to provide a legally binding determination of the Crimean occupation. Article 39 of the Charter provides the Security Council with a power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression". The Security Council decisions are legally binding upon all member states of the UN. It is known that the Security Council has played a crucial role in upholding and enforcing international humanitarian law.[771] It condemned violations of humanitarian law and urged parties involved to fulfil their obligations under these laws.[772] However, the Council's effectiveness was often hindered by the interests of individual member states, particularly by its five permanent

767 Borys Babin et al., "Attempted Annexation of Crimea and Maritime Environment Legal Protection", *Lex Portus* 7, 1 (2021): 42-45.

768 *Ibid.,* 45.

769 *Ibid.*

770 *Ibid.*

771 Sarah McCosker, "Ensuring Respect for IHL in the International Community: Navigating Expectations for Humanitarian Law Diplomacy by Third States Not Party to an Armed Conflict," in *Ensuring Respect for International Humanitarian Law* (London: Routledge, 2020), 28.

772 *Ibid.*

members.[773] Thus, UN Security Council's decisions, apart from those on procedural matters, are subject to the veto of the permanent members of the UN.[774] The Russian Federation is one of the permanent members along with the United States, China, France and the United Kingdom.[775]

As Article 27 of the UN Charter states, each member of the Security Council has one vote. Regarding procedural matters, decisions require the affirmative vote of nine members. For all other matters, decisions must have the affirmative vote of nine members, including the concurring votes of the permanent members.

The veto of the Russian Federation regarding the non-procedural decision of the Security Council that is not within Russian interest is predictable.[776]

The Russian Federation as a permanent member of the UN Security Council has always used its negative vote for the Security Council's resolutions regarding Ukraine. For example, on the 15th of March 2014, the 29th of July 2015 and the 25th of February 2022 regarding Letter dated February 28, 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136). The Russian Federation also voted negatively on September 30, 2022 regarding maintenance of peace and security of Ukraine.[777]

> The draft resolution, by which the Council would have declared that the referendum to be held on 16 March 2014 in Crimea could have "no validity" and could not form the basis for any alteration of the status of Crimea, was not adopted, owing to the negative vote of the Russian Federation.[778]

Then the question is are there any other options? The answer could be affirmative as there is always an option that the Russian Federation will not put its veto on the decision. However, at the moment this option is highly unrealistic.

The legal scholarship already asked whether the prohibition of threats to

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773 Bardo Fassbender, "The Security Council: Progress Is Possible but Unlikely", in *Realizing Utopia: The Future of International Law*, (Oxford University Press, 2012), 55-56.

774 More detailed on the right of veto see: Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Leiden: Brill Nijhoff, 1998).

775 Katuoka and Gorbun, "A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea", *op. cit. 745.*

776 *Ibid.*

777 "Security Council - Veto List, (in reverse chronological order)" in *Research Guides: UN Security Council Meetings & Outcomes Tables: Vetoes*, Dag Hammarskjöld Library, accessed 2 September 2023, https://research.un.org/en/docs/sc/quick/veto. Only in the case of the Malaysia Airlines MH17 flight downing the conflicting viewpoints among permanent members of the UNSC resulted in institutional action. This led to the adoption of Resolution 2166 (2014), where it is deploring the incident and calling for an independent international investigation. See, Enrico Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?" *ZaöRV* 75 (2015): 216.

778 "Report of the Practice of the Security Council, 2014–2015." *United Nations.* New York, 2018. See, in particular, Part III, Purposes and principles of the Charter of the United Nations, Prohibition of the threat or use of force under Article 2, paragraph 4 at p. 219.

peace, breaches of peace, or acts of aggression applies to the Russian Federation.[779] Surprisingly, this is not a straightforward matter. The Russian Federation contends that only the UN Security Council has the authority to decide if aggression exists, and within the Security Council, Russia holds veto power, allowing it to block any decision not in line with its stance. This means that even if the Russian Federation is involved in acts that disrupt peace or constitute aggression, the Security Council cannot make any determinations on this matter.[780]

Therefore, what to do with this situation? What could be possibly changed? Does it mean the need of reforming the UN Security Council? Thus, while trying to find a solution to one issue, there is another issue on its way. The UN Security Council has to be changed to be able to exercise its own functions and powers given to it by UN Charter and, as a result, to be able to determine the fact of the Crimean occupation by the Russian Federation. However, reforming UN Security Council is not a new idea[781] and it is still going on nowadays.[782] By reforming the UN Security Council it usually means adding more permanent members, rethinking how the veto power is used, and improving how decisions are made with more openness and responsibility.[783] However, it was well-established that the discussions about formal reform, which involves changing

779 Lauri Mälksoo, "The Annexation of Crimea and Balance of Power in International Law," *European Journal of International Law* 30, 1 (24 May 2019): 308; Patrycja Grzebyk, "The Annexation of Crimea in the Light of the Definition of Aggression. Does Prohibition of Aggression Apply to Russia?" *SSRN Scholarly Paper* (2017): 137-153.

780 Grzebyk, *op. cit. 779*; Katuoka and Gorbun, "A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea", *op. cit. 745.*

781 Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, *op. cit. 774*; Elisabetta Martini, "UN Security Council Reform. Current Developments", *IAI Istituto Affari Internazionali*, 11 November 2009, https://www.iai.it/en/pubblicazioni/un-security-council-reform-current-developments; Alan Boyle, "International Lawmaking: Towards a New Role for the Security Council?" in *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), 172–184.

782 See, one of the latest collection of articles in this regard in *UN Security Council Reform: What the World Thinks* edited by Patrick Stewart (Washington, DC: Carnegie Endowment for International Peace, 2023), https://carnegieendowment.org/2023/06/28/un-security-council-reform-what-world-thinks-pub-90032.

783 More detailed information on the reforming of the UN can be found in Martin Daniel Niemetz, *Reforming UN Decision-Making Procedures: Promoting a Deliberative System for Global Peace and Security*, Routledge Research on the United Nations 3 (Abingdon, Oxon: Routledge, 2015), 64. But also see, Niguse Mandefero Alene et al., "Africa's Quest for Reform of the United Nations Security Council: A Just Cause Curbed by Unrealistic Proposals," *African Journal on Conflict Resolution* 23, 1 (2023): 60–83; Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective, op. cit. 774*; Boyle, "International Lawmaking: Towards a New Role for the Security Council?" *op. cit. 781,* 172–184; Martini, *op. cit. 781*; Ndiyaye Innocent Uwimana, "The UN Security Council Reforms: Myth or Reality? An African Analysis" (University Of Zimbabwe), accessed 2 September 2023, https://www.memoireonline.com/02/11/4260/The-UN-security-council-reforms-myth-or-reality-an-african-analysis.html; Andrew Weber*, United Nations: Security Council Reform*, *Washington, D.C., Law Library of Congress*, 2005.

the membership or voting rules provided in the UN Charter, are unable to progress.[784]

Nevertheless, when interpreting an international instrument, it must be done within the context of the entire legal system that exists at the time of interpretation.[785] The law should not ignore the evolving nature of life, circumstances, and community standards within which it operates. Moreover, treaties, especially complex treaties with a constitutional or legislative nature, should not be considered entirely unchangeable.[786]

The Russian Federation used its veto power in draft resolutions of UNSC related to Ukraine in different years. To obtain a UN Security Council decision without any vote from the Russian Federation, there are two scenarios when the Russian Federation vote would not influence the implementation of the UNSC resolution regarding the Crimean occupation and one where the vote would not be required:

1. the Russian Federation will be deprived of its veto-power and/or its seat in UN Security Council;
2. the procedure will not include a vote of the Russian Federation as a state of interest;
3. or avoid veto-powers due to the newly established procedure.

Thus, this part will elaborate on each of these scenarios separately.

3.2.3.1. Depriving the Russian Federation of its veto-power and/or its seat in UN Security Council

The system of collective security outlined in the UN Charter never became effective in practice. It had two main components: one was based on the power of the "Great Powers" like the United States, the UK, France, China, and the Soviet Union, with the belief that their combined might would ensure peace. The other component was the idea of universal solidarity among states, where they would collectively respond to aggression.[787]

However, the realistic part, relying on the powerful nations, collapsed with the beginning of the Cold War. The idealistic part, based on universal solidarity, also proved unrealistic. This loss of faith in the Security Council as a defender of freedom led states to rely on their own military forces, alliances, and mutual assistance

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784 Jess Gifkins, "Beyond the Veto: Roles in UN Security Council Decision-Making," *Global Governance: A Review of Multilateralism and International Organizations* 27, 1 (18 February 2021): 17. Also see, Peter Nadin, *UN Security Council Reform*, 1st Edition, Global Institutions Series (London: Routledge, Taylor & Francis Group, 2016); Niemetz, *op. cit. 783.*

785 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31-32, para. 53; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Brill Nijhoff, 2009), 132.

786 Fassbender, *The United Nations Charter as the Constitution of the International Community*, *op. cit. 785,* 132.

787 Fassbender, "The Security Council: Progress Is Possible but Unlikely," *op. cit. 773*, 56.

treaties.[788] In practice, the veto power of the permanent Security Council members meant that they and their allies were exempt from the Charter's prohibition on the use of force. Any state using self-defence, supported by even one of the 5 permanent members, could take military action without interference from the Security Council.[789] However, the main purpose of the UN Charter was never to protect those responsible for serious crimes or to let permanent members protect their allies when they commit such crimes.[790]

The veto power in the UN Security Council can be used in various ways.[791] Thus, it would seem logical that the action has to be taken and the veto power should be restricted or even regulated. The same would possibly apply to the Russian membership status.

However, it was already established in practice that the discussions concerning the reform, which would entail changes of the membership or voting rules outlined in the UN Charter, have been unable to advance.[792] Amending the UN Charter needs approval from two-thirds of the UN General Assembly and unanimous agreement from all five permanent members of the UN Security Council. Although there is broad consensus on the necessity for reform, no single reform model has collected sufficient support.[793]

While it is possible to argue that the Russian Federation's succession of the seat of

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788 *Ibid.*

789 *Ibid.*

790 Jennifer Trahan, "Vetoes and the UN Charter: The Obligation to Act in Accordance with the 'Purposes and Principles' of the United Nations," *Journal on the Use of Force and International Law* 9, 2 (April 5, 2022): 275.

791 There are **open or real veto** (this is when a permanent member explicitly rejects a substantive issue), **double veto** (it arises when council members dispute whether a proposal is procedural or substantive, meaning that the first veto prevents it from being considered a procedural matter, and the second defeats it as a substantive issue), **hidden or indirect veto** (it is also known as the sixth veto and it applies in case if seven out of the fifteen council members vote against or abstain from a proposal, then it can be defeated without a negative vote by a permanent member), **artificial and imposed veto** (it occurs when a power tries to make its consent essential for issues that should ideally be decided by a majority), **veto by proxy** (it happens when a permanent member uses its veto on behalf of a non-veto-possessing state involved in a dispute). Apart from these formal forms of the veto, there's also the "**closet veto**." In this case, permanent members use the threat of a veto during closed-door negotiations to influence outcomes. Many draft resolutions are decided before formal Council meetings due to this practice, and some issues may never reach Council meetings with all members present. The forms of the veto were identified by Anjali Patil. See, Anjali V. Patil, *The UN Veto in World Affairs, 1946-1990: A Complete Record and Case Histories of the Security Council's Veto* (Sarasota: UNIFO Publishers, 1992), cited from Thomas Schindlmayr, "Obstructing the Security Council: The Use of the Veto in the Twentieth Century," *Journal of the History of International Law / Revue d'histoire Du Droit International* 3, 2 (1 January 2001): 224-225.

792 Gifkins, *op. cit. 784,* 17. Also see, Nadin, *UN Security Council Reform*, *op. cit. 784,* Niemetz, *op. cit. 783.*

793 Gifkins, *op. cit. 784,* 17-18; See also, Bardo Fassbender, "All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council," *Max Planck Yearbook of United Nations Law Online* 7, 1 (1 January 2003): 183–218.

USSR is illegal and therefore, it can be removed from the of its veto-power and/or even its seat in UN Security Council, there are also those who argue opposite.[794] And the main question here, is that even if the broad consensus on the necessity for the action within the UN Security Council towards the Russian Federation would be achieved, whether such change would gather sufficient support to make such change. As it is possible to see from the earlier practice on the reforming of the UN Security Council, such ideas were supported but never made into reality.

794 For the discussion see: Ewa Sałkiewicz-Munnerlyn, "Can Russia's UN Veto Be Removed?" [In Ukrainian: "Chy mozhna pozbavyty Rosiyu prava veto v OON?"], Actual Problems of International Relations 1, 155 (6 July 2023): 1-12; Joris van de Riet, "No, Russia Can (Still) Not Be Removed From the UN Security Council: A Response to Thomas Grant and Others: Part One," *Opinio Juris* (blog), 11 February 2023, http://opiniojuris.org/2023/02/11/no-russia-can-still-not-be-removed-from-the-un-security-council-a-response-to-thomas-grant-and-others-part-one/; Joris van de Riet, "No, Russia Can (Still) Not Be Removed From the UN Security Council: A Response to Thomas Grant and Others: Part Two," *Opinio Juris* (blog), 11 February 2023, http://opiniojuris.org/2023/02/11/no-russia-can-still-not-be-removed-from-the-un-security-council-a-response-to-thomas-grant-and-others-part-two/; Ariel Cohen and Vladislav Inozemtsev, "How to Expel Russia from the UN," *The Hill* (blog), 3 November 2022, https://thehill.com/opinion/international/3717566-how-to-expel-russia-from-the-un/; Marianna Fakhurdinova, "Can Russia's UN Veto be Removed?" *Institute for War & Peace Reporting*, 11 October 2022, https://iwpr.net/global-voices/can-russias-un-veto-be-removed; Thomas Grant, "Removing Russia from the Security Council: Part One," *Opinio Juris* (blog), 18 October 2022, http://opiniojuris.org/2022/10/18/removing-russia-from-the-security-council-part-one/; Thomas Grant, "Removing Russia from the Security Council: Part Two," *Opinio Juris* (blog), 19 October 2022, http://opiniojuris.org/2022/10/19/removing-russia-from-the-security-council-part-two/; Thomas Grant, "Expelling Russia from the UN Security Council — a How-to Guide," *Center for European Policy Analysis* (blog), 26 September 2022, https://cepa.org/article/expelling-russia-from-the-un-security-council-a-how-to-guide/; Romita Paul et al., "The United Nations in Hindsight: Challenging the Power of the Security Council Veto," *Just Security*, 28 April 2022, https://www.justsecurity.org/81294/the-united-nations-in-hindsight-challenging-the-power-of-the-security-council-veto/; Dan Maurer, "A U.N. Security Council Permanent Member's De Facto Immunity From Article 6 Expulsion: Russia's Fact or Fiction?" *The Lawfare Institute* (blog), 15 April 2022, https://www.lawfaremedia.org/article/un-security-council-permanent-members-de-facto-immunity-article-6-expulsion-russias-fact-or-fiction; André Nollkaemper, "Three Options for the Veto Power After the War in Ukraine," *EJIL: Talk!* (blog), 11 April 2022, https://www.ejiltalk.org/three-options-for-the-veto-power-after-the-war-in-ukraine/; Joris van de Riet, "No, Russia Cannot Be Removed from the UN Security Council," *Leiden Law Blog* (blog), 22 March 2022, https://www.leidenlawblog.nl/articles/no-russia-cannot-be-removed-from-the-un-security-council; Rebecca Barber, "Could Russia Be Suspended from the United Nations?" *EJIL: Talk!* (blog), 1 March 2022, https://www.ejiltalk.org/could-russia-be-suspended-from-the-united-nations/; Jennifer Trahan, "Aggression and the Veto', *Opinio Juris* (blog), 28 February 2022, http://opiniojuris.org/2022/02/28/aggression-and-the-veto/; Andrew Macleod, "Ukraine Invasion: Should Russia Lose Its Seat on the UN Security Council?" King's College London, 25 February 2022, https://www.kcl.ac.uk/ukraine-invasion-should-russia-lose-its-seat-on-the-un-security-council, etc. For the possible legal framework, see Vienna Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3; 17 I.L.M. 1488 (1978); Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Mar. 21, 1986. 25 ILM 543 (1986).

3.2.3.2. Excluding a vote of the Russian Federation as a state of interest for the voting related to Ukraine

Article 27 para 3 of United Nations Charter states that

> [d]ecisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Firstly, the language of the Article includes the word "shall" which means direct obligation of the state to follow such provisions. Secondly, Chapter VI of the United Nations Charter contains provisions regarding peaceful settlement of disputes, so Security Council can "call upon the parties to settle their dispute" by such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the choice of parties to the dispute.[795] Moreover, some authors also come to this provision from the perspective that it can be used in case of the initiation of an investigation procedure and establishment of the Consultative Committee of Experts in respect of the occupation of Crimea and its maritime environment protection.[796] Thus, this provision can help with peaceful settlement of disputes but it does not help with determination of acts of aggression. The determination of acts of aggression is not under Chapter VI but under Chapter VII of the United Nations Charter.

The relevant practice in this matter is silent. In March 2014, Ukraine accused Russia of aggression in Crimea, violating international law and threatening its sovereignty.[797] Russia defended its actions, claiming they were requested for stability by the President Yanukovych and Crimean authorities. Ukraine deemed the Crimea referendum and Russian annexation illegitimate, urging the world not to recognise it. Russia argued that the people of Crimea exercised their right to self-determination through a free referendum, complying with international law.[798] The UN resolution urged peaceful dispute resolution without mentioning Russia explicitly, but it implied Russia as a party to the dispute. Despite critical views on Russia's veto, no state raised the duty to abstain during the discussion.[799]

The problem here could be seen from two perspectives. The first one is that because the Russian Federation was not mentioned explicitly in the draft resolution, then,

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795 Katuoka and Gorbun, "A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea", *op. cit. 745*.

796 Babin et al., "Attempted Annexation of Crimea and Maritime Environment Legal Protection," *op. cit. 767,* 46.

797 Security Council Report S/PV.7124 (2014), *UN Documents*, 1 March 2014; Milano, *op. cit. 777,* 220.

798 Security Council Report S/PV.7144 (2014), *UN Documents*, 19 March 2014; Milano, *op. cit. 777,* 220-221.

799 Milano, *op. cit. 777,* 220-221.

the duty to abstain is not involved and bases solely on a voluntary decision of the state party to the dispute. The second one is that states decided to avoid the direct confrontation with the Russian Federation by telling how it was expected to act as a party to the dispute according to the UN Charter.

Regardless, of which perspective seems more realistic, abstention from voting by the party to a dispute only applies to the decisions under Chapter VI, and under Article 52(3) of the Charter. In this situation, the only available option is for UNSC to call Ukraine and the Russian Federation to solve their dispute within any peaceful means of their choice, as outlined in the UN Charter.

However, there's a potential challenge. It is suggested that "the Council cannot force states to agree to third party settlement of disputes, or impose territorial boundaries, or compel states to extradite suspected terrorists, because to do so would be inconsistent with existing law, procedural due process, or treaty commitments." [800] While the UNSC can theoretically call upon both parties to peacefully address the issue of the Crimean occupation, the Russian Federation may argue that the UNSC exceeds its authority, and by this, such a call is illegal. Consequently, the call would remain a mere suggestion and might be disregarded by the Russian Federation. However, it also depends on the international reaction to it, whether there is going to be overwhelming support or not. How many states and international institutions have to support such actions of the UNSC to be considered as an overwhelming majority so the decision would be considered as binding? Could the dispute be considered as binding? In all cases, this leads to the fact that it would not solve the determination of the Crimean occupation between these two states: Ukraine and the Russian Federation. As well as it is not clear whether such determination would be clear for the dispute settlement body under UNCLOS.

3.2.3.3. Avoiding the possibility of the veto due to the newly established procedure

Bardo Fassbender advised that while the Security Council has the discretion to decide when and how to intervene for international peace and security, its actions, especially economic and military sanctions, should be more consistent and less arbitrary.[801] According to him, the Security Council should establish a consistent precedent to predict its actions better. To achieve this, it could pass resolutions outlining a framework for its actions in specific cases. For example, it could specify the conditions under which it should intervene when a population suffers severe human rights violations. However, Bardo Fassbender also notes that it is essential to acknowledge that this idea faces practical challenges because the Council has been unwilling to commit to general

800 Alan Boyle, "International Lawmaking: Towards a New Role for the Security Council?" *op. cit. 781,* 183. It is referring to Ian Brownlie, "The Decisions of Political Organs of the United Nations and the Rule of Law," in *Essays in Honour of Wang Tieya*, (Dordrecht: Martinus Nijhoff, 1993), 91.

801 Fassbender, "The Security Council: Progress Is Possible but Unlikely," *op. cit. 773*, 59.

obligations so far.[802] Also, such an option would mean retrospective applicability and therefore, it could also put into question whether it is legal to do so or not.

From the perspective of the law of the sea, a court of tribunal under UNCLOS dispute settlement would be competent to interpret a Security Council resolution but it could not question its validity.[803] Thus, the question goes whether if there would be a Security Council resolution on the determination of the Crimean occupation that possibly is challenged by the Russian Federation, can the UNCLOS dispute settlement bring the light on this matter? It highly depends on the wording of the submission by the parties and the view of the dispute settlement body. However, from the made analysis it seems that a court or tribunal adjudicating on the basis of the jurisdiction provided by UNCLOS would most likely rule about its lack of the jurisdiction to decide over the legality of the UNSC resolution.

3.2.3.4. Request to the ICJ for an advisory opinion on the Security Council

While previous options have their own challenges, there is an option that could potentially bring the light on the veto power by the permanent member of UNSC or even on all of them. The Security Council can request ICJ to provide an advisory opinion.

To make such a decision, the consent of all the permanent members of the Security Council is necessary because this is not a procedural decision. Since the Russian Federation is likely to veto, it is possible to request an advisory opinion from ICJ through the General Assembly.[804]

It's important to note that on April 28, 2022, the Parliamentary Assembly of the Council of Europe adopted Resolution No. 2346 regarding the Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes. In paragraph 12.5.2, the Parliamentary Assembly calls the UNGA to "request an Advisory Opinion from ICJ on possible limits to the veto rights of permanent members of the United Nations Security Council that could be based on the general legal principles of the prohibition of the abuse of rights and the duty of member States of international organisations to exercise their membership rights in good faith."

The interesting relevant thought to this is presented by Vattel, namely, "pretensions

802 He mentions not only scenarios that seems realistic today but also proceeds with 'unrealistic utopia' of what else UNSC could do. See, Fassbender, "The Security Council: Progress Is Possible but Unlikely," *op. cit. 773*, 60.

803 Churchill, "Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution," *op. cit. 692,* 154.

804 Katuoka and Gorbun, "A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea", *op. cit. 745*. For the options of asking for Advisory Opinion from ICJ see, Chapter 4.4. in Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press, 2020), 242-257; Trahan, "Vetoes and the UN Charter: The Obligation to Act in Accordance with the 'Purposes and Principles' of the United Nations," *op. cit. 790,* 268–269 and 272-273.

to empire are respected as long as the nation that makes them is able to assert them by force; but they vanish of course on the decline of her power."[805] Another scholar, Han Fei, wrote that "no state is eternally powerful, and no state is eternally weak."[806] Bardo Fassbender states that "the Western members of the Council, especially the permanent members, should realize that their dominance is very fragile. It must be handled with care as long as it is not openly rejected."[807] Critics argue that the UN has often been unable to prevent its member states from acting excessively. They also question why the UN exists if its main goal is to actively handle conflicts, rather than just observing them.[808] There is also a belief dated by 2012, that there is no hope for a reform of the United Nations and the UN will not be reformed soon, whether in its structure or in its functioning.[809]

It makes sense to acknowledge that existence of so-called doctrine of the implied powers. This doctrine originated from *the ICJ's Reparation for Injuries advisory opinion*. According to this opinion, international organisations have powers that are not explicitly mentioned in their charters but are necessary for them to fulfil their duties. Identifying these powers is essential for the organisation's constitutional development, but it should be done carefully.[810] Maybe this could work for the UN as well?

Thus, the Advisory Opinion from ICJ with its legal analysis could answer the possibilities of changes within the UN Security Council. And only then, possibly, after the following options provided by Advisory Opinion, if they would be provided, the UN Security Council could issue a determination on the occupation of Crimea.

For now, it is obvious that in 2014 and years following it but before 2022, the question of the Crimean occupation was staying heavily discussed within the international law scholarship but nearly not at all within the UN Security Council. Can a new wave of Russian aggression against Ukraine trigger the changes within the UN Security Council? Right now, there are more questions than answers and only the future would be able to answer those questions. Following the options of the determination of the Crimean occupation within the UN Security Council, it is logical to move from within the UN Security Council to the option that can be used by the UN General Assembly.

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805 This comment was related to high seas territorial claims but according to the author of this doctoral dissertation, it is also relevant for the present discussion. Vattel's quote is cited from Mitchell, *op. cit. 758,* 817.

806 Mitchell, *op. cit. 758,* 817.

807 Fassbender, "The Security Council: Progress Is Possible but Unlikely," *op. cit. 773*, 58.

808 William R Slomanson, *Fundamental Perspectives on International Law*, 6th ed. (Boston: Wadsworth Cengage Learning, 2011), 153. It is also argued that when faced with a global crisis within the scope of its mandate, UNSC has no obligation to decide whether to take action or not, but it should take the action. See, Anna Spain, "The U.N. Security Council's Duty to Decide," *Harvard National Security Journal* (1 January 2013), 320–384.

809 Antonio Cassese, "Gathering Up the Main Threads," in *Realizing Utopia: The Future of International Law* (Oxford, New York: Oxford University Press, 2012), 647-648.

810 Fassbender, *The United Nations Charter as the Constitution of the International Community*, *op. cit. 785,* 133.

3.2.4. UN General Assembly resolution as a statement of the fact of Crimea's occupation

Before addressing the question of determination of the Crimean occupation by UN General Assembly resolution, it is necessary to see how they are used in jurisprudence, mainly within law of the sea dispute settlement bodies.

Starting from the ICJ decision in the *South West Africa Cases* in 1966, UNGA resolution is considered to have recommendatory character, can have considerable persuasive power, however, "[i]t operates on the political not the legal level: it does not make these resolutions binding in law."[811] In the ICJ's Advisory Opinion about the *Legality of the Threat or Use of Nuclear Weapons* in 1996 it states that UN General Assembly resolutions "even if they are not binding, may sometimes have normative value".[812]

However, in the *Coastal State Rights Dispute* none of the invoked UNGA resolutions made any influence on the decision: they were not considered as those that have normative value. The arbitral tribunal in its Award concerning Preliminary Objections of the Russian Federation reaffirms previous views on the influence of UNGA resolutions.[813] However, it concludes that UNGA resolutions do not have power to restrain the tribunal from acknowledging that there is a sovereignty dispute over Crimea between Ukraine and the Russian Federation.[814] Thus, in this case tribunal recognises that there is a legal dispute without taking any side of the dispute and neither following nor contradicting the provisions stated in UNGA resolutions presented in the dispute.

Another example of the attitude to UNGA resolutions can be found in *Chagos Marine Protected Area Arbitration*. In this case, even though different UNGA resolutions were mentioned[815], the tribunal remained silent on their impact or relevance to the case, not including them in the merits.

The judgement on Preliminary Objections in the *Mauritius/Maldives Maritime Boundary Dispute* brought new aspects to UNGA resolutions. This judgement gave start to a new scholarship wave involving the issues of sovereignty and self-determination and the "legal effect" of ICJ Advisory Opinions within the dispute

811 *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p. 6, para 98.

812 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *op. cit. 242,* para. 70. Although, it should be noted that there is legally binding UN Resolutions. See, Rosalyn Higgins, "The Advisory Opinion on Namibia: Which Un Resolutions Are Binding under Article 25 of the Charter?" *International & Comparative Law Quarterly* 21, 2 (April 1972): 270–286; Ahmad Alsharqawi et al., "The Role of General Assembly Resolutions to the Development of International Law," *Journal of Legal, Ethical and Regulatory Issues* 24, 2 (April 2021): 1-6.

813 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* paras. 172-173.

814 *Ibid.,* paras. 175-177.

815 *Chagos MPA Arbitration*, Award, *op. cit. 27,* paras. 86, 103 and 153.

between Mauritius and Maldives as well as relevant UNGA resolutions.[816] Granting "legal effect" to Advisory Opinion provides further analysis of UNGA resolutions involved in the dispute. The Special Chamber finds that UNGA resolution 73/295[817] was adopted after it received the Advisory Opinion of the ICJ concerning the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and by this Advisory Opinion, UNGA was "entrusted to take necessary steps toward the completion of the decolonization of Mauritius"[818]. It is clear that "the Special Chamber did not unambiguously state that the Chagos Archipelago fell within Mauritius" territory,[819] but rather that Mauritius is a coastal state of the Chagos Archipelago according to "the determinations made in the *Chagos* arbitral award, and, in particular, the determinations made in the *Chagos* advisory opinion which were acted upon by UNGA resolution 73/295."[820]

It brings us to the situation when in the *Coastal State Rights Dispute* the arbitral tribunal takes from UNGA resolutions the acknowledgement of a territorial dispute without being able to identify a coastal state[821] while in the *Mauritius/Maldives Maritime Boundary Dispute* the Special Chamber identifies a coastal state based on the *Chagos* Advisory Opinion and the following UNGA resolution 73/295.

Judge *ad hoc* Oxman in his Separate and dissenting opinion highlights that UNGA resolutions in the *Mauritius/Maldives Maritime Boundary Dispute*, similar to those in the *Coastal State Rights Dispute* between Ukraine and Russia. All of them were not adopted unanimously or by consensus, moreover, many states decided to either abstain or vote against the resolution.[822] Namely, the *Coastal State Rights Dispute*, the arbitral tribunal states that

> the effect of factual and legal determination made in UNGA resolutions depends largely on their content and the conditions and context of their adoption. So does the weight to be given to such resolutions by an

816 Volker Roeben and Jankovic Sava, "Unpacking Sovereignty and Self-Determination in ITLOS and the ICC: A Bundle of Rights?" *EJIL: Talk!* (blog), 4 March 2021, https://www.ejiltalk.org/unpacking-sovereignty-and-self-determination-in-itlos-and-the-icc-a-bundle-of-rights/; Sarah Thin, "The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute," *EJIL: Talk!* (blog), 5 February 2021, https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/.

817 General Assembly Resolution A/RES/73/295 on Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, 22 May 2019.

818 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* para. 227.

819 Roeben and Sava, *op. cit. 816.*

820 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* para. 250.

821 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* paras. 175-177.

822 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* The Separate and dissenting opinion of Judge ad hoc Oxman, para 27.

international court or tribunal.[823]

This statement was also reaffirmed in *the Mauritius/Maldives Maritime Boundary Dispute*.[824] However, despite this, UNGA resolution in combination of Advisory Opinion and its "legal effect" obtained its normative value. Therefore, the evaluation made by the Special Chamber of ITLOS is different from the arbitral tribunal's evaluation in the *Coastal State Rights Dispute*. Apart from the *Mauritius/Maldives Maritime Boundary Dispute*, there is a view that ICJ also gave certain weight to UNGA resolutions. It happened "in the *Nuclear Weapons, Jerusalem Wall, South West Africa*, and *Chagos Advisory Opinion* proceedings."[825]

In *Coastal State Rights Dispute*, the arbitral tribunal points out that "the UNGA resolutions in question are phrased in encouraging language [and] were not agreed upon by all states or by consensus, but with many states abstaining or voting against them."[826] This leads to consider whether the tribunal's reasoning might have been different if the UNGA resolutions had received nearly unanimous support and were expressed in less encouraging language.[827]

As a result, it seems that obtaining the UNGA resolution on the clear determination of the Crimean occupation by the Russian Federation with nearly unanimous support could bring the relevant solution for the dispute established by the arbitral tribunal in the *Coastal State Rights Dispute*.

To practically achieve such a result in the voting of states, the annual organising and conducting the Summits of the Crimean Platform could help to bring awareness among the state's representatives and to gather their support for the voting in recognising Crimea as occupied and annexed by the Russian Federation. While the main goal of the Platform is de-occupation of Crimea and its peaceful return to Ukraine, one of the aims is "to increase the effectiveness of international response to the ongoing occupation of Crimea."[828] The Crimean Platform is "a new international consultation and coordination format initiated by Ukraine"[829] where it unites different thematic events and initiatives related to Crimea in the framework of governmental and non-governmental forums and meetings.[830]

The UNGA resolution could also be used to bring the question of the Crimean

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823 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* para. 174.

824 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* para 225.

825 Jurisdiction Hearing, 11 June 2019, 30:15-21, Professor Harold Hongju Koh, cited from *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8*, footnote 166, p. 33.

826 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 8,* 55, para 175.

827 Kunoy, *op. cit*. 56, 125.

828 "About Platform," *Crimea Platform*, accessed 9 September 2023, https://crimea-platform.org/en/about/.

829 *Ibid*.

830 For detailed overview of the structure and activities, see, "The Crimea Platform: levels and events" in "The Crimea Platform: Strategy, Consolidation, Synergy," *Ministry of Foreign Affairs of Ukraine*, accessed 9 September 2023, https://poland.mfa.gov.ua/storage/app/sites/61/crimea-platform.pdf, p. 9.

occupation before the ICJ by requesting its Advisory Opinion. For example, the *Chagos Advisory Opinion* was requested by UNGA resolution 71/292 under Article 96(1) of the UN Charter. To assess the impact of a UNGA resolution in resolving the issue of who holds coastal state status over the Chagos Archipelago was only possible because another UNGA resolution requested *the Chagos Advisory Opinion* which had its "legal effect".

Out of 27 Advisory Opinions by the ICJ, 16 were issued on the request made by UNGA resolutions. According to Article 96 of UN Charter: "The General Assembly or the Security Council may request ICJ to give an advisory opinion on any legal question." Therefore, the UNGA can ask the ICJ not only for determination of the Crimean occupation, but also for an Advisory Opinion on its own influence and the determination of its own "legal effect". Thus, the next part answers whether the ICJ can bring clarity into an established existence of the dispute between Ukraine and the Russian Federation over the territory of Crimea by the arbitral tribunal in the *Coastal State Rights Dispute*.

3.2.5. The ICJ as an institution that can confirm the fact of the Crimean occupation

ICJ is one of the main organs of the UN. It is also the principal judicial organ of the UN. The ICJ Statute is annexed to the UN Charter. Due to this, the maintenance of international peace and security is a fundamental aspect for the considerations of the establishment and ongoing functioning of the ICJ.[831]

The ICJ Statute, Article 36 paragraph 1 says that

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.[832]

Neither Ukraine nor Russia have made a declaration accepting the ICJ's compulsory jurisdiction under Article 36 of the ICJ's statute.[833] Thus, the jurisdiction of the ICJ solely depends on special agreements or international treaties that included the clause on the competence of the ICJ to decide over certain disputes. In some cases, states can accept the ICJ's jurisdiction for specific disputes even if they have not made a broader declaration. This can happen when both parties to a dispute agree to submit it to the ICJ, regardless of their previous declarations.

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831 Gentian Zyberi, "The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest," in *Research Handbook on International Law and Peace* (Cheltenham, Northampton: Edward Elgar Publishing, 2019), 429.

832 Statute of the International Court of Justice, *op. cit. 252.*

833 Marika Lerch and Ionel Zamfir, "International Court of Justice Preliminary Decision in Ukraine v Russia (2022)," *European Parliamentary Research Service and Directorate-General for External Policies*, March 2022, https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729350/EPRS_ATA(2022)729350_EN.pdf.

Declaration under Article 36 of the ICJ Statute provides the possibility for the ICJ to decide on all relevant to the dispute matters without the limitation to its jurisdiction, when the dispute settlement procedure under UNCLOS is designed to resolve issues related only to the law of the sea. It does not address disputes concerning sovereignty over land territory. The provisions in UNCLOS regarding coastal state jurisdiction acknowledge pre-existing sovereignty over such territory.[834]

In international practice it is common that many law of the sea disputes involve issues not only related to the law of the sea but to other aspects of international law. These are issues that do not solely relate to matters covered by the UNCLOS. For example, it can be the issue of sovereignty over land or islands that cannot be resolved by dispute settlement in Part XV of UNCLOS. This is possibly why such disputes have not been brought under Part XV but under Article 36 of the ICJ Statute or regional agreements like the Pact of Bogota. These bases allow the Court to address a broader range of questions beyond UNCLOS's compulsory jurisdiction.[835]

Thus, the common practice followed by the ICJ is not fully applicable when there is limitation of ICJ jurisdiction. Ukraine faces challenges presenting the case directly related to the Crimean occupation or asking for the legal determination of the Crimean occupation in the ICJ. It happens because Russia has ratified almost all relevant conventions referring to ICJ as a dispute settlement body with reservations, making it necessary to get Russia's consent before applying to the ICJ.[836] This limits options to obtain a relevant legally binding decision on the determination of the Crimean occupation by the Russian Federation. But what if when it is impossible to use a legally binding decision, to use an advisory opinion by ICJ? To use "an authoritative statement of international law on the questions with which it deals" that was named so by ITLOS in *Mauritius/Maldives Maritime Boundary Dispute*?

The outcomes of the arbitral tribunals in the cases of *Chagos Marine Protected Area*, *the South China Sea Arbitration*, and the *Coastal State Rights Dispute* seem to have established a consistent approach regarding the jurisdiction under compulsory dispute settlement procedures according to UNCLOS. This approach refers to situations where the core issue of a dispute involves territorial sovereignty. However, the determinations by ITLOS Special Chamber's in the *Mauritius/Maldives Maritime Boundary Dispute* add complexity to this issue.[837] The criterion set in the *Coastal State Rights Dispute*, where a relatively minimal requirement is needed to establish the presence of a dispute, was not followed by the Special Chamber of ITLOS.[838]

The Special Chamber states that

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834 Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," *American Journal of International Law* 107, 1 (January 2013): 142.

835 Gautier, "Some Reflections on the 'New Law of the Sea'", *op. cit. 706,* 1061.

836 Babin et al., "Attempted Annexation of Crimea and Maritime Environment Legal Protection," *op. cit. 767*, 41.

837 Kunoy, *op. cit*. *56*, 126.

838 *Ibid.,* 129.

> it is generally recognised that advisory opinions of the ICJ cannot be considered legally binding. As the ICJ itself stated in the advisory opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, '[t]he Court's reply is only of an advisory character: as such, it has no binding force' […] However, it is equally recognised that an advisory opinion entails an authoritative statement of international law on the questions with which it deals."[839]

Moreover,

> the Special Chamber finds it necessary to draw a distinction between the binding character and the authoritative nature of an advisory opinion of the ICJ. An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, **judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law.**[840]

Some Ukrainian scholars already mention that it is also necessary to consider the possibility of seeking advisory opinions from the ICJ through the UNGA on legal issues related to Russian aggression against Ukraine.[841] While jurisdiction of ICJ in its contentious cases relies on the consent of the states that are parties to the dispute, in advisory proceedings the ICJ response is purely advisory and lacks binding force.[842] However, the most important idea here is that while receiving the binding decision on

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839 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* para. 202.

840 *Ibid.,* para. 203. Emphasis is added.

841 Ustymenko, "Measures for the Legal Protection of Ukraine's National Interests at Sea," *op. cit. 484,* 90.

842 Niccolò Lanzoni, "The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case," *The Italian Review of International and Comparative Law* 2, 2 (19 December 2022): 307. However, it should be noted that there is also opinion that there is certain "binding force" of ICJ Advisory Opinions. For the discussion see, Roberto Ago, "'Binding' Advisory Opinions of the International Court of Justice", *American Journal of International Law* 85, 3 (1991): 439–451; Charles N Brower and Peter H.F Bekker, "Understanding 'Binding' Advisory Opinions of the International Court of Justice," in *Liber Amicorum Judge Shigeru Oda*, vol. 1, (The Hague: Kluwer Law International, 2002), 351–368. Also, there is an opinion that "despite not being *per se* legally binding, [ICJ Advisory Opinions] can produce legal effects and urge States to adopt certain measures in practice". For further discussion see, Giulia Bernabei, "The Law-Making Effect of ICJ Advisory Opinions: A Survey of the Chagos Opinion", in *Case-Law and the Development of International Law* (Leiden: Brill Nijhoff, 2021), 138; Fabian Simon Eichberger, "The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case - Judgment on Preliminary Objections," *Melbourne Journal of International Law* 22, 2 (2021), 1-20. For the latest overview, see, Carlos A. Cruz Carrillo, "The Role of Advisory Opinions in Addressing Public Interest Issues," in *Public Interest Litigation in International Law* (London: Routledge, 2023), 170–199.

the status of Crimea seems difficult or nearly impossible, the situation could be solved by obtaining Advisory Opinion of ICJ.

In this regard, the UNGA resolution could seek ICJ's Advisory Opinion in regard to the ongoing dispute over Crimea, between Ukraine and the Russian Federation. According to the Article 96 UN Statute, "[t]he General Assembly […] may request the International Court of Justice to give an advisory opinion on any legal question."[843] Therefore, the main requirement for the question to ask is a legal question.

The *Chagos Marine Protected Area Arbitration* with regard to the Chagos Archipelago serves as a good study case mainly because the C*oastal State Rights Dispute* was compared to it. [844] Secondly, the Special Chamber in the dispute between Mauritius and Maldives described Mauritius as a coastal state of the Chagos Archipelago before the process of the decolonization was finished.[845] This provides opportunities for a new dispute to arise and decisions to be made concerning the coastal state rights over Crimea even if the occupation of Crimea was, is or will be ongoing. Thirdly, in both cases, Mauritius and Ukraine are not able to obtain relevant resolutions by the Security Council that are legally binding. Treatment of Mauritius as a coastal state of the Chagos Archipelago was decided because of the existence of the Advisory Opinion and following its UNGA resolution. Because the question about the coastal state over Crimea was already raised and treated as a preliminary objection in the *Coastal State Rights Dispute*, the further settlement of the dispute by international court or tribunal would possibly confirm a newly established "legal effect" of Advisory Opinion.

There are views that "[p]erhaps we will see more decisions granting 'legal effect' to Advisory Opinions" or "perhaps this is essentially a one-off; a bit of legal trickery or magic that allows the Special Chamber to ignore jurisdictional obstacles rooted in a discredited colonial claim".[846] However, "…determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding."[847] Consequently, the future Advisory Opinion and the following UNGA resolutions could help to settle the question of what the coastal state over Crimea is now. And by doing so, this case would serve as indication of whether new influence obtained by UNGA resolutions with Advisory Opinion goes further than one case or not. There is no clear answer whether the international court or tribunal will confirm or ignore UNGA resolutions on the determination of Crimea but there is

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843 Article 96 UN Statute.

844 Schatz, "The Award Concerning Preliminary Objections in *Ukraine v. Russia*: Observations Regarding the Implicated Status of Crimea and the Sea of Azov", *op. cit. 84.* Also see, Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 42.*

845 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* paras. 246, 250, 354.

846 Thin, *op. cit. 816.*

847 *Delimitation of the maritime boundary in the Indian Ocean*, Preliminary Objections, *op. cit. 630,* para. 205.

already existing jurisprudence when ICJ Advisory Opinion was taken into account to establish certain facts and further allow the Special Chamber of ITLOS to proceed with its jurisdiction over matters regulated by UNCLOS. Thus, without trying there would be no answer at all.

Moreover, some believe that if Ukraine seeks a definitive statement from the ICJ affirming that Russia violated the law, advisory proceedings might give a clearer answer on determination of such activities.[848] However, this belief could face some challenges as there would be a significant reason for ICJ to decline providing its advisory opinion if doing so would effectively bypass the principle that a State cannot be compelled to submit its disputes to judicial settlement without its consent.[849]

According to the Statute of the ICJ, "The Court may give **an advisory opinion on any legal question** at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[850] Then, according to the Rules of ICJ, the ICJ shall acknowledge "**whether the request for the advisory opinion relates to a legal question actually pending between two or more States.**"[851] If there is a request for advisory opinion concerning a legal question actually pending between two or more States, then "the views of those States shall first be ascertained."[852]

In the Advisory Opinion on *Status of Eastern Carelia*, Permanent Court of International Justice established that

> The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are. The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case.

848 Deepak Raju, "An Advisory Opinion for Ukraine?", *Opinio Juris* (blog), 29 April 2022, http://opiniojuris.org/2022/04/29/an-advisory-opinion-for-ukraine/; Massimo Lando, "Advisory Opinions of the International Court of Justice in Respect of Disputes," *Columbia Journal of Transnational Law* 61, 1 (2023): 70.

849 *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 25, para. 33; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, para. 85. Also see, Ksenia Polonskaya, "International Court of Justice: The Role of Consent in the Context of Judicial Propriety Deconstructed in Light of Chagos Archipelago," *The Law & Practice of International Courts and Tribunals* 18, 2 (19 November 2019): 189–218.

850 Article 65 of the Statute of the ICJ, (emphasis is added).

851 Article 102(2) of the Rules of the ICJ, (emphasis is added).

852 Article 106 of the Rules of the ICJ.

> Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.[853]

As a result, the PICJ rejected providing the advisory opinion based on the fact that the Soviet Russian Government refused to provide evidence and lack of the evidence as well as it was not party to the Statute of PICJ nor a member of the League of Nations.[854] However, the Advisory Opinion on *Status of Eastern Carelia* is often refer as an example that "state consent is a precondition for the exercise of the advisory jurisdiction in bilateral disputes."[855] Indeed, a principle according to which a State "is not obliged to allow its disputes to be submitted to judicial settlement without its consent" is also noted in other Advisory Opinions.[856] But at the same time, in the Advisory Opinion on *Western Sahara*, the ICJ noted that Spain gave "its consent to the exercise by the Court of its advisory jurisdiction" by being a party to the Statute of the ICJ and a member of the UN.[857] Later, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* the ICJ in line with its arguments in *Western Sahara*, rendered the advisory opinion even though Israel had not agreed to its jurisdiction. In particularly, the Court pointed out that Israel's objection did not prevent its participation in the issue, as the ICJ was asked for an opinion on a matter of a particular importance to the United Nations that is extended far beyond a simple bilateral disagreement.[858] Thus, "the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground." [859] The same situation happened in the Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In this case, the United Kingdom and some other states were referring that at core of the advisory proceeding is a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago and rendering such advisory

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853 *Status of Eastern Carelia*, Advisory opinion, PCIJ Series B no 5, ICGJ 272 (PCIJ 1923), p. 28-29.

854 *Ibid.,* p. 29. Also see, some explanation on this provided in *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 23-24, para. 30.

855 Philip Burton, "Searching for the Eastern Carelia Principle", *ESIL Reflections* 8, 1 (10 January 2019), https://esil-sedi.eu/esil-reflection-searching-for-the-eastern-carelia-principle/.

856 *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 24-25, paras. 32-33; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, 71.

857 *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 23-24, para. 30. For the legal analysis, see, Philippe V. Lalonde, "The Death of the Eastern Carelia Doctrine: Has Compulsory Jurisdiction Arrived in the World Court," *University of Toronto Faculty of Law Review* 37, 1 (Spring 1979): 80-100; Lando, "Advisory Opinions of the International Court of Justice in Respect of Disputes", *op. cit. 848,* 67-132.

858 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *op. cit. 200,* 27, para. 50.

859 *Ibid.*

opinion would contravene the principle concerning State's consent.[860] However, the ICJ concluded that the opinion was asked on a matter of decolonization that a particular importance to the United Nations[861] and that the fact that the ICJ may have to rule "on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute."[862] Therefore, the importance of the decision plays its role for the ICJ while it decides on Advisory Opinion. There are clear similarities between the Chagos Archipelago and Crimean Peninsula. The importance of the Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* also was highlighted by Mauritius in the public hearings in Advisory Opinion on *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem,* on 22 February 2024. Mauritius stated that the Advisory Opinion concerning the legal consequences of the separation of the Chagos Archipelago made "a significant, immediate and irreversible impact".[863] After the adoption of the Advisory Opinion, the UNGA adopted Resolution 73/295 where it welcomed and affirmed the findings of the ICJ and demanded compliance with them.[864] Mauritius also mentioned the decision by Special Chamber of the ITLOS in *Delimitation of the maritime boundary in the Indian Ocean between Mauritius and Maldives.* And more importantly that "in November 2022, Mauritius and the United Kingdom decided to "begin negotiations on the exercise of sovereignty" over the Chagos Archipelago."[865] Moreover, "[w]hile these negotiations are still ongoing, Mauritius remains confident that they will conclude successfully, and that the United Kingdom will, as a result, bring itself into compliance with its international obligations,

860 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, pp. 116-117, para. 83.

861 *Ibid.,* p. 118, para. 88.

862 *Ibid.,* p. 118, para. 89. Also, more detailed on the Advisory Jurisdiction of the ICJ, see one of the most recent publications by Mauro Barelli, "A Heartfelt Commitment to the International Rule of Law? The United Kingdom and the International Court of Justice", *Netherlands International Law Review* 70, 2 (1 September 2023): 161-163.

863 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem,* Verbatim Record of Public sitting held on Thursday 22 February 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for advisory opinion submitted by the General Assembly of the United Nations), Uncorrected, p. 63, para. 10.

864 General Assembly Resolution A/RES/73/295 on Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, 22 May 2019.

865 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem,* Verbatim Record of Public sitting held on Thursday 22 February 2024, *op. cit. 863,* 63, para. 11.

as elucidated by the Court in its Advisory Opinion."[866] Therefore, if to see the timeline of events, the communication between Mauritius and the United Kingdom went from totally disagreeing with each other to confidence of future negotiations between each other. It is possible that comparing Ukraine and Crimea with Mauritius and Chagos Archipelago, at the moment, Ukraine is just in the beginning of the timeline. The timeline where the Russian Federation would bring itself into compliance with its international obligations, as could be potentially elucidated by ICJ in its Advisory Opinion regarding Crimea.

Another argument that can be used in support of the seeking an advisory opinion from ICJ on the matters of the status of Crimea could be the fact that once the legal question is framed in terms of law and raises problems of international law, it is jurisdiction of the ICJ to render the advisory opinion on such matter.[867] Important to note, that even when the legal question of the status of Crimea may be considered as a one that has the political aspect, even then, the ICJ would not be deprived from its competence to grant an advisory opinion.[868]

Therefore, the wording of the legal questions regarding the determination of the status of Crimea as occupied has to be very carefully phrased. It should be avoided the emphasis on the disagreement between the parties regarding the status of Crimea, rather the focus has to be given to the importance of the determination to the UN as a part of its function to maintain international peace and security. Thus, such determination would be important for exercising this function by applying effective collective measures for the determination of the legal status of Crimea by the ICJ. Since the matters of the legal determination of the occupation of Crimea is also for the relevance to

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866 *Ibid.* Eran Sthoeger writes that "[i]n August 2021, the Universal Postal Union, a United Nations specialized agency, decided to no longer recognise stamps issued by the British Indian Ocean Territory, which it would from then on consider to be part of Mauritius. Mauritius has also raised the issue in the Indian Ocean Tuna Commission (IOTC), an intergovernmental organization established under the auspices of the Food and Agriculture Organization (FAO). A 2022 legal opinion from the FAO took the view that the IOTC should treat Chagos as part of Mauritius. The matter is, as of October 2023, still pending: as part of a consultative process with the IOTC, during the 2023 IOTC annual meeting, the United Kingdom committed to clarifying "the status of its [IOTC] membership before the end of the year," and Mauritius raised no objection." See, Eran Sthoeger, "How Do States React to Advisory Opinions? Rejection, Implementation, and What Lies in Between," *AJIL Unbound* 117 (2023): 295. Also see, David Snoxell, "Prospect of the Chagos Advisory Opinion and the Subsequent UN General Assembly Resolution Helping to Resolve the Future of the Chagos Archipelago and Its Former Inhabitants: A Political Perspective" in *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion*, ed. by Thomas Burri and Jamie Trinidad, 262–279. Cambridge: Cambridge University Press, 2021.

867 The confirmation of this fact can be found in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *op. cit. 200,* 21, para. 37; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 18, para. 15.

868 In particular, "the fact that a legal question also has political aspects […] does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statue'". It is also confirmed in the vast jurisprudence by the ICJ. See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *op. cit. 200,* 23, para. 41.

the UN and contain bigger matters than a dispute between Ukraine and the Russian Federation, then such Advisory Opinion by ICJ is possible to receive.

For example, in Advisory Opinion of the ICJ on Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, the question was formulated as "[i]s the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[869] And the ICJ concluded that the adoption of such declaration of independence did not violate any applicable rule of international law.[870] Here, the ICJ, interpreted the asked question as seeking the answer on "whether or not the applicable international law prohibited the declaration of independence".[871] The Judge Yusuf in his Separate Opinion, despite the fact that he was in general agreement with the ICJ's Advisory Opinion, noted relevant issues regarding the interpretation of the asked question. While the ICJ stated that the question did not require it to answer on whether international law grants Kosovo an entitlement to declare independence or on whether international law generally provides entities within a State with an entitlement to unilaterally break away from it[872], the Judge Yusuf's view is that it is "an overly restrictive and narrow reading of the question of the General Assembly."[873]

The lesson that could be learned: it is highly important to phrase the request properly and accordingly considering previous requests for advisory opinions to avoid either too broad or too narrow interpretation of the asked question.

In the Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* the question was formulated as "[w]hat are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?" Similar phrase regarding "the legal consequences" was also involved in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the question was formulated as follows:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles

869 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *op. cit. 147,* 8, para. 1.

870 *Ibid.,* 452, para. 122.

871 *Ibid.,* 425, para. 56.

872 *Ibid.*

873 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Yusuf, 618-619, para. 2; Similar view was also taken by Judge Simma in his Declaration in this Advisory Opinion, where he mentioned his concerns about the ICJ's interpretation of the General Assembly's request is unnecessarily limited and potentially misguiding. See, Declaration of Judge Simma, p. 478-479, paras. 1-4.

> of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[874]

There were arguments that "the legal consequences arising from the construction of the wall" could be interpreted in a way that requested ICJ "to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality" and therefore, the ICJ should decline to respond to the question.[875] However, the ICJ concluded that request to state "the legal consequences arising from the construction of the wall" includes an assessment of "whether that construction is or is not in breach of certain rules and principles of international law."[876] The ICJ also noted "Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce"[877] but it is common to have different view on legal issues in nearly every advisory proceeding.[878] Therefore, the fact that there is a legal dispute between Ukraine and the Russian Federation on the status of Crimea confirmed by the Annex VII Arbitration instituted under provisions of UNCLOS could prevent the ICJ to rule the advisory opinion. But at the same time, since the question has to be asked regarding the legal matters by the UN General Assembly, that would mean that the ICJ still can give its advisory opinion concerning the legal question involving Crimea. Also, by applying the interpretation that was used by the ICJ in this Advisory Opinion, it makes sense to start the question with asking "what are the legal consequences".

In the Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* the question was formulated as

> (a) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?";
>
> (b) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the

874 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *op. cit. 200,* 141, para.1.

875 *Ibid.,* p. 152-153, para. 36.

876 *Ibid.,* p. 154, para. 39.

877 *Ibid.,* p. 158, para. 48.

878 *Ibid.* It is also referring the Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), op. cit. 785,* 24, para. 34.

resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"[879]

The ICJ confirmed its jurisdiction to provide the Advisory Opinion as well as did not use its discretional power to decline to give an advisory opinion even if the conditions of jurisdiction are met.[880] The conclusion for some arguments were as following:

1) advisory proceedings are suitable for determination of complex and disputed factual issues based on sufficient information on the facts presented to for the ICJ. Therefore, ICJ cannot decline to answer the questions put to it;[881]
2) it is not for the ICJ itself to determine whether the Court's response would assist the General Assembly in the performance of its functions, but it is rather for the General Assembly itself to determine "whether it needs the opinion for the proper performance of its functions";[882]
3) the Advisory Opinion "is given not to States, but to the organ which is entitled to request it"[883], moreover, the matters that were determined by the Arbitral Tribunal constituted under UNCLOS Annex VII in the Arbitration regarding the Chagos Marine Protected Area are not the same as those that are before the ICJ in this Advisory opinion proceeding;[884]
4) the questions asked do not relate to a pending dispute between two States, which have not consented to its settlement by the ICJ as "[t]he General Assembly has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius."[885] Otherwise, there would be a compelling reason for the ICJ to decline to give an advisory opinion when such an opinion "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent"[886]

These conclusions give certain lessons that could be learned: the question should be formulated in a way that would involve the need of the General Assembly to receive the ICJ assistance so that it may be guided in the discharge of its functions relating to

879 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 102, para. 1.

880 *Ibid.,* p. 111-118, paras. 54-91.

881 *Ibid.,* p. 114-115, paras. 69-74. The same argument was used in the Advisory Opinion on *Western Sahara*, see, *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 28-29, para. 45-46. The reference is also made to the Advisory opinion on *Status of Eastern Carelia*.

882 *Ibid.,* 115-116, paras. 75-78.

883 *Ibid.,* 116, para. 81. Also, see Advisory Opinion on *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, I.C.J. Reports 1950, p. 71.

884 *Ibid.,* 116, paras. 79-82.

885 *Ibid.,* 117-118, paras. 86-91.

886 *Ibid.,* 117, para. 85. Also, see reference to Advisory Opinion on *Western Sahara*, 25, para. 33.

the occupation of Crimea. Also, there should be sufficient amount of information on the facts presented to for the ICJ to decide the question regarding the occupation of Crimea.

In the Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the question is formulated as follows:

> "considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
>
> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"[887]

Since, the proceedings are still ongoing in this advisory opinion, there is no answer yet on how to formulate the question better than it was done before. Therefore, the approximate wording of the draft resolution of UNGA that would ask for an Advisory Opinion of the ICJ regarding Crimea could be formulated as follows:

887 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem,* Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/247 of 30 December 2022, p. 2.

Draft of the Request for an Advisory Opinion of the International Court of Justice on the legality and legal consequences of the matters involving the referendum organised in Crimea and further admission of the Republic of Crimea to the Russian Federation

The General Assembly,

Guided by the principles of the Charter of the United Nations,

Bearing in mind its functions and powers under the Charter of the United Nations,

Recalling its resolution 68/262 of 27 March 2014,

Recalling its resolutions 71/205 of 19 December 2016, 72/190 of 19 December 2017, 73/263 of 22 December 2018, 74/168 of 18 December 2019, 75/192 of 16 December 2020, 76/179 of 16 December 2021, 77/229 of 15 December 2022, 78/221 of 19 December 2023, as well as its resolutions 73/194 of 17 December 2018, 74/17 of 9 December 2019; 75/29 of 7 December 2020; 76/70 of 9 December 2021,

Taking note of the "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' adopted by the Venice Commission at its 98th Plenary Session", Venice, 21–22 March 2014,

Taking note of the reports by the Office of the Prosecutor of the International Criminal Court on Preliminary Examination Activities for 2016, 2017, 2018, 2019, 2020,

Taking note of the European Parliament resolutions 2014/2627 (RSP) of 13 March 2014, 2014/2717 (RSP) of 17 July 2014, 2014/2841 (RSP) of 18 September 2014; 2014/2965 (RSP) of 15 January 2015; 2016/2556 (RSP) of 4 February 2016, 2016/2692 (RSP) of 12 May 2016,

Recalling that on 6 March 2014 the Supreme Rada (Council) of the Autonomous Republic of Crimea adopted a Resolution "On the all-Crimean referendum" and on 18 March 2014 the so-called "Agreement on the Admission of the Republic of Crimea to Russia" was signed, and on 21 March 2014, it was ratified,

Aware, that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,

Aware of the responsibility of the international community to act in good faith in accordance with the Charter of the United Nations, generally recognised principles and rules of international law, as well as to ensure respect for international law, and recalling in this regard its resolution 2625 (XXV) of 24 October 1970,

Stressing the need to ensure accountabilities for all violations of international law in order to end impunity, ensure justice, deter further violations and promote peace,

Considering that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Crimea by taking into account failure of the Security Council to adopt its resolution involving the status of Crimea as occupied, and determining that such an advisory opinion is also necessary for the General Assembly for the proper performance of its functions,

Reaffirming that the international community, through the United Nations, has a legitimate interest in the question of Crimea, as it involves responsibility of the United Nations to be a centre for harmonizing the actions of nations in the attainment for maintaining international peace and security and development friendly relations among nations,

Recognizing that legal unclarity could escalate tensions, instability and violence, and calling for full respect for international law and the establishment of a stable environment conducive to the pursuit of peace,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions:

a. Was 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 lawful and was the following admission of the Republic of Crimea to Russia lawful, in regard to Ukrainian legislation and international law, including obligations reflected in the United Security Charter, General Assembly resolution 2625 (XXV) of 24 October 1970?
b. Whether the completion of the referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution met the requirements of Ukrainian legislation and international law?
c. What are the consequences for all States and, in particular, the United Nations, under international law, including obligations reflected in the abovementioned documents, arising from the illegal admission of the Republic of Crimea to Russia, and taking into account the recorded facts and events that led up to its admission.

Therefore, such draft resolution could be proposed to vote to the UNGA. However, it should be emphasised that to it extremely important to collect and submit as much information and facts as possible. Therefore, it makes sense before submitting the request for the Advisory Opinion is to establish COI and/or the Consultative Committee of Experts. In this situation, decisions and conclusions of such Committees would work to facilitate fact-finding. As they are not binding, they could face the same approach that was used in the *Coastal State Rights Dispute* when *ad hoc* tribunal rejected adopting the view of the UNGA Resolutions. However, it could be taken into

account by the ICJ in the Advisory Opinion, as such findings constitute facts and not non-binding legal views.

3.2.6. Role of international courts and tribunals to confirm the fact of the Crimean occupation by establishing a crime of aggression

Role of the International Criminal Court

The International Criminal Court (ICC) has the authority to determine the status of Crimea, particularly in relation to the crime of aggression, however, it faces a number of challenges that makes this situation highly unlikely.[888]

The definition of aggression which includes the use of armed force by one state against the sovereignty, territorial integrity, or political independence of another state, was established by General Assembly resolution 3314 (XXIX) on December 14, 1974.[889] This definition was further clarified by Resolution RC/Res.6 on June 11, 2010.[890]

The crime of aggression is a serious offence under the Rome Statute, dealing with violations of the UN Charter's prohibition of using force.[891] On June 17, 2018, the jurisdiction of ICC over the crime of aggression was activated.[892] Due to the recent inclusion of the crime of aggression under the jurisdiction of the ICC it still remains less discussed compared to other international crimes.[893]

The elements of the crime of aggression are outlined in Article 8(2)bis and align

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888 For the more general overview, see Dapo Akande and Antonios Tzanakopoulos, "Treaty Law and ICC Jurisdiction over the Crime of Aggression," *European Journal of International Law* 29, 3 (August 2018): 939–959; Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 2nd ed. Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2021), 258-352; Grover, Leena. "Interpreting the Crime of Aggression" in *The Crime of Aggression: A Commentary* (Cambridge: Cambridge University Press, 2016), 375–411; Leena Grover, "Activating the Crime of Aggression Amendments: A Look Ahead," in *The International Criminal Court in Turbulent Times*, edited by Gerhard Werle and Andreas Zimmermann, International Criminal Justice Series (The Hague: T.M.C. Asser Press, 2019), 155–172.

889 General Assembly Resolution 3314 (XXIX) Definition of Aggression, 14 December 1974. For further clarification, see part. 3. Understanding Resolution RC/RES.6 in "Handbook Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC", 3rd ed., November 2019, https://crimeofaggression.info/documents/1/handbook.pdf.

890 Resolution RC/Res.6! "Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression", *The Review Conference of the Rome Statute*, 13th plenary meeting, 11 June 2010, https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf. In particular, Annex I Amendments to the Rome Statute of the International Criminal Court on the crime of aggression.

891 Andreas Schüller, "What can('t) international criminal justice deliver for Ukraine?" *Verfassungsblog* (blog), 24 February 2023, https://verfassungsblog.de/justice-ukraine/.

892 "How the Court Works," *International Criminal Court,* accessed 17 September 2023, https://www.icc-cpi.int/about/how-the-court-works.

893 Isabella Elliott, "The Impact of the International Criminal Court's Juridicial Context and Jurisdiction on Its Ability to Effectively Deter the Crime of Aggression," *Southampton Student Law Review* 13 (2023): 26.

with the previously adopted definition. Notably, paragraph 2(a) of the same Article specifies that the act of aggression encompasses actions such as the invasion or attack by one state's armed forces on the territory of another state, any temporary military occupation resulting from such invasion or attack, or any annexation of another state's territory or part thereof through the use of force.[894] This crime can only occur during an active form of hostilities and does not cover the situation of occupation without such actions.[895]

The main challenge to ICC to establish the occupation of Crimea is that the time of the occupation precedes the time when the crime of aggression was activated under its jurisdiction. The aggression of the Russian Federation against Ukraine started in 2014 with the illegal annexation of Crimea and the initiation of a proxy war in the eastern regions of Donbas and Luhansk in Ukraine.[896] Since the act of aggression was made by the Russian Federation in the beginning of 2014, the logical question arises – whether such jurisdiction of the ICC that started in 2018 is applicable to the dispute between Ukraine and the Russian Federation?

Moreover, another challenge is that there is a condition quite unique to this crime: the aggressor state must also be a party to the Rome Statute for the ICC to have its jurisdiction.[897] Changing this rule in the Statute is technically feasible, but it depends on the willingness of the 123 ICC member states.[898]

The option avoiding mentioned challenges was proposed by Giulia Pinzauti and Alessandro Pizzuti. They suggest prosecuting Russia's crime of aggression against Ukraine as crimes against humanity, specifically under Article 7(1)(k) of the Rome Statute. It allows the prosecution of the acts of aggression as crimes against humanity avoiding the jurisdictional limitations that apply to the crime of aggression. Authors argue that this action violates the Ukrainian people's right to self-determination, causing severe suffering, and can be classified as other inhumane acts. Unlike other proposals, they emphasise the right to self-determination as the key link between aggression and inhumane acts.[899] However, while this option gives a way around the jurisdiction of the ICC, it does not clearly establish the fact of the Crimean occupation by the Russian Federation, rather it focuses on the crimes committed towards the population of Crimea.

It is visible that the ICC currently lacks jurisdiction over Russia's aggression against Ukraine. The ICC Prosecutor Karim Khan is advocating for reforms to close this

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894 Rome Statute of International Crimina Court, Pub. L. No. U.N. Doc. A/CONF.183/9, 1998.

895 Babin et al., "Attempted Annexation of Crimea and Maritime Environment Legal Protection," *op. cit. 767,* 42.

896 Kreß, *op. cit. 457,* 3-4.

897 Schüller, *op. cit. 891.*

898 *Ibid.*

899 See more detailed in Giulia Pinzauti and Alessandro Pizzuti, "Prosecuting Aggression against Ukraine as an 'Other Inhumane Act' before the ICC", *Journal of International Criminal Justice* 20, 5 (16 February 2023): 1061–1083.

gap.[900] He says that "the situation in Ukraine must […] set a new standard for concerted action to achieve global accountability for international crimes".[901] Although he has struggled to propose a practical and timely solution, considering the importance of delivering justice promptly.[902] Some suggest amending the Rome Statute to give the ICC the authority to prosecute such crimes when referred by the UN General Assembly.[903] The best way to address the legitimacy issue, especially for states that have been victims of acts of aggression in the past, would be to gather a majority in the ICC Assembly of States Parties to amend the Rome Statute. This would not only allow the ICC to handle current cases of aggression but also future ones.[904] There is a belief that the idea of setting up an *ad hoc* tribunal instead of focusing on reforming the ICC could weaken the ICC.[905]

Nevertheless, the ongoing discussion related to the Russian Federation aggression against Ukraine also relies on the ideas of the necessity for a special tribunal.

Role of a special tribunal yet to be established

The question of establishing an *ad hoc* tribunal in respect of the Russian aggression towards Ukraine was firstly addressed by Philippe Sands. He asks that considering that the ICC currently lacks jurisdiction over this matter, why not establish a specialised international criminal court to investigate Putin and his associates for the crime of aggression committed on Ukrainian territory?[906]

Shortly after the publication of the article by Philippe Sands, Ukraine's foreign minister, Dmytro Kuleba, expressed Ukraine's interest in establishing a specialised tribunal for this purpose.[907] Subsequently, a coalition of key states, including the Baltic

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900 Peter Dickinson, "Calls Mount for Russia to Face Tribunal for Aggression against Ukraine," *Atlantic Council* (blog), 28 February 2023, https://www.atlanticcouncil.org/blogs/ukrainealert/calls-mount-for-russia-to-face-tribunal-for-aggression-against-ukraine/.

901 "ICC Prosecutor Karim A. A. Khan KC Concludes Fourth Visit to Ukraine: 'Amidst This Darkness, the Light of Justice Is Emerging,'" *International Criminal Court*, 7 March 2023, https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-fourth-visit-ukraine-amidst-darkness-light-justice.

902 Dickinson, *op. cit. 900.*

903 Shane Darcy, "Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly," *Just Security* (blog), 16 March 2022, https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/; Kai Ambos, "A Ukraine Special Tribunal with Legitimacy Problems?: A Reply to Günter Krings (CDU), Volker Ullrich (CSU) and Sergey Lagodinsky (Bündnis 90/Die Grünen)," *Verfassungsblog* (blog), 6 January 2023, https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/.

904 Schüller, *op. cit. 891.*

905 Ambos, *op. cit. 903.*

906 Philippe Sands, "Putin's Use of Military Force Is a Crime of Aggression," *Financial Times*, 28 February 2022, https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c.

907 "A Criminal Tribunal for Aggression in Ukraine," Research Event Recording 4 March 2022 — 11:30 am to 12:30 pm, online, *Chatham House, The Royal Institute of International Affairs*, accessed 20 February 2023, https://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine;

States, Poland, and others, rallied together in support of this idea.[908] The parliamentary assemblies of organisations like the Council of Europe, NATO, and the European Parliament also endorsed the proposal.[909] Additionally, Avaaz, a global activist organisation, initiated a petition that quickly garnered over two million signatures[910], while scholars engaged in discussions regarding the advantages and disadvantages of creating the first tribunal to address the crime of aggression since the Nuremberg Trials.[911] Since then, there was a growing acknowledgment of the necessity to prevent impunity for the crime of aggression.[912] Ukraine's Foreign Affairs Minister, Dmytro Kuleba,

"Statement of the Minister for Foreign Affairs of Ukraine Mr. Dmytro Kuleba on the Establishment of the Tribunal Aimed at Delivering Justice for the Crime of Armed Aggression," *Permanent Mission of Ukraine to the United Nations*, 7 March 2022, http://ukraineun.org/en/press-center/535-statement-of-the-minister-for-foreign-affairs-of-ukraine-mr-dmytro-kuleba-on-the-establishment-of-the-tribunal-aimed-at-delivering-justice-for-the-crime-of-armed-aggression/.

908 "The Ministers of Estonia, Latvia and Lithuania Call to Establish a Special Tribunal to Investigate the Crime of Russia," *Ministry of Foreign Affairs of the Republic of Lithuania,* 16 October 2022, https://urm.lt/default/en/news/the-ministers-of-estonia-latvia-and-lithuania-call-to-establish-a-special-tribunal-to-investigate-the-crime-of-russias-aggression; "Poland Supports Creation of a Special Tribunal for Crimes of Aggression against Ukraine," *Ministry of Foreign Affairs Republic of Poland,* 7 March 2023, https://www.gov.pl/web/diplomacy/poland-supports-creation-of-a-special-tribunal-for-crimes-of-aggression-against-ukraine; "Greece Becomes the 30th Country Supporting a Special Tribunal for Russia - Ukrainian World Congress", *Ukrainian World Congress*, 7 March 2023, https://www.ukrainianworldcongress.org/greece-becomes-the-30th-country-supporting-a-special-tribunal-for-russia/; Patrick Wintour, "UK Offers Qualified Backing for Tribunal to Prosecute Russia's Leaders," *The Guardian*, 20 January 2023, https://www.theguardian.com/politics/2023/jan/20/uk-offers-qualified-backing-special-tribunal-to-prosecute-russia-leaders-putin-ukraine; etc.

909 European Parliament Resolution 2022/3017(RSP) On the Establishment of a Tribunal on the Crime of Aggression against Ukraine, 19 January 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0015_EN.html; "PACE Unanimously Demands an International Tribunal to Prosecute Russian and Belarusian Leaders for the Crime of Aggression against Ukraine," *The Parliamentary Assembly of the Council of Europe,* 26 January 2023, https://pace.coe.int/en/news/8963/pace-unanimously-demands-an-international-tribunal-to-prosecute-russian-and-belarusian-leaders-for-the-crime-of-aggression-against-ukraine; Alya Shandra, "NATO Parliamentary Assembly Designates Russia as a Terrorist State, Calls for Tribunal," *Euromaidan Press*, 21 November 2022, https://euromaidanpress.com/2022/11/21/nato-parliamentary-assembly-recognises-russia-as-terrorist-state-calls-for-tribunal/.

910 "This Call to Put Putin on Trial Is Gaining Momentum," *Avaaz*, March 14, 2022, https://secure.avaaz.org/campaign/en/prosecute_putin_loc/. Provided information was last time checked on September 17, 2023.

911 Philippe Sands, "There Can Be No Impunity for the Crime of Aggression against Ukraine," *Financial Times*, February 17, 2023, https://www.ft.com/content/c26678cb-042c-4b84-bb26-88047046601a.

912 *Ibid*. Also see, Parliamentary Assembly of the Council of Europe Resolution 1988 (2014) Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions, 9 April 2014; European Parliament Resolution 2022/3017(RSP) On the Establishment of a Tribunal on the Crime of Aggression against Ukraine, 19 January 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0015_EN.html; Tom Dannenbaum, "Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine," *Just Security* (blog), 10 March 2022, https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/; Kevin Jon Heller, "Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea," *Opinio Juris* (blog), 7 March 2022, http://opiniojuris.

acknowledges that negotiating the creation of such a tribunal is challenging.[913] Such an idea also received a certain level of criticism.[914]

There are different opinions on how to address the prosecution of the crime of aggression against Ukraine.[915] In general, some believe that they can be summarised into three options[916]:

1. Institution-Based Option;
2. Treaty-Based Approach;
3. Hybrid Option.

Institution-Based Option: This involves creating a tribunal through a treaty

org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/; Kevin Jon Heller, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression," *Opinio Juris* (blog), 16 March 2022, https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/; Claus Kreß et al., "The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System," *Just Security* (blog), 23 January 2023, https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/; Miguel Lemos, "The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine," *EJIL: Talk!* (blog), 16 January 2023, https://www.ejiltalk.org/the-law-of-immunity-and-the-prosecution-of-the-head-of-state-of-the-russian-federation-for-international-crimes-in-the-war-against-ukraine/; Marika Lerch, "Russia's War on Ukraine in International Law and Human Rights Bodies: Bringing Institutions Back In," *European Parliamentary Research Service and Directorate-General for External Policies*, 8 April 2022, https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/639322/EXPO_BRI(2022)639322_EN.pdf. Milica Stojanovic, "Ukraine Tribunal Could Try Russian Leaders for Aggression," *Balkan Insight*, 7 April 2022, https://balkaninsight.com/2022/04/07/ukraine-tribunal-could-try-russian-leaders-for-aggression-expert/; "A Criminal Tribunal for Aggression in Ukraine", *op. cit. 907*. In addition, a group of around 40 influential legal and political figures have signed The Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine. See, "The Combined Statement and Declaration Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine," accessed 14 September 2022, https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf.

913 Gaiane Nuridzhanian, "Justice for the Crime of Aggression Today, Deterrence for the Aggressive Wars of Tomorrow: A Ukrainian Perspective," *Just Security* (blog), 24 August 2022, https://www.justsecurity.org/82780/justice-for-the-crime-of-aggression-a-ukrainian-perspective/.

914 David Hannay, "Letter: Nuremberg Is Wrong Model for Putin's Crimes," *Financial Times*, February 23, 2023, https://www.ft.com/content/ccdb7b1b-6f4f-4060-b972-6fe08fec136f; Heller, "Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea," *op. cit. 912*; etc.

915 Nuridzhanian, "Justice for the Crime of Aggression Today, Deterrence for the Aggressive Wars of Tomorrow: A Ukrainian Perspective," *op. cit. 913.*

916 Dickinson, *op. cit. 900*; Andrii Smyrnov et al., "Comment and Analysis: Why the World Needs a Tribunal to Try the Russian Leadership for the Crime of Aggression," *International Bar Association*, 8 March 2023, https://www.ibanet.org/why-the-world-needs-a-tribunal-to-try-the-Russian-leadership-for-the-crime-of-aggression; Anton Korynevych and Tymur Korotkyi, "The Special Tribunal for the Crime of Aggression against Ukraine: Realpolitik versus the Inevitability of Punishment for the Crime of Aggression," *Ukrainian Journal of International Law* 2 (30 June 2022): 33–42; M. I. Smyrnov, "Creation and Activity of a Special International Tribunal Ad Hoc on the Crime of Russian Aggression against Ukraine," *Legal Novels* 19 (2023): 169–177.

between Ukraine and the UN, with support from a UN General Assembly resolution. If this approach faces obstacles, an alternative is to establish the tribunal through another international organisation like the Council of Europe, EU, or G7, ideally with the endorsement of the UN General Assembly.[917] Currently, the institution-based option involving the UN is viewed as the most favourable approach.[918]

***Treaty-Based Approach**:* Under this option, a tribunal is formed based on a multilateral international treaty that may be open to participation by any state.[919] Some reluctance arises from concerns about creating an alternative to the ICC, a permanent court already equipped to handle aggression cases, even though legal constraints prevent the ICC from exercising jurisdiction over aggression against Ukraine. Another reason for hesitation among states could be the exceptional nature of trying state leaders for international crimes.[920] Thus, the hybrid option is proposed.

Hybrid Option: This option combines Ukrainian law and jurisdiction with an international component to create a specialised court.[921] The reasoning for this is that Ukraine itself does have the right to prosecute the crime of aggression. Its domestic law does not fully align with the Rome Statute's definition. Additionally, given the ongoing aggression against Ukraine, it might not be able to conduct an independent and impartial prosecution domestically.[922] Moreover, it is considered that "atrocity crimes committed by foreign nationals are extremely difficult to prosecute effectively and fairly at the national level without international assistance."[923] Therefore, establishing a hybrid Ukrainian-international institution could be a viable option to support Ukraine internationally. Such an institution, comprising both international and Ukrainian personnel, could handle all international core crimes and would likely have more legitimacy, avoiding double standards.[924] Also, hybrid option involves two possible forms: a domestic court exercising territorial jurisdiction (in Russia, Belarus, or Ukraine) or a domestic court exercising universal jurisdiction.[925]

From the perspective of determining the status of Crimea as occupied, the main

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917 Dickinson, *op. cit. 900.*

918 *Ibid*.

919 *Ibid.*

920 Nuridzhanian, "Justice for the Crime of Aggression Today, Deterrence for the Aggressive Wars of Tomorrow: A Ukrainian Perspective," *op. cit. 913.*

921 Dickinson, *op. cit. 900.* Not exactly within the topic, but the question of the extraterritorial expansion of criminal jurisdiction over international crimes was addressed by Paola Gaeta, "The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes," in *Realizing Utopia: The Future of International Law* (Oxford, New York: Oxford University Press, 2012), 596–606.

922 Schüller, *op. cit. 891.*

923 Michael Scharf et al., "High War Crimes Court of Ukraine for Atrocity Crimes in Ukraine," *Opinio Juris* (blog), 29 July 2022, https://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/.

924 Schüller, *op. cit. 891.*

925 Dannenbaum, *op. cit. 912.*

question is whether such an *ad hoc* tribunal would deal with this particular question and what would be the legitimacy of such a special tribunal.

There is already discussion that the legitimacy of any new international tribunal could be weak or even non-existent, even if the UN General Assembly were to support it.[926] However, some believe that the issue around the legitimacy of the *ad hoc* tribunal can potentially be resolved with engaging the United Nations, in particular, the UN General Assembly.[927]

Concerning the voting outcome by UNGA, it should ideally be as decisive as the condemnation of Russian aggression on March 2, 2022 (Resolution A/ES-11/1, with 141 votes in favour out of 193 member States) and the condemnation of the so-called annexations on October 7, 2022 (Resolution A/ES-11/L.5, with 143 votes in favour). Only then can it be said that such a tribunal truly represents the will of the international community as a whole and can be considered genuinely international. Achieving such a voting result, however, is far from guaranteed.[928] Although, there is a belief that the Eleventh Emergency Special Session by UNGA sends a message that a substantial portion of the international community stands in solidarity with Ukraine, and only a small number of states align with Russia in this conflict.[929] On the contrary, other resolutions related to this context, such as Russia's exclusion from the UN Human Rights Council (Resolution A/ES-11/3, April 8, 2022, with 93 votes in favour) and resolutions regarding Russian reparation obligations (Resolution A/ES-11/L.6, November 7, 2022, with 94 votes in favour), received considerably less support.[930]

In particular, it could be recommended that the UN Secretary General establishes the tribunal through a bilateral treaty with Ukraine or a pre-negotiated bilateral agreement between the UN and Ukraine, subject to UN General Assembly's approval.[931] The regional efforts, such as those within the Council of Europe or a multilateral treaty involving interested States and Ukraine (similar to the Nuremberg model), may result

926 Schüller, *op. cit. 891.*

927 Ambos, *op. cit. 903.*

928 Ambos, *op. cit. 903.*

929 Hannah Birkenkötter, "On the Side of International Law: The General Assembly's Emergency Special Session on Ukraine," *Verfassungsblog* (blog), 24 February 2023, https://verfassungsblog.de/on-the-side-of-international-law/.

930 Ambos, *op. cit. 903.*

931 While resorting to the UN General Assembly is practical and contributes to legitimacy, it faces the challenge that General Assembly resolutions are not binding (Article 10, 13 (1), 14 UN Charter). The legal effect, such as contributing to customary international law, and the political significance of such resolutions largely depend on the specific voting outcome and the resolution's content. The Uniting for Peace mechanism used by the UN Security Council (S/RES/2623 2022) has certainly strengthened the General Assembly's mandate. Additionally, while enforcement actions are within responsibility of the UN Security Council, the General Assembly does have a role in matters of international peace and security by recommending certain "measures for the peaceful adjustment of any situation," which might involve some form of action. See, Ambos, *op. cit. 903.*

in more limited legitimacy, possibly confined to Europe only.[932]

Therefore, the UN General Assembly Resolution becomes not only desirable but necessary in this context. Within this resolution, the General Assembly would need to recommend to the UN Secretary General the establishment of such a tribunal, either by finalising a bilateral treaty with Ukraine or by negotiating a bilateral agreement between the UN and Ukraine in advance, which would then be presented to the General Assembly for its approval. The first approach was employed during the establishment of the Special Court for Sierra Leone when the UN Security Council mandated the UN Secretary General without invoking Chapter VII powers[933]. In this case, this option is unavailable due to Russia's veto power. The second approach was used for creating the Extraordinary Chambers in the Courts of Cambodia.[934] The tribunal's jurisdiction would primarily rely on Ukraine's territorial jurisdiction, which Ukraine would delegate to the tribunal. Given the widespread recognition of the principle of territoriality, this is legally unproblematic in principle.[935]

The main question is whether the decision of the *ad hoc* tribunal could have enough binding power and whether it will be capable of determining the status of Crimea, starting from 2014? The answer on the first part depends on the recognition of the decision by such an *ad hoc* tribunal by the international community and other dispute settlement bodies. The answer on the determination of Crimea as occupied depends on an establishing document of such an *ad hoc* tribunal. The document will be able to provide jurisdiction of the tribunal. Therefore, it could be able to solve the fact established by the UNCLOS tribunal that there is a sovereignty dispute over Crimea between Ukraine and the Russian Federation.

3.2.7. Implications following the legal determination of Crimea's occupation

UNCLOS was never meant to solve sovereignty disputes, especially those involving sovereignty over land. Sovereignty disputes need different solutions, like cooperation or going to a tribunal, as seen in cases like Singapore and Malaysia in their dispute over Pedra Branca.[936]

Disputes in the South China Sea are too politically sensitive for international judges

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932 Ambos, *op. cit*. *903*.

933 See, Security Council Resolution S/RES/1315 (2000) [on establishment of a Special Court for Sierra Leone]. 14 August 2000; "Residual Special Court for Sierra Leone," *RSCSL*, accessed 17 September 2023, https://rscsl.org.

934 See, General Assembly Resolution A/RES/57/228 on Khmer Rouge trials, 22 May 2003; "Establishment of ECCC", *Extraordinary Chambers in the Courts of Cambodia*, accessed 17 September 2023, https://www.eccc.gov.kh/en/about-eccc/chronologies.

935 Ambos, *op. cit*. *903*.

936 Robert Beckman, "Professor Robert Beckman on the Role of UNCLOS in Maritime Disputes," *Georgetown Journal of International Affairs* (blog), 6 May 2021, https://gjia.georgetown.edu/2021/05/06/professor-robert-beckman-on-the-role-of-unclos-in-maritime-disputes/.

to decide on sovereignty. Similar issues exist in the East China Sea, involving states like Japan, Korea, China, and Russia. These disputes trace back to World War II when peace treaties did not clarify sovereignty over certain islands once occupied by Japan. UNCLOS cannot address these sovereignty matters, as it's primarily about maritime rights and boundaries. These disputes need different approaches, often complex and political.[937] The same applies to relation of Crimean occupation and UNCLOS dispute settlement. While UNCLOS dispute settlement is clearer and more straightforward, the determination of Crimean occupation is more complex and political.

The protection of maritime rights and obligations within the water generated by the Crimean Peninsula is only possible after the establishment of the fact of occupation. Only after that it is possible to address the responsibility of the Russian Federation and its violations in respect rights and obligation provided by UNCLOS and Ukraine as a coastal state over the waters around Crimea.

Critics of international law sometimes connect the failure to follow international law rules with the difficulty of penalising states. They argue that domestic legal systems rely on the threat of punishment, but this comparison can be misleading. Punishment typically involves penalties imposed on wrongdoers through a legal process.[938] Punishment implies a hierarchy where one punishes another. In contrast, international law is built on the principle of "sovereign equality."[939] Thus, sovereignty in the legal context means that a state is independent and not under the control of another state.[940]

The International Law Commission spent about five decades addressing the issue of State responsibility. After scrupulous analysis, the ILC adopted the "Articles on State Responsibility," which were subsequently endorsed by the UN General Assembly. Articles on State Responsibility represent the most authoritative statement on the law of state responsibility today. Importantly, they do not advocate for the punishment of states for their wrongful actions. Instead, they emphasise the need for "full reparation for the damage caused by the internationally wrongful act," as stated in Article 31.[941] This reparation can take various forms, such as restitution, compensation, and satisfaction, none of which are considered as punitive measures.[942] Thus, the main idea behind establishing the fact of the Crimean occupation is to bring the Russian Federation to justice and make it accountable for its actions. The reparation can take various forms, but the Russian Federation has to be held in violation of those rights and obligations provided by UNCLOS.[943] Regardless of whether a state accepts jurisdiction of one or

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937 *Ibid.*

938 Markus Reiterer, "Some Thoughts on Compliance with International Obligations," in *International Law between Universalism and Fragmentation* (Leiden: Brill Nijhoff, 2008), 955.

939 *Ibid.*

940 *Ibid.*

941 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit. 243.*

942 Reiterer, *op. cit. 938,* 955.

943 It is obvious that the Russian Federation also has to be held responsible for its other crimes of international law. Due to the scope of this doctoral dissertation, it is not mentioned here. However, it is

another dispute resolution body or does not accept, it "remain responsible for acts attributable to them that are contrary to international law."[944]

After the determination of the Crimean occupation outside of the framework of UNCLOS, there are a couple of options. First, to bring the case back to the Annex VII arbitral tribunal and then, the arbitral tribunal as a compulsory dispute settlement body under UNCLOS would be able to be decide over the coastal state rights and obligations over Crimea and all of those submission that had to be revised due to its lack of jurisdiction. Secondly, once the determination is done by the *ad hoc* tribunal, then if empowered with such jurisdiction, the *ad hoc* tribunal could move further and decide over those issues that the Annex VII arbitral tribunal in the *Coastal State Rights Dispute* had lack of jurisdiction to decide on. The decision can be done by interpretation and application of the provisions of UNCLOS, as well as reparations can be awarded considering the law of the sea jurisprudence in similar violations. The *ad hoc* tribunal could possibly have broader jurisdiction than UNCLOS and then also would have jurisdiction to declare the violation of Ukrainian coastal state's domestic laws and regulations by the Russian Federation. Since these laws and regulations are domestic (it could be in regard to regulation of territorial sea and internal or waters with historic title), there should be a national court ruling over such a situation. But due to the possibly granted jurisdiction to the *ad hoc* tribunal, such ruling could be made by it.

important for justice to be served.

944 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Preliminary objections, Judgment of 2 February 2024, General List No. 182, at 57, para. 150. Also see, *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 279, at 328, para. 128; *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction of the Court, Judgment, I. C.J. Reports 1998, p. 432, at 456, para. 55-56, etc.

CONCLUSIONS

The dissertation determines whether the occupation of Crimea impacts the activation of the dispute settlement system under Part XV UNCLOS, and it offers recommendations on how the Crimean occupation can be removed as an obstacle to the dispute settlement under UNCLOS. Its main conclusions can be summarised as follows:

1. Since 2014, the status of Crimea as an occupied territory has led to several disputes between Ukraine and the Russian Federation. These disputes have been submitted to numerous international courts and tribunals, including the ICJ, ICC, ECtHR, and investment arbitration tribunals. These proceedings were initiated by Ukraine against the Russian Federation under various agreements, including ICSFT, CERD, and UNCLOS. However, due to the jurisdictional limits of the judicial institutions adjudicating on the basis of these agreements, the issue of the occupation of Crimea could not be directly addressed. Instead, the focus was on specific violations under these conventions, reflecting a strategic approach of Ukraine chosen in order to avoid jurisdictional challenges. Therefore, the occupation of Crimea has thus far not been legally determined in the context of those legal disputes.
2. UNCLOS lacks provisions for the status of maritime zones affected from occupied land territory. That said, the arbitral tribunal in the *Coastal State Rights Dispute*, adjudicating on the basis of Part XV UNCLOS, recognised its jurisdiction over some of the Ukrainian submissions. This implies that not all maritime disputes which affect occupied territory, or territory whose legal status is disputed, are beyond the scope of Part XV UNCLOS. By participating in the dispute, the Russian Federation, objecting to the arbitral tribunal's jurisdiction *ratione materiae*, did not refer to the provisions of international humanitarian law. As a result, the provisions of UNCLOS are considered by both parties to the dispute as being those governing the waters around Crimea.
3. In the *Coastal State Rights Dispute*, the arbitral tribunal ruled that it could not address claims dependent on Ukraine being a coastal state over Crimea, adhering to the principle that it could not rule on territorial sovereignty. This decision did not at all support Russia's claims as being the coastal state of Crimea but rather recognises the existence of a dispute between Ukraine and the Russian Federation. The arbitral tribunal acknowledged the Russian Federation's claim to sovereignty over Crimea but refrained from analysing its legality. This thesis submits that the tribunal's neutral approach raises questions concerning the scope of the principle of non-recognition regarding Crimea's occupation. At the same time, it supports the idea that some UNCLOS provisions concerning coastal state rights can be applied without explicitly naming either Ukraine or the Russian Federation as a coastal state over the waters around Crimea in the dispute. The provisions of UNCLOS prohibit any state from violating such rights and obligations, which include warship immunity, freedom of navigation, and the protection and preservation of the

marine environment. As has been demonstrated, violations of these rights and obligations in the EEZ around Crimea can be determined regardless of the determination of who is the coastal state. Also, in *the Coastal State Rights Dispute*, Ukraine can potentially invoke Article 58 UNCLOS regarding the rights and duties of other states in the EEZ, and Article 59 concerning disputes arising between coastal states and other states in the EEZ. Violation of these provisions can be operationalized by reference to the possibility under Article 290(1) UNCLOS to request provisional measures to cease Russian activities.

4. Articles 88, 141, and 301 UNCLOS emphasise the peaceful uses of the seas and oceans. Two main conclusions can be drawn in this respect. First, Ukraine cannot invoke these provisions to hold the Russian Federation responsible for the violation of such "peaceful uses" by occupying the waters around Crimea, because it would most likely not be possible to argue in favour of the existence of a dispute concerning the interpretation or application of UNCLOS. Secondly, assuming *arguendo* that a dispute concerning the interpretation or application of UNCLOS exists, Ukraine cannot hold the Russian Federation responsible for the violation of such "peaceful uses" by treating waters around occupied Crimea as its own because such usage during occupation could be considered as covered by an optional exception concerning military activities under Article 298(1)(b) UNCLOS. Consequently, the arbitral tribunal under UNCLOS would not have the authority to make a ruling on this matter.
5. All coastal states of the Black Sea could bring claims regarding the Russian Federation's violations of certain rights and obligations established under UNCLOS provisions. These rights and obligations affect freedom of navigation and warship immunity as well as obligations to protect and preserve the marine environment. However, having a presumption that if such provisions of UNCLOS provide obligations *erga omnes partes,* as it is said in the legal scholarship, then, any state can claim violations of their rights in the waters of the Black Sea. Therefore, if a court or a tribunal under UNCLOS would find that these obligations are *erga omnes partes* then all state parties to UNCLOS can address these matters in the dispute settlement under UNCLOS.
6. Regardless of the Crimean occupation being an obstacle to comprehensive dispute settlement under UNCLOS between Ukraine and the Russian Federation, several issues involved in the dispute do not depend on the occupation but could still not be solved within UNCLOS provisions. In this respect, applicability of UNCLOS provisions in the waters around Crimea in the Azov Sea and the Kerch Strait depends on the status of the Azov Sea and the Kerch Strait. So, if waters within the Azov Sea and the Kerch Strait are covered by a historical title, the optional exception under Article 298(1)(a) applies. Thus, the Crimean occupation does not affect existing limitations and optional exceptions on jurisdiction concerning matters falling under Ukrainian and the Russian Federation's reservations to jurisdiction under UNCLOS. If the waters of the Azov Sea or the Kerch Strait are recognised as internal waters, these

waters are not fully excluded from the application of UNCLOS. The dispute related to such waters could qualify as a dispute concerning the interpretation or application of UNCLOS. Several provisions of UNCLOS, namely the Preamble, Articles 2, 123 and Part XII, Part XIII, Part XIV and Part XV, are applicable in the internal waters and could be invoked by Ukraine in waters of the Azov Sea and the Kerch Strait regardless of the Crimean occupation. Also, some parts of the overall dispute, in particular those related to maritime delimitation, marine scientific research or fisheries management, can be solved within the compulsory conciliation under Annex V UNCLOS. Admittedly, though, with respect to the interpretation or application of Articles 15, 74 and 83 relating to maritime boundary delimitation, or those involving historic bays or titles, the occupation of Crimea could serve as an obstacle to the jurisdiction of the compulsory conciliation as being as part of the concurrent consideration of the unsettled dispute concerning sovereignty.

7. Even though the optional exception under Article 298(1)(a) UNCLOS excludes disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to maritime boundary delimitations from compulsory dispute settlement procedures under UNCLOS, Articles 74(3) and 83(3) UNCLOS can still be invoked before UNCLOS courts and tribunals. These provisions establish an obligation to cooperate, in particular, to enter into provisional arrangements of a practical nature and not to jeopardise or hamper the reaching of a boundary agreement.
8. In the solely theoretical scenario, if the UN Security Council adopted a resolution confirming the Crimean occupation, it would not fall under the optional exception under Article 298 UNCLOS. Since making decisions about the determination of the coastal state over the Crimean Peninsula falls beyond the scope of jurisdiction under UNCLOS as outlined in Article 288, the optional exception under Article 298 related to the UN Security Council would not be triggered.
9. The UN General Assembly is entitled to request an advisory opinion from the ICJ relating to the occupation, and legal status, of Crimea. Due to already established precedents in general international law, an advisory opinion by the ICJ is considered as entailing an authoritative statement of international law on the questions with which it deals. Thus, an advisory opinion by the ICJ, if it is asked carefully and by avoiding the direct questions on sovereignty, could establish the fact of the Crimean occupation. A nearly unanimous and worldwide supported resolution of the UN General Assembly with a statement of the fact of Crimean occupation could also play a positive role in the determination of the legal status of Crimea. The creation and annual holding of the Crimea Platform can help to gather the required international recognition of the legal determination of the Crimean occupation.
10. International law experts have advocated the establishment of a special tribunal with jurisdiction to address the Russian aggression against Ukraine. Therefore,

such a special tribunal can confirm the occupation of Crimea. However, since the tribunal has not yet been established, the main questions nowadays are if and by whom it could be established, and what the scope of its jurisdiction would be. The most beneficial options for the legal determination of the status of Crimea will arguably be institution-based (creation of a tribunal through a treaty between Ukraine and the UN, preferably with UN General Assembly support) or a treaty-based approach (create a tribunal based on a multilateral international treaty). Determining the legal status of Crimea following the Russian occupation is crucial for addressing violations of rights and obligations provided by UNCLOS in waters around Crimea.

11. After such determination, two scenarios exist. First, to bring the case back to an arbitral tribunal under Annex VII of UNCLOS for the resolution of those issues that fell outside of the jurisdiction *ratione materiae* of the arbitral tribunal in *the Coastal State Rights Dispute*. Secondly, to provide the special tribunal on the Russian aggression against Ukraine with jurisdiction not only to establish the crime of aggression, military occupation and annexation of Crimea by the use of force against Ukraine, but also with jurisdiction to address issues concerning rights of Ukraine as a coastal State. This may involve interpreting UNCLOS provisions and awarding reparations based on the law of the sea jurisprudence. Thus, in both scenarios, after the legal determination of the Crimean occupation, claims that previously were considered outside of the jurisdiction provided by UNCLOS can be solved.

RECOMMENDATIONS

Based on the results of this doctoral dissertation, it is recommended that:

1. Ukraine should focus on ways to determine the illegality of the occupation of Crimea by the Russian Federation through either an advisory opinion by ICJ or a special tribunal on the Russian aggression against Ukraine with jurisdiction to determine the Crimean occupation.
    a. Taking into account that the Russian Federation highly like will veto, and has indeed vetoed, the possibility of the UN Security Council adopting a resolution confirming the illegality of the annexation of Crimea, it is recommended to focus on seeking an ICJ Advisory Opinion. Therefore, it is recommended to lobby within the UN General Assembly to acquire a majority for a request for an advisory opinion by the ICJ. The request submitted to the ICJ should be formulated so as to include a legal clarification of the referendum held in Crimea as well as the impact of the Russian Federation on the referendum. Following an advisory opinion, it is recommended to gather international support within the UN General Assembly and adopt a resolution with a majority as large as possible stating that Crimea was illegally occupied and annexed by the Russian Federation. Such support can be achieved by promoting, and continuing to gather, international support confirming the illegality of the occupation of Crimea during annual Crimea Platform meetings. Also, it is recommended to establish COI or Consultative Committee of Experts to provide the ICJ with facts of the occupation and annexation of Crimea.
        1) Was 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 lawful and was the following admission of the Republic of Crimea to Russia lawful, in regard to Ukrainian legislation and international law, including obligations reflected in the United Security Charter, General Assembly resolution 2625 (XXV) of 24 October 1970?
        2) Whether the completion of the referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution met the requirements of Ukrainian legislation and international law?
        3) What are the consequences for all States and, in particular, the United Nations, under international law, including obligations reflected in the above-mentioned documents, arising from the illegal admission of the Republic of Crimea to Russia, and taking into account the recorded facts and events that led up to its admission?
    b. It is recommended to create a special tribunal over the Russian aggression against Ukraine with jurisdiction to establish the facts of occupation and

annexation. It is important to ensure that the tribunal's decision and jurisdiction are internationally recognised.

2. As long as no legal determination of the status of Crimea by the ICJ or the special tribunal has been achieved, Ukraine is advised to apply the relevant provisions of UNCLOS in its law of the sea-related dispute with the Russian Federation:
   a. In *the Coastal State Rights Dispute*, it is recommended that Ukraine invokes Article 58 UNCLOS regarding the rights and duties of other states in the EEZ and Article 59 UNCLOS concerning disputes arising between coastal states and other states in the EEZ. From a procedural perspective, Ukraine is advised to use Article 290(1) UNCLOS to request provisional measures to stop Russian activities interfering with Ukraine's coastal state rights under UNCLOS. The basis for this could be that the waters surrounding Crimea may be considered by the arbitral tribunal as disputed and by this, both parties have to refrain from activities in such disputed waters. Since Russia exercises a certain level of control over these waters, then, it can be prescribed the violation of provisions of UNCLOS as not complying with it within such disputed waters.
   b. Attempts to hold Russia responsible for violating the "peaceful purposes" or "peaceful uses" clauses under UNCLOS are not seen as promising. Even if this issue should fall under UNCLOS jurisdiction, then the optional exception concerning military activities would be triggered. Therefore, it is more important to apply Articles 74(3) and 83(3) UNCLOS, which involve obligations to cooperate, in particular, the obligation to enter into provisional arrangements of a practical nature and not to jeopardise or hamper the reaching of a boundary agreement. The arguments that Article 74(3) and 83(3) UNCLOS are exempt from the application of optional exception under Article 298(1)(a) should be made.
   c. Assuming that the waters of the Azov Sea or the Kerch Strait constitute internal waters, it is important to make the argument that these waters are not fully excluded from the application of UNCLOS. The dispute related to such waters could qualify as a dispute concerning the interpretation or application of UNCLOS. Ukraine should use the provisions of UNCLOS, namely, the Preamble, Article 2, 123 and Part XII, Part XIII, Part XIV and Part XV, as those that are still applicable in the internal waters and could arguably invoke these provisions regardless of the Crimean occupation.
   d. Assuming that the waters of the Azov Sea or the Kerch Strait could be recognised as falling under a historical title, and if it would be recognised, then it is possible to argue that even if such a title existed, the fact that there is an ongoing Russian aggression against Ukraine, for the further stability and peace in the region, it is important to govern such waters within the provisions of UNCLOS. The possibility to resort to compulsory dispute settlement should help the state resolve their dispute between themselves

within peaceful dispute settlement as the coastal states in the waters of the Azov Sea and the Kerch Strait.

3. After the determination of the Crimean occupation and *de facto* control of Crimea regained Ukraine should consider the possibility of bringing the dispute related to maritime delimitation in the Azov Sea and the Kerch Strait to compulsory conciliation under Annex V UNCLOS. It could help parties to delimit the waters of the Azov Sea and the Kerch Strait and, consequently, to reduce tensions between the states over the disputed maritime waters. However, since the compulsory conciliation does not include a binding decision, it should be done after the Russian Federation is held accountable for its current violations of international law and there would be estimated that the Russian Federation would fulfil its obligations in good faith as well as exercise its rights, jurisdiction and freedoms recognised by UNCLOS in a manner which would not constitute an abuse of right.
4. To encourage all states parties to UNCLOS, in particular the coastal states in the Black Sea, to assert their rights under UNCLOS, addressing issues like freedom of navigation and environmental damage collaboratively regarding the ongoing new wave of aggression by the Russian Federation against Ukraine.
5. Further research on topics that were not within the objectives of this dissertation but still require in-depth analysis, is recommended. Firstly, given the ongoing debate between UNCLOS and international humanitarian law, it's essential to clarify under which circumstances provisions of UNCLOS apply during international armed conflict in a variety of different situations. Secondly, after the Russian aggression against Ukraine, there are possible ways of reforming the UN to work more efficiently and effectively in situations where it is necessary to maintain international peace and security.

These recommendations are aimed at providing guidance to addressing the complex legal issues related to the occupation of Crimea and ensuring the effective application of dispute settlement procedures under UNCLOS in this context.

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MYKOLAS ROMERIS UNIVERSITY

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THE CRIMEAN OCCUPATION AND DISPUTE RESOLUTION UNDER THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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THE CRIMEAN OCCUPATION AND DISPUTE RESOLUTION UNDER THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

SUMMARY

The research problem

In 2014 the Russian Federation occupied and annexed a part of the sovereign territory of Ukraine – the Crimean Peninsula (Autonomous Republic of Crimea (ARC)). On September 16, 2016, Ukraine served the Russian Federation with a Notification and Statement of Claim under Annex VII UNCLOS[945] referring to the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (further, *Coastal State Rights Dispute)*. Later, on April 1, 2019, Ukraine served the Russian Federation with another dispute - *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*. And on April 16, 2019, Ukraine submitted the request for the prescription of provisional measures to International Tribunal for the Law of the Sea (ITLOS).

One of the main issues in the *Coastal State Rights Dispute* is conflicting views between Ukraine and the Russian Federation concerning the status of Crimea, starting from 2014. One view is that Crimea was annexed, while the other that it legally became a territory of the Russian Federation.[946] The Russian Federation objects to the jurisdiction of the tribunal under Annex VII UNCLOS and states that "the real issue in this case concerns sovereignty over land territory (i.e., sovereignty over Crimea)."[947] Even the name of the dispute itself - *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* - requires a tribunal's decision about which is the coastal state of the territory of Crimea. It should be noted that the majority of the breaches related to the coastal state rights were predetermined by the occupation of Crimea. It should also be kept in mind that according to Article 288(1) UNCLOS, the subject-matter jurisdiction granted by UNCLOS is "over any dispute concerning the interpretation or application of this Convention".

As a consequence of the Russian Federation's occupation of the ARC and the city of Sevastopol, Ukraine has lost control over a significant portion of its territorial sea and EEZ. In total, this loss amounts to approximately 100,000 square kilometres in both

945 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982).

946 More detailed on this as well as for the detailed overview of the dispute see, Chapter I, Part 1.3.2., in particular part 1.3.2.1. *Coastal State Rights Dispute.*

947 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation (19 May 2018), para. 13, p.5.

the Black and Azov seas, out of the 137,000 square kilometers of sea waters over which Ukraine exercises sovereignty or sovereign rights.[948]

UNCLOS preamble highlights that "all issues relating to the law of the sea"' need to be settled "in a spirit of mutual understanding and cooperation" which is "an important contribution to the maintenance of peace, justice and progress for all peoples of the world".[949] To give it practical implementation, UNCLOS includes dispute settlement procedure in Part XV.

When Ukraine submitted the application in the *Coastal State Rights Dispute,* the Russian Federation objected to the jurisdiction of an *ad hoc* tribunal instituted under Annex VII of UNCLOS.[950] One of the objections was that the dispute concerns Ukraine's "claim to sovereignty over Crimea".[951] In return, Ukraine replied that "under any proper interpretation of the Convention, a respondent State's mere assertion of a claim to land territory cannot automatically divest a tribunal of jurisdiction to resolve a maritime dispute".[952]

According to the view of Valentin Schatz and Dmytro Koval "it is far from clear that Russia's objection based on its claim to sovereignty over Crimea would fall into the category of abusive objections."[953] In this regard Peter Tzeng stated that "the validity of this claim, however, depends on a Ukrainian claim of sovereignty over Crimea".[954] Gaiane Nuridzhanian similarly pointed out that "the jurisdictional challenge for the Ukrainian case arises from the fact that the dispute under the UNCLOS originates in the conflict between the parties concerning the annexation of Crimea".[955] According to the above-mentioned, the dispute can be seen as having matters falling outside the tribunal's jurisdiction.[956] Indeed, in its Award on Preliminary Objections the arbitral

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948 Bohdan Ustymenko, Tetiana Ustymenko, "Maritime Security of Ukraine. A Reference Work. (13) The Prohibition Against Vessels and Ships Entering the 12-Mile Zone of the Crimean Peninsula", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183694; Bohdan Ustymenko, "Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.

949 Preamble, UNCLOS.

950 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), Award on Preliminary Objections (21 February 2020), paras. 32-34. Further, *Coastal State Rights Dispute.*

951 *Ibid.*, para. 43.

952 *Coastal State Rights Dispute*, Written Observations and Submissions of Ukraine on Jurisdiction (27 November 2018), para. 19, pp. 8-9.

953 Valentin Schatz and Dmytro Koval, "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS", *EJIL: Talk! (blog)*, September 6, 2018. https://www.ejiltalk.org/insights-from-the-bifurcation-order-in-the-ukraine-vs-russia-arbitration-under-annex-vii-of-unclos/.

954 Peter Tzeng, "Jurisdiction and Applicable Law under UNCLOS", *The Yale Law Journal* 126, 1 (October 2016): 242.

955 Gaiane Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction", *Max Planck Yearbook of United Nations Law* 21 (2017): 392.

956 *Ibid.*

tribunal took the position that there is an existing sovereignty dispute over Crimea. Due to this position, Ukraine has to revise and resubmit its Memorial according to the established jurisdiction.[957]

The focus of this dissertation is the subject-matter jurisdiction of a court or a tribunal under provisions of UNCLOS. Therefore, it acknowledges the limits of such subject-matter jurisdiction without referring to possible ways of extending such jurisdiction by applying Article 293 UNCLOS regarding the applicable law. The subject-matter jurisdiction should also be differentiated from the concept of admissibility that could lead to the same result as lack of the jurisdiction but with respect to different reasons.

It should also be noted that the focus of this dissertation is not about the legal status of Crimea. The status of Crimea is regarded as occupied and illegally annexed territory based on the UN General Assembly Resolution 68/262 on March 27, 2014, on Territorial integrity of Ukraine. The status of Crimea as occupied and annexed was confirmed by various international authorities and organizations as well as a vast amount of scholars supporting this statement.[958] It is also based on the assumption that the occupation of Crimea by the Russian Federation is a violation of prohibition of the use of force[959] and therefore, the word "occupation" is used in this thesis to reflect the illegal change of the control over Crimea.

The Russian Federation did not agree with the status of Crimea as occupied and annexed.[960] In the *Coastal State Rights Dispute* the Russian Federation used the objection to the jurisdiction of the tribunal under Annex VII UNCLOS related to "the disputed territorial sovereignty issue" multiple times.[961] The Russian Federation brings analogical arguments as regards to Ukraine and its sovereignty in other disputes.[962]

In *Dispute Concerning the Immunity of Three Ukrainian Naval Vessels and the Twenty-Four Servicemen on Board* before ITLOS, the Russian Federation in the Note Verbale, on April 30, 2019 pointed out "its strong disagreement" with the qualification of the status of the Kerch Strait and territorial sea adjusted to Crimea.[963] The Russian Federation stated that as the qualification of the Kerch Strait and territorial sea was given by Ukraine "such issues of sovereignty over Crimea cannot be the subject

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957 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 950*, paras. 197-198.

958 For the detailed overview, see Chapter I, part 1.1.2. Occupation of Crimea in 2014.

959 *Ibid.* But also see, Daniel Wisehart, "The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?", *EJIL: Talk!* (blog), March 4, 2014, https://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/. He makes a conclusion that the Russian use of force in Crimea is illegal under international law.

960 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation, *op. cit. 947*, 4, para. 10.

961 *Ibid.,* 10, para. 26.

962 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation),* Preliminary objections of the Russian Federation (24 August 2020), 5, para. 23.

963 Note verbale from the Embassy of the Russian Federation in the Federal Republic of Germany of 30 April 2019.

of any proceeding before the Tribunal."[964] On the 25th of May 2019, ITLOS issued an order approving the immediate release of Ukrainian naval vessels and detained Ukrainian servicemen. In this order ITLOS outlined that "the rights claimed by Ukraine are rights to the immunity of warships and naval auxiliary vessels and their servicemen on board under the Convention and general international law".[965] It should be noted that as it was the provisional measures stage, ITLOS only checked for the *prima facie* jurisdiction, while the sovereignty issues are dealt with at the later stages. ITLOS could not have dealt with the jurisdictional issues at this stage. But even in the further stage, the arbitral tribunal instituted under Annex VII UNCLOS in the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* did not include the sovereignty issues over Crimea in its Award on the Preliminary Objections of the Russian Federation. The reason for this is that "Ukraine advances its case on the basis that there is no need for the Tribunal to take any position on the issue of territorial sovereignty over Crimea."[966] Therefore, the Russian Federation agrees that the issue of territorial sovereignty over Crimea is not part of the dispute as regardless of a coastal state, the Russian Federation's actions against Ukraine's naval vessels would still allegedly violate the relevant provisions of UNCLOS.[967]

Meanwhile, in the *Coastal State Rights Dispute,* the arbitral tribunal ruled that it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. As a result, the Arbitral Tribunal cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea.[968]

Thus, while one of the disputes rejected in part because of the unclear coastal state, another one did not have this issue at all, as the dispute was more from the view that regardless of a coastal state issue the immunity of warships should not be violated. Therefore, it is possible to see that regardless of Crimea's sovereignty claim, there are still rights and obligations of states under UNCLOS that can be brought under jurisdiction of dispute settlement bodies under UNCLOS.

It should be noted that the level of uncertainty surrounding sovereignty disputes is clearly demonstrated in the decision in *Chagos Marine Protected Area Arbitration*

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964 *Ibid.*

965 *Detention of three Ukrainian naval vessels* (Ukraine v. Russian Federation), Provisional Measures, Order, 25 May 2019 ITLOS Reports 2018-2019 (further, *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS), para. 96, p. 306.

966 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen,* Preliminary objections of the Russian Federation, *op. cit. 962,* 5, para. 23.

967 *Ibid.* For the detailed overview of the dispute see, Chapter I, Part 1.3.2., in particular part 1.3.2.2. *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen.*

968 *Coastal State Rights Dispute,* Award on Preliminary Objections, *op. cit. 950*, para. 197.

(Mauritius v. United Kingdom).[969] It stated that "the Tribunal 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. That, however, is not this case, and the Tribunal therefore has no need to rule upon the issue."[970]

The question whether Crimean occupation can be considered as a minor issue of territorial sovereignty being additional to a dispute concerning the interpretation or application of the Convention was answered. In particular, in its Award on Preliminary Objections in the *Coastal State Rights Dispute,* the arbitral tribunal stated that Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the "coastal State" within the meaning of provisions of the Convention invoked by Ukraine.[971]

Thus, the question arises what rights and obligations provided by UNCLOS are influenced by the Crimean occupation? Why in one dispute the Crimean occupation is a prerequisite to the arbitral tribunal's decision under UNCLOS and in another it is not? Is there anything that can be done to bring to the jurisdiction of a court or a tribunal adjudicating on the basis of UNCLOS, a number of claims submitted by Ukraine that are affected by the question of Crimean occupation?

Thus, it is necessary to analyse to what extent the occupation of Crimea affects UNCLOS provisions. Moreover, it is crucial to analyse what issues related to the Crimean occupation can be decided by dispute settlement bodies adjudicating under Part XV of UNCLOS, what issues cannot be decided regardless of the Crimean occupation, and whether there are alternative ways to address the alleged violation of rights and obligations under UNCLOS, assuming *arguendo* the lack of jurisdiction *ratione materiae* established in the *Coastal State Rights Dispute*. Therefore, this dissertation focuses on the question of the subject matter jurisdiction of a court or tribunal under the provisions of UNCLOS and does not involve the questions of admissibility or usage of Article 293 UNCLOS, by interpreting applicable law to extend the jurisdiction of such a court or tribunal.

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969 *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom) (further, *Chagos MPA Arbitration*), Award (18 March 2015). In a nutshell, the dispute involved Mauritius challenging the United Kingdom's establishment of a Marine Protected Area (MPA) around the Chagos Archipelago. Mauritius believed that this action breached UNCLOS and other laws. Mauritius argued that the UK, by declaring the MPA, infringed upon its rights as a coastal state and contended that the UK was not entitled to declare maritime zones unilaterally, especially against Mauritius' objections, considering the historical circumstances of detaching the Chagos Archipelago.

970 *Ibid.,* 90, para 221.

971 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 950,* 58-59, para. 195.

Relevance of the topic

The illegal occupation and further annexation of Crimea by the Russian Federation caused significant violations of the Ukrainian rights as a coastal state in the waters surrounding Crimea. Crimean occupation affects approximately 73% of the waters over which Ukraine exercises sovereignty or sovereign rights.[972]

It highlights a lot of uncertainties that existed even before the occupation of Crimea between Ukraine and the Russian Federation in respect of their rights and obligations as coastal states in the waters of the Azov Sea and the Kerch Strait.[973] These issues became even more urgent and critical after the occupation of Crimea and continue to exist. Ukraine's ability to defend its legitimate interests in the waters generated by Crimea depends on the interpretation and application of provisions of UNCLOS as well as on determination of the Crimea as occupied and annexed by the Russian Federation.

The relevance to find out the answers concerning the Crimean occupation and the dispute resolution under UNCLOS is significantly highlighted by the ongoing full-scale aggression of the Russian Federation against Ukraine. The international armed conflict is already having its impact. It is a belief that this ongoing conflict is accelerating an existing phase of significant changes in how states handle conflicts and strive for long-term peace in the international system.[974] The prohibition of the use of force, as codified in Article 2(4) of the UN Charter, was historically seen as the most important provision in the Charter.[975] Moreover, it is widely accepted today that states should resolve their disputes peacefully using the methods outlined in Article 33 of the Charter until the Security Council makes a determination under Article 39.[976] In the current global crisis, characterised by a significant breakdown of the international collective security system and a crisis of values, it is essential to

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972 "Percentage Calculator: 100000 Is What Percent of 137000? = 72.99", accessed 10 September 2023, https://www.percentagecal.com/answer/100000-is-what-percent-of-137000#. Numbers of square kilometres are based on information provided by Bohdan Ustymenko, "Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.

973 Such uncertainties were predominated by the lack of the maritime delimitation in the Azov Sea and the Kerch Strait, unclear status of the Azov Sea and the Kerch Strait and its regulation by UNCLOS provisions.

974 Anna Geis and Ursula Schröder, "Global Consequences of the War in Ukraine: The Last Straw for (Liberal) Interventionism?" *Zeitschrift Für Friedens- Und Konfliktforschung* 11, 2 (1 October 2022): 296-297. On a more practical level, see, Richard Higgott and Simon Reich, "It's bifurcation, not bipolarity: understanding world order after the Ukraine invasion," Policy brief, vol. 16. Brussels: CSDS (2022), https://brussels-school.be/sites/default/files/CSDS%20Policy%20brief_2216.pdf.

975 Antônio Augusto Cançado Trindade, "The Primacy of International Law over Force" in *Promoting Justice, Human Rights and Conflict Resolution through International Law / La Promotion de La Justice, Des Droits de l'homme et Du Règlement Des Conflits Par Le Droit International* (Leiden: Brill Nijhoff, 2007), 1039.

976 *Ibid.*

emphasise the supremacy of international law over the use of military force.[977] The compulsory dispute settlement procedures under UNCLOS could serve as indicators of the supremacy of international law.

The International Court of Justice (hereinafter ICJ) in *the Continental Shelf* case submitted to it in 1982 by Special Agreement between Libya and Malta stated "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[978] Despite the fact that this proceeding was not decided on the basis of UNCLOS, it illustrates the approach that can be used by a court or a tribunal that is granted its jurisdiction by provisions of UNCLOS. Thus, it is relevant to establish how the provisions of UNCLOS can be exercised to its fullest.

UNCLOS offers an ideal framework where it can show the flexibility in adapting to the changing requirements of States without the need to be amended.[979] At the same time, a state that became a party to the treaty may reconsider and try to reclaim powers it previously delegated.[980] Therefore, it is important to keep a balance between the granted jurisdiction and exercise it to the fullest without expanding or limiting.

Therefore, the relevance of this doctoral dissertation is predetermined by the occupation of Crimea, the loss of control over nearly 73% of the waters over which Ukraine exercises sovereignty or sovereign rights and necessity of the responsibility over the violations of UNCLOS that requires a dispute settlement body under UNCLOS to decide, expressly or implicitly, on the sovereignty of Ukraine over Crimea.[981]

Before the full-scale invasion of Ukraine by the Russian Federation on February 24, 2022, Ukraine and Russia included in their negotiation process only Donetsk and the Luhansk region. Thus, in their negotiations during 2014-2015[982], these two countries were talking about ceasing fire in the Donetsk and Luhansk regions. No question of Crimea has been raised in those agreements. Reality tells that before the new wave of

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977 *Ibid*., 1055.

978 *Continental Shelf (Libyan Arab Jamahiriya/Malta),* (Judgment), 3 June 1985, ICJ. Rep 13, para 19.

979 Hayley Keen and Charlotte Nichol, "Sea level rise: The primary challenge to effective implementation of UNCLOS, Written evidence (UNC0038)," *UK Parliament International Relations and Defence Committee Inquiry UNCLOS: fit for purpose in the 21st Century?* (12 November 2021): 3. Original reference was made to the impacts of climate change. However, the author of this dissertation believes that it could be applied not only to the climate change.

980 José E. Alvarez, "State Sovereignty Is Not Withering Away: A Few Lessons for the Future," in *Realizing Utopia: The Future of International Law*, edited by The Late Antonio Cassese (Oxford University Press, 2012), 31.

981 It should be noted that none of the disputes are solved.

982 See, Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk Agreement), *United Nations Peacemaker*, 5 September 2014, https://peacemaker.un.org/UA-ceasefire-2014; Memorandum on the Implementation of the Provisions of the Protocol on the Outcome of Consultations of the Trilateral Contact Group on Joint Steps Aimed at the Implementation of the Peace Plan (Implementation of the Minsk Agreement), *United Nations Peacemaker*, 19 September 2014. https://peacemaker.un.org/implementation-minsk-19Sept2014; Package of Measures for the Implementation of the Minsk Agreements, *United Nations Peacemaker*, 12 February 2015, https://peacemaker.un.org/ukraine-minsk-implementation15.

the Russian aggression, Crimea had all chances to become and to remain as a frozen conflict between Ukraine and the Russian Federation. It did not happen as the conversation of the legality of the occupation of Crimea became vivid on February 24, 2022. Thus, such circumstances could serve as another reason for the relevance of this topic.

Research review of the relevant resources

While the occupation of Crimea arose as an issue for legal research only in 2014, the dispute settlement under UNCLOS started its research history as early as 1984. However, there is a possibility to use the negotiation drafts and papers that were written even before 1984 as those that are related to the adopted Part XV UNCLOS. Thus, the general topic of the resolution of disputes under provisions of UNCLOS is widely researched and has been a subject of legal scholarship a lot of times. There are widely-cited works of distinguished scholars such as Alan Boyle[983], Yoshifumi Tanaka[984], Natalie Klein[985], Igor Karaman[986], Louis Sohn[987], Douglas Guilfoyle[988], Robin Churchill[989],

983 Alan Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", *International & Comparative Law Quarterly* 46, 1 (1997); Alan Boyle, "Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea" in *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford: Hart Publishing, 2003); Alan Boyle and Christine Chinkin, *The Making of International Law*, (Oxford, New York: Oxford University Press, 2007); Alan Boyle, "The International Tribunal for the Law of the Sea and the Settlement of Disputes," in *The Changing World of International Law in the Twenty-First Century:A Tribute to the Late Kenneth R. Simmonds* Joseph Jude Norton, Mads Tønnesson Adenæs and Mary Footer (The Hague, Kluwer Law International, 1998): 99–134; Alan Boyle, "Problems of compulsory jurisdiction and the settlement of disputes relating to straddling fish stocks," *International Journal of Marine and Coastal Law*, 14, 1 (1999): 1–25.

984 Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (Cambridge: Cambridge University Press, 2019); Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press, 2018).

985 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005); Natalie Klein, "The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?" *Proceedings of the ASIL Annual Meeting* 108 (2014): 359–364; Natalie Klein, "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention" *International Journal of Marine and Coastal Law* 32 (2017): 332-363; Natalie Klein, "Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions," *Chinese Journal of International Law* 15, 2 (2016): 403-415; Natalie Klein and McCreath Millicent, "Resolving international disputes concerning the marine environment" in *Research Handbook on International Marine Environmental Law* (Cheltenham, UK: Edward Elgar Publishing, 2023): 124-149; Douglas Guilfoyle and Natalie Klein, "The UN Convention on the Law of the Sea Dispute Settlement System, Written evidence (UNC0001)." *UK Parliament International Relations and Defence Committee Inquiry UNCLOS: fit for purpose in the 21st Century?* 12 November 2021.

986 Igor V. Karaman, *Dispute Resolution in the Law of the Sea* (Leiden: Brill Nijhoff, 2012).

987 Louis B. Sohn, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?" *Law and Contemporary Problems* 46, 2 (1983): 195–200.

988 Douglas Guilfoyle, "Governing the oceans and dispute resolution: An evolving legal order?" in *Global governance and regulation: Order and disorder in the 21st century* Leon Wolff and Danielle Ireland-Piper (eds) (Routledge, 2018).

989 Robin Churchill, "Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means", in *International Law and Dispute Settlement: New Problems and Techniques*,

J. G. Merrills[990], A. O. Adede[991], Saiful Karim[992], Kate Parlett[993], Alexander Proelss[994],

(Hart Publishing, 2010): 143–171; Robin Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During Its First Decade" in *The Law of the Sea: Progress and Prospects* David Freestone, Richard Barnes & David M Ong (eds.) (Oxford: Oxford University Press, 2006): 388–416; Robin Churchill, "The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use", *Ocean Development & International Law* 48, 3–4 (2 October 2017): 216-238; Robin Churchill, "International Law Obligations of States in Undelimited Maritime Frontier Areas", in *Frontiers in International Environmental Law: Oceans and Climate Challenges*, (Leiden: Brill Nijhoff, 2021): 141–170. And many more of his works and articles. The special attention has to be given to his articles in *International Journal of Marine and Coastal Law* about Dispute Settlement in the Law of the Sea: Survey for different years. See for example, the latest: Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2017," *International Journal of Marine and Coastal Law* 33, 4 (2018): 653-682; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2018," *International Journal of Marine and Coastal Law* 34, 4 (2019): 539-570; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2019", *The International Journal of Marine and Coastal Law* 35, 4 (2020): 621–659; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2020", *The International Journal of Marine and Coastal Law* 36, 4 (2021): 539-573; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2021", *The International Journal of Marine and Coastal Law* 37, 4 (2022): 575-609.

990 John G. Merrills, "The Law of the Sea Convention" in *International Dispute Settlement* (Cambridge: Cambridge University Press, 2011): 167–193.

991 A. O. Adede, "The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention," *Ocean Development & International Law* 11, 1–2 (1982): 125–48; A. O. Adede, "The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary" in *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Leiden: Brill Nijhoff, 2021).

992 Saiful Karim, "Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System" in *Litigating International Law Disputes*, edited by Natalia Klein (Cambridge: Cambridge University Press, 2014): 260–283.

993 Kate Parlett, "Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals," *Ocean Development & International Law* 48, 3–4 (2017): 284–299.

994 Alexander Proelss, "The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics* 46 (2018): 47–60; Alexander Proelss, "Implicated Issues and Renvoi Clauses: Challenges to the Regime for the Peaceful Settlement of Disputes under the Law of the Sea Convention", in *Peaceful Management of Maritime Disputes* (London: Routledge, 2023): 29–54.

Sean D. Murphy[995], Bjørn Kunoy[996], David Anderson[997], James Harrison[998], Thomas A. Mensah,[999] Lan Ngoc Nguyen[1000], and many more.[1001]

The question of territorial sovereignty and law of the sea was covered by works of Irina Buga[1002], Clive Schofield[1003], Paul C. Irwin[1004], Bernard H. Oxman[1005], Robert W.

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995 Sean D. Murphy, "Creativity in Dispute Settlement Relating to the Law of the Sea," in *By Peaceful Means: International Adjudication and Arbitration* Charles N. Brower et al. (Oxford, New York: Oxford University Press, 2023).

996 Bjørn Kunoy, "The Scope of Compulsory Jurisdiction and Exceptions Thereto under the United Nations Convention on the Law of the Sea", *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 58 (2021): 78–141.

997 David Anderson, "Peaceful settlement of disputes under UNCLOS", in *Law of The Sea: UNCLOS as a Living Treaty* Jill Barrett and Richard Barnes (eds.) (London, British Institute of International and Comparative Law, 2016): 385–415; David Anderson, "Strategies for dispute resolution: negotiating joint agreements", in *Boundaries and Energy: Problems and Prospects* Gerald Blake, et al. (eds.), (London, Kluwer Law International, 1998): 473–484; David Anderson, "The role of ITLOS as a means of dispute settlement under UNCLOS" in *International Marine Environmental Law: Institutions, Implementation and Innovations* Andree Kirchner (ed.) (The Hague, New York, London, Kluwer Law International, 2003): 19– 29, and others.

998 James Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", *Ocean Development and International Law* 48, 3-4 (2017): 269–283.

999 Thomas Mensah, "The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea", *Max Planck Yearbook of United Nations Law* 2 (1998): 307–323; Thomas Mensah, "The role of peaceful dispute settlement in contemporary ocean policy and law" in *Order for the Oceans at the Turn of The Century*, Davor Vidas and Willy Østreng (eds.), (The Hague, Kluwer Law International, 1999): 81–94.

1000 Lan Ngoc Nguyen, *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (Cambridge: Cambridge University Press, 2023).

1001 For fuller list of sources, see, "Select Bibliography on Settlement of Disputes Concerning the Law of the Sea" in *Yearbook International Tribunal for the Law of the Sea / Annuaire Tribunal international du droit de la mer, Volume 25 (2021)*, (Leiden: Brill Nijhoff, 2022): 165–168. It has a particular Chapter on Select Bibliography on Settlement of Disputes Concerning the Law of the Sea. The *Yearbook International Tribunal for the Law of the Sea* is published annually.

1002 Irina Buga, "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals," *International Journal of Marine and Coastal Law* 27, 1 (2012): 59–95.

1003 Clive Schofield, "Options to Avoid and Resolve Disputes over Island Sovereignty", in *Peaceful Management of Maritime Disputes* (London: Routledge, 2023), 109–128.

1004 P. C. Irwin, "Settlement of Maritime Boundary Disputes - An Analysis of the Law of the Sea Negotiations" *Ocean Development & International Law* 8, 2 (1980): 114-115.

1005 Bernard H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals," in *The Oxford Handbook of the Law of the Sea*, Donald R. Rothwell et al.(ed), (Oxford: Oxford University Press, 2015), 394-400.

Smith and Bradford Thomas[1006], Natalie Klein[1007], etc. A major view is that disputes over territorial sovereignty, including questions related to land territory, are outside of jurisdiction of a court or tribunal under UNCLOS. It is not addressed or covered by UNCLOS.[1008]

The question of the maritime zones generated by the occupied land territory was covered by different scholars[1009], including references to the question of applicability of the law of the sea during an armed conflict.[1010] However, only in recent publications, some authors refer to waters around Crimea.[1011]

When it comes to the topic of Crimea, there were some historical analyses conducted prior to 2014. However, the research on this subject gained significant attention following the Russian annexation and occupation of Crimea. The literature on this issue includes discussions on self-determination, the presence of unidentified armed forces (Russian military personnel), the use of force, the illegal referendum to join Russia, the Russian declaration of Crimea as part of the Russian Federation, the application of economic sanctions, the abuse of human rights in Crimea since the occupation, the regulation and protection of investments, as well as the analysis of lawfare against Russia in various courts and tribunals. These matters all pertain to the

1006 Robert W. Smith and Thomas Bradford, "Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes," in *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, Myron H. Nordquist and John Norton Moore (eds), (Leiden: Brill Nijhoff, 1998).

1007 Natalie Klein and Kate Parlett, *Judging the Law of the Sea* (Oxford, New York: Oxford University Press, 2022), 103-116.

1008 See for example, Buga, *op. cit. 1002,* 68; Smith and Bradford, *op. cit. 1006*: 55, 66; Sienho Yee, "The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections," *Chinese Journal of International Law* 13, 3 (2014): 663-688.

1009 See, for example, Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2019), 47-48, 224. Dinstein believes that when effective control is established on land, it attaches itself to any abutting maritime areas, including internal waters, territorial sea and continental shelf. He also covers legal regulation of submarine cables connecting an occupied territory with a neutral territory. Also see, Eyal Benvenisti, *The International Law of Occupation*, (Oxford, New York: Oxford University Press, 2012); Bing Bing Jia, "The Terra Nullius Requirement in the Doctrine of Effective Occupation: A Case Study in: Law of the Sea" in *From Grotius to the International Tribunal for the Law of the Sea*, Lilian del Castillo (ed.) (Leiden: Brill Nijhoff, 2015), 657-673.

1010 Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford, New York: Oxford University Press, 2011), 259-261; John Astley and Michael Schmitt, "The Law of the Sea and Naval Operations," *Air Force Law Review* 42 (1997): 119-138; Vaughan Lowe, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," in *International Law Studies: The Law of Naval Operations*, Horace B. Robertson Jr (ed), (1991): 111, 130–3; George P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (Routledge, 1998): 7; Marco Longobardo, "The Occupation of Maritime Territory Under International Humanitarian Law," *International Law Studies* 95 (2019): 322-361.

1011 Raul Pedrozo, "Russia-Ukraine Conflict: The War at Sea," *International Law Studies*, US Naval War College, 100 (2023): 1-61; Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law. Elements of International Law*, (Oxford, New York: Oxford University Press, 2022).

annexation and occupation of Crimea.[1012]

At the same time, there is still a limited amount of legal research specifically related to the occupation of Crimea and dispute settlement under UNCLOS. This can be easily explained by the fact that Crimea was occupied and annexed in 2014[1013] and Ukraine submitted the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* to an Annex VII Arbitral Tribunal only in 2016. It has been ten years since the occupation and eight years since the topic of the Crimean occupation and dispute settlement under UNCLOS began to be discussed. While there have been a decent number of articles accompanying research on this topic, no comprehensive research has been conducted yet.

However, it should be noted that there is a quite some number of legal writings available on the matter of "mixed disputes", "incidental issue" or "implicated issue problem" within the law of the sea that existed before the occupation of Crimea or

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1012 Robert Geiß, "Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind," *International Legal Studies* 91 (2015): 425-449; Christian Maxsen, "The Crimea Crisis: An International Law Perspective," *Heidelberg Journal of International Law* 74 (2014): 367-391; Antonello Tancredi, "The Russian Annexation of the Crimea: Questions Relating to the Use of Force," *Questions in International Law* 1, 5 (2014): http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/; Oleksandr Zadorozhnii, "To Justify against All Odds: The Annexation of Crimea in 2014 and the Russian Legal Scholarship," *Polish Yearbook of International Law* 35 (2015): 139-170; Lina Laurinavičiūtė and Laurynas Biekša, "The Relevance of Remedial Secession in the Post-Soviet 'Frozen Conflicts'," *International Comparative Jurisprudence* 1, 1 (2015): 66–75; Ilona Khmelova, "Institute of Recognition in the Context of the Occupation and Annexation of the Crimea by the Russian Federation," *Ukrainian Journal of International Law* 2 (2016): 23-26; Alisa Gdalina, "Crimea and the Right to Self-Determination: Questioning the Legality of Crimea's Secession from Ukraine," *Cardozo Journal of International and Comparative Law* 24, 3 (2016): 531-564; Oleksandr Zadorozhnii, "The International Legal Personality of 'DPR' and 'LPR'," *Ukrainian Journal of International Law* 4 (2016): 5-11; Kit De Vriese, "The Application of Investment Treaties in Occupied or Annexed Territories and 'Frozen' Conflicts: Tabula Rasa or Occupata?" in *Investments in Conflict Zones* (Leiden: Brill Nijhoff, 2020): 319–358; Christine Sim, "Parallel Proceedings Arising from Uncertain Territorial and Maritime Boundaries" in *Investments in Conflict Zones*, (Leiden: Brill Nijhoff, 2020): 209–245; Peter Tzeng, "Sovereignty over Crimea: A Case for State-to-State Investment Arbitration," *Yale Journal of International Law* 41, 2 (2016): 459-468; Cameron Miles, "Lawfare in Crimea: Treaty, Territory, and Investor–State Dispute Settlement," *Arbitration International* 38, 3 (2022): 135–150; Saba Pipia, "Tensions in Crimean Waters: Can Russia's Actions Amount to Threat of Force?" *EJIL: Talk!* (blog), July 28, 2021. https://www.ejiltalk.org/tensions-in-crimean-waters-can-russias-actions-amount-to-threat-of-force/; Andrii Voitsikhovkyi and Oleksandr Bakumov, "Armed Aggression of the Russian Federation against Ukraine as a Threat to the Collective Security System" [in Ukrainian: "Zbroyna ahresiya Rosiys'koyi Federatsiyi proty Ukrayiny yak zahroza systemi kolektyvnoyi bezpeky"], *Law and Safety* 88, 1 (2023): 134-145.

1013 "Condemning the ongoing temporary occupation of part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter "Crimea") – by the Russian Federation, and reaffirming the non-recognition of its annexation". See, General Assembly Resolution A/RES/77/229 on Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), 15 December 2022.

submission of disputes involving waters around Crimea under UNCLOS.[1014] Moreover, once such disputes were submitted, they were analysed from the view of another example of a mixed dispute.[1015] While some scholars use the definition of "mixed dispute" to address a dispute regarding maritime delimitation or law of the sea dispute involving questions over disputed territory,[1016] other ones use it in broader sense, meaning that it is a dispute involving law of the sea issues dealt with by UNCLOS along with external issues[1017] or a law of the dispute with matters excluded by the optional exception in Article 298 UNCLOS.[1018] The definitions of "incidental issue" or "implicated issue problem" within the law of the sea scholarship is used to address matters that are considered as a law of the sea dispute but also invoke some external issues.[1019] Overall, it is possible to determine the similarities between these definitions,

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1014 Buga, *op. cit. 1002*, 59–95; Wensheng Qu, "The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond", *Ocean Development & International Law* 47, 1 (2016): 40–51; Jia Bing Bing, "The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge", *German Yearbook of International Law* 57 (2015): 4; Miguel García García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Leiden: Brill Nijhoff, 2015), 26-28; etc.

1015 Robert Volterra, et al., "The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait," *The International Journal of Marine and Coastal Law* 33, 3 (2018): 616; Sandrine W. De Herdt, "Mixed Disputes", *The International Journal of Marine and Coastal Law* 37, 2 (2022): 358–367; Xinxiang Shi and Chang Yen-Chiang, "Order of Provisional Measures in Ukraine versus Russia and Mixed Disputes Concerning Military Activities," *Journal of International Dispute Settlement* 11, 2 (2020): 278–294; Viktoriia Hamaiunova, "Legal Position of LOS Tribunal Regarding Mixed Disputes", *Technology Transfer: Innovative Solutions in Social Sciences and Humanities* 3 (18 May 2020): 80–83; Ke Song, "The Battle of Ideas under LOSC Dispute Settlement Procedures", *The International Journal of Marine and Coastal Law* 38, 2 (2023): 207–227; Yoshifumi Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *International Law Studies* 96 (2020): 223-256; Alexander Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits*, (Leiden: Brill Nijhoff, 2022): 28; Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", *op. cit. 998,* 275–278; Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *New York University Journal of International Law and Politics* 50 (2018): 447–508.

1016 Buga, *op. cit. 1002*; Qu, *op. cit. 1014,* 45; Song, *op. cit. 1015,* 220-221; Hamaiunova, *op. cit. 1015,* 80; Volterra, et al., *op. cit. 1015,* 616.

1017 Herdt, *op. cit. 1015,* 359; Shi and Yen-Chiang, *op. cit. 1015,* 10; Bing, "The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge", *op. cit. 1014,* 4; García-Revillo, *op. cit. 1014,* 26.

1018 Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *op. cit. 1015,* 238; Shi and Yen-Chiang, *op. cit. 1015,* 10

1019 Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *EJIL: Talk! (blog)*, October 14, 2016. https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/; Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *Denver Journal of International Law & Policy* 46, 1 (2017), https://digitalcommons.

as all of them one way or another are aimed to address the situation where a dispute that falls under the subject matter jurisdiction of a court or a tribunal also has some external element. Nevertheless, while there is still no clear choice of how to call such issue as well as no clear guidance on how address such issues, this thesis adds to the legal research the ways on what provisions of UNCLOS can be used or legal determinations be made without expanding the scope of the subject matter jurisdiction of a court or a tribunal instituted under Annex VII UNCLOS.

Among the legal research conducted on the topics related to the Crimean occupation and dispute settlement under UNCLOS, two main areas of scholarship can be identified. Some focus on ongoing disputes with *ad hoc* arbitral tribunals under Annex VII of UNCLOS and previously decided the case on provisional measures by ITLOS. These articles also provide an overview of general matters of the law of the sea and how the disputes between Ukraine and Russia raise important considerations. Others seek to evaluate the effectiveness of the lawfare initiated by Ukraine against Russia, not only within the framework of UNCLOS dispute settlement, but also in other courts and tribunals.

For the first ones, there is those who have analysed the *Coastal State Rights Dispute*,[1020] the *Dispute Concerning the Detention of Ukrainian Naval Vessels and*

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du.edu/djilp/vol46/iss1/3; Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *op. cit. 1015,* 447–508; Volterra, et al., *op. cit. 1015,* 614–622; Fabian Simon Eichberger, "Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues", *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht / Heidelberg Journal of International Law* 81, 1 (21 April 2021): 239–240; Loris Marotti, "Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals," in *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, ed. Angela Del Vecchio and Roberto Virzo (Cham: Springer International Publishing, 2019) 399; Matina Papadaki, "Incidental Questions as a Gatekeeping Doctrine", AJIL Unbound 116 (January 2022): 170–175; and others.

1020 "*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation)", PCA Case Repository, accessed 16 June 2023, https://pca-cpa.org/en/cases/149/. See more details in: Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 1019*; Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *op. cit. 1019*; Volterra, et al., *op. cit. 1015,* 614–622; Schatz and Koval, "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS", *op. cit. 953*; Massimo Lando and Nilüfer Oral, "Jurisdictional Challenges and Institutional Novelties – Procedural Developments in Law of the Sea Dispute Settlement in 2020," *The Law & Practice of International Courts and Tribunals* 20, 1 (2021): 191–221; Valentin Schatz, "The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections," *Review of Central and East European* Law 46, 3–4 (2021): 400–415; Dmytro Koval, "The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next" *Lex Portus* 7, 1 (2021): 7–30.

Servicemen,[1021] the *Case concerning the detention of three Ukrainian naval vessels*[1022] as well as all of them or some of them together.[1023] These articles primarily focus on specific questions related to the disputes between Ukraine and the Russian Federation, providing brief overviews of the situation and drafting conclusions. The main emphasis is on evaluating whether the conflict over Crimea's status would hinder dispute settlement under UNCLOS and after the Award, why the tribunal reached certain findings, what is considered as military activities, etc. As a result, there has been a surge of legal scholarship exploring the issue of territorial sovereignty in law of the sea disputes and differences between military activities or law enforcement activities, legal status of the Azov Sea and the Kerch Strait.

Valentin Schatz and Dmytro Koval have a couple of publications regarding Crimea and waters surrounding Crimea with respect to disputes under UNCLOS.[1024] For

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1021 "*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation)," PCA Case Repository, accessed 16 June 2023, https://pca-cpa.org/en/cases/229/. See Yoshifumi Tanaka, "Military Activities or Law Enforcement Activities? Reflections on the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen," *The Korean Journal of International and Comparative Law* 11, 1 (2023): 1–26.

1022 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS. See the articles: Tullio Treves, "The International Tribunal for the Law of the Sea and Other Law of the Sea Jurisdictions (2020)," *The Italian Yearbook of International Law Online* 30, 1 (2021): 321–355; Maria Pia Benosa, "Limits on the Use of Force at Sea in the Jurisprudence of ITLOS: From M/V Saiga to Ukraine/Russia" in *Case-Law and the Development of International Law* (Leiden: Brill Nijhoff, 2021), 208–224; Yurika Ishii, "Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation): Provisional Measures Order (ITLOS)." *International Legal Materials* 58, 6 (2019): 1147–1166; Shi and Yen-Chiang, *op. cit. 1015*; Tanaka, "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases," *op. cit. 1015.* Also see the blog posts, James Kraska, "Did ITLOS Just Kill the Military Activities Exemption in Article 298?" *EJIL: Talk!* (blog), May 27, 2019. https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/; Yurika Ishii, "The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order," EJIL: Talk! (blog), May 31, 2019, https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/.

1023 James Kraska, "The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?" *EJIL: Talk!* (blog), December 3, 2018. https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/; Shi and Yen-Chiang, *op. cit. 1015*; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2019", *op. cit. 989*; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2020", *op. cit. 989*; Nilüfer Oral, "Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS," *International Law Studies* 97 (2021): 478–508; Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits*, *op. cit. 1015,* 93–116; Hosang Boddens, "An Analysis of Some Recent Maritime Challenges from the Perspective of the International Law of Military Operations," *Adelaide Law Review* 43, 2 (2022): 752- 765.

1024 Valentin Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part III" *Völkerrechtsblog*, January 15, 2018, https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-3/; Valentin Schatz and Dmytro Koval, "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS,"

example, in their article "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov, (Part III): The Jurisdiction of the Arbitral Tribunal", Schatz and Koval have determined the potential obstacles to the arbitral tribunal's jurisdiction. The authors state that "it is beyond the scope of this blog post to offer a final conclusion of all issues raised in the course of the analysis". In addition, in the part named "The Problem of Incidental Sovereignty Questions" they mention that there is a need for "further in-depth consideration (which we are unable to provide here)".

Valentin Schatz and Dmytro Koval separately provided their comments over the Award issued in the *Coastal State Rights Dispute.*[1025]

Oleksandr Zadorozhnii in "The Arbitration Process in Accordance with the UN Convention on the Law of the Sea of 1982 and the Recourse to the International Court of Justice as a Way to Resolve Disputes between Ukraine and the Russian Federation: The Effectiveness, Advantages, Disadvantages" provides "with some of the international legal actions to hold Russia responsible for waging the war of aggression against Ukraine and its consequences".[1026] A different research is done by Maryna Rabinovych in 'The Interplay between Ukraine's Domestic Legislation on Conflict and Uncontrolled Territories and Its Strategic Use of "Lawfare" before Russia's 2022 Invasion of Ukraine – A Troubled Nexus?' where she has analysed the connection between domestic and international law in Ukraine before the invasion and examines the potential impact of such a connection on Ukraine's future legal actions against Russia with shortly mentioning its disputes under UNCLOS.[1027]

Nilüfer Oral in "Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS" has examined disputes between Ukraine and Russia in

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op. cit. 953; Valentin Schatz, "The Award Concerning Preliminary Objections in Ukraine v. Russia: Observations Regarding the Implicated Status of Crimea and the Sea of Azov" *EJIL: Talk! (blog)*, March 20, 2020. https://www.ejiltalk.org/the-award-concerning-preliminary-objections-in-ukraine-v-russia-observations-regarding-the-implicated-status-of-crimea-and-the-sea-of-azov/; Koval, "The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next," *op. cit. 1020*; Schatz, "The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections," *op. cit. 1020.*

1025 Schatz, "The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections *op. cit. 1020*; Koval, "The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next," *op. cit. 1020.*

1026 Oleksandr Zadorozhnii, "The Arbitration Process in Accordance with the UN Convention on the Law of the Sea of 1982 and the Recourse to the International Court of Justice as a Way to Resolve Disputes between Ukraine and the Russian Federation: The Effectiveness, Advantages, Disadvantages" [in Ukrainian: "Arbitrazhnyy protses vidpovidno do Konventsiyi OON z mors'koho prava 1982 r. ta zvernennya do Mizhnarodnoho Sudu OON yak sposoby rozv'yazaty spory mizh Ukrayinoyu i Rosiys'koyu Federatsiyeyu: efektyvnist', perevahy, nedoliky"], *Ukrainian Journal of International Law* 2 (2016): 7-15.

1027 Maryna Rabinovych, "The Interplay between Ukraine's Domestic Legislation on Conflict and Uncontrolled Territories and Its Strategic Use of "Lawfare" before Russia's 2022 Invasion of Ukraine – A Troubled Nexus?" *Review of Central and East European Law* 47, 3–4 (2022): 268–297.

light of the historical context of the conflict over Crimea and the Black Sea fleet from the period of the Ottoman Empire, the USSR and the period following the dissolution of the former USSR. It concluded that these disputes present an important addition to the recent trend of cases where the underlying disputed sovereignty matters are brought under the UNCLOS dispute resolution procedures.[1028]

Peter Tzeng was one of the first who wrote an article on the relevant to this dissertation topic: "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy"[1029]. This article analyses the implication of territorial sovereignty issues comparing the situation between Ukraine and Russia to cases between Mauritius v. United Kingdom and Philippines v. China. The article provides a general overview on how the tribunal might rule on its jurisdiction instead of focusing merely on the situation around the waters of Crimean and dispute settlement under UNCLOS. Later, his legal interest shifted more to the aspects of investment law related to the Crimean occupation.[1030]

Therefore, the scholarship analysis on this matter focuses not only on the issues related to Crimea and UNCLOS dispute settlement, but similar matters regarding Crimea in other courts and tribunals.

Gaiane Nuridzhania in her article "Crimea in International Courts and Tribunals: Matters of Jurisdiction" provides a general overview about the relation of jurisdiction of the various international courts relating to the issue of Crimea.[1031]

Lawrence Hill-Cawthorne in "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study" has analysed the concept of 'disaggregation' in international law, which involves dividing broader disputes into separate legal claims under different international rules and jurisdictions. Therefore, he has provided an overview of the disputes between Ukraine and the Russian Federation as a case study. His main focus is on three approaches observed in case law where tribunals deal with claims that appear to have jurisdiction over that are related to a broader dispute outside their jurisdiction. He concludes by discussing potential reasons why a tribunal may adopt one approach over the others in specific cases.[1032]

1028 Oral, *op. cit. 1023.*

1029 Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *op. cit. 1019,* 3-8. Before the article, it was a blog post, see: Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 1019.*

1030 Peter Tzeng, "Investment Protection in Disputed Maritime Areas," *The Journal of World Investment and Trade* 19, 5–6 (2018): 828–859; Peter Tzeng, "Investments on Disputed Territory: Indispensable Parties and Indispensable Issues", *Brazilian Journal of International Law* 14, 2 (2017):122-138; Peter Tzeng, "Sovereignty over Crimea: A Case for State-to-State Investment Arbitration," *op. cit. 1012.* It is also worth to mention his blog post: Peter Tzeng, "Conditional Decisions: A Solution for *Ukraine v. Russia* and Other Similar Cases?" *EJIL: Talk!* (blog), March 20, 2020, https://www.ejiltalk.org/conditional-decisions-a-solution-for-ukraine-v-russia-and-other-similar-cases/.

1031 Gaiane Nuridzhanian, "Crimea in International Courts and Tribunals: Matters of Jurisdiction," *Max Planck Yearbook of United Nations Law Online* 21, 1 (2018): 378–403.

1032 Lawrence Hill-Cawthorne, "International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study," *International & Comparative Law Quarterly* 68, 4 (2019): 783-785.

This literature analysis shows that the established research problem has not only become relevant only recently, but also that it has not been comprehensively examined before and very little examination has taken place in general. Previous academic research related to jurisdiction under UNCLOS and/or the Crimean occupation, lacks comprehensive and in-depth analysis on the influence of the Crimean occupation to effective dispute settlement procedures.

Novelty of the doctoral dissertation

There is a quite some number of legal writings available on the issue of "mixed disputes",[1033] but this doctoral dissertation presents new arguments that could be invoked in a mixed law of the sea dispute where there is no determination of a coastal state is possible. Some authors focused on jurisdiction under UNCLOS while others focused on the status of Crimea. There is currently no in-depth research combining the two topics. Although the legal scholarship has started to address the law of the sea matters regarding the mixed disputes with specific respect to Crimea[1034], there is still a lack of the comprehensive analysis which also includes in depth assessment of the provisions of UNCLOS which have not been sufficiently taken into account yet with respect to the law of the dispute between Ukraine and the Russian Federation. For example, Articles 58, 59, and 74(3) UNCLOS. Thus, this doctoral dissertation provides a comprehensive study which combines the question of Crimean occupation and dispute settlement under UNCLOS, evaluates rights and obligations of the coastal states in the waters generated by Crimea, provides legal interpretation of the provisions of UNCLOS applicable regardless of the determination of Crimea as well as proposes options how to determine the status of the Crimean occupation to resolve the matters related to it by the provisions of UNCLOS. Additionally, this doctoral dissertation is novel because it proposes options on how Ukrainian submissions that were rejected in the *Coastal State Rights Dispute* can still be decided by applying UNCLOS provisions.

Theoretical and practical significance

The theoretical significance of this doctoral dissertation is the evaluation of significance of the dispute over sovereignty between coastal states on the resolution of disputes over the law of the sea by using the example of the Crimean occupation. It proposes an interpretation of some provisions of UNCLOS in the light of their applicability regardless of the existing sovereignty dispute between parties. Therefore, the contribution of this dissertation can be seen as to offer new arguments that could be invoked in a mixed law of the sea dispute where there is no determination of a coastal state is possible.

Considering the relevance of this research in the theoretical and scientific sphere,

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1033 See detailed in the Research review on the topic of the doctoral dissertation.

1034 Peter Tzeng, "The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond," *op. cit. 1019*; Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy," *op. cit. 1019*; Volterra, et al., *op. cit. 1015,* 616 ; and others.

its practical significance should be noted.

To begin with, the results of this research would be useful for the arbitral tribunal in the ongoing *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* and/or future decisions in other similar cases.

Secondly, the analysis presented in this research and the conclusions that will be drawn could prove helpful to invoke the responsibility over the violations of UNCLOS that requires a dispute settlement body under UNCLOS to decide, expressly or implicitly, on the sovereignty of Ukraine over Crimea.

Thirdly, the doctoral dissertation can help to determine what options could be the most effective for invoking the state responsibility as well as providing another perspective on the importance of justice and peaceful dispute settlement between states.

Furthermore, such research could be useful for further academic examinations related to the effectiveness of UNCLOS dispute settlements as well as the role of occupation in various international law of the sea disputes. It might also be interesting for further research involving deeper and comprehensive examination of interpretation and application of certain articles of UNCLOS and mechanism to bring the Russian Federation to responsibility for its violations of international law and in particular, international law of the sea. The results of the research could be used for academic lecturing and preparing future educational materials in the topics related the international law of the sea and law of the state responsibility.

The aim and research objectives

To solve the research problem, the **aim** is to find out what are the matters that fall within the subject-matter jurisdiction of a court or a tribunal under UNCLOS taking into consideration the Crimean occupation and how the matters that affected by the fact of Crimean occupation could be still solved according to UNCLOS provisions.

To achieve the aims of the research, the following **research objectives** are established:

1) to assess the Crimean occupation by examining its historical and legal context, defining key legal terms and concepts related to it and UNCLOS dispute resolution, and analysing its representation in international disputes;
2) to determine the jurisdictional scope of UNCLOS dispute settlement bodies concerning the rights and obligations of Ukraine and the Russian Federation in the maritime zones generated by Crimea in the Black Sea, the Azov Sea, and the Kerch Strait and to identify the limitations and exceptions to compulsory dispute settlement under UNCLOS due to the Crimean occupation;
3) to analyse and provide options to solve the question of Crimean occupation as a potential sovereignty dispute between Ukraine and the Russian Federation so the compulsory dispute settlement under provisions of UNCLOS could be applicable as well as to examine the question of how the violation of the provisions related to Ukraine as a coastal state over Crimea can be addressed within UNCLOS.

Defence Statement:

The dispute resolution under UNCLOS can be applied only to a certain extent in solving the disputes between Ukraine and the Russian Federation concerning the waters around occupied Crimea.

Methodology

This dissertation is based on the analysis of state and judicial practice as well as legal scholarly writings. It is based on the common methods of research (positivist international legal analysis based on the dogmatic and doctrinal approaches) relevant to the international legal scholarship. It provides a critical assessment of legal decisions rendered by courts and tribunals.

These are the methods used to attain the aim of the research:

- Description method is used for providing a general overview of the topic in the beginning of the dissertation.
- Historical method is engaged in order to understand what maritime zones were bordering Crimea and their delimitation before and after the Crimean occupation.
- Linguistic method and method of logic was used in order to interpret the provisions of UNCLOS, case law and other legal documents.
- Method of analysis is employed in the examination of breaches related to the rights and obligations provided by UNCLOS and predetermined by occupation of Crimea. The same method is used in the case analysis on tribunal decisions related to the lack of jurisdiction due to sovereignty issues. It is also employed in the determination of all possible ways of dispute settlement procedures under UNCLOS between Ukraine and Russia with regard to determination of the Crimea as occupied and annexed by the Russian Federation.

It should be noted that none of the earlier mentioned methods prevails over the other. All the methods are applied together for the detailed analysis and comprehensive research of this doctoral dissertation.

Structure of the thesis

The doctoral dissertation is divided into an introduction and three substantial parts that are divided into smaller sections, conclusions and recommendations, bibliography, summary. This structure has been chosen to provide a systematic analysis of different aspects related to the Crimean occupation and resolution of disputes under UNCLOS provisions.

The general part of the thesis is included in Chapter I. This chapter provides an understanding of the Crimean occupation and disputes settlement procedures under UNCLOS. It explores the historical background of the Crimean occupation, tracing its origins from events that occurred before the occupation to following events after, including events after February 24, 2022. Additionally, it provides legal peculiarities of the main concepts relevant to seeing the occupation through the lens of international humanitarian law and international law of the sea and analysing the dispute settlement

mechanism of UNCLOS and Ukraine and the Russian Federation as state parties to it. Chapter I also establishes how the issue of Crimea's occupation is presented in international disputes, including cases brought before the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and investment tribunals. This chapter concludes by examining specific disputes between Ukraine and the Russian Federation under UNCLOS, in particular the *Coastal State Rights Dispute* and the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen.*

Chapter II takes to the core of the matter by answering the question what matters are covered by the jurisdiction of the UNCLOS dispute settlement bodies between Ukraine and the Russian Federation in the light of the Crimean occupation. It clarifies the rights and duties of coastal states in the Black Sea, the Azov Sea, and the Kerch Strait. This comprehensive analysis covers the territorial sea, contiguous zone, exclusive economic zone (EEZ), and continental shelf. It provides analysis of the complex legal framework governing the Sea of Azov and the Kerch Strait, manoeuvring through difficulties of identifying relevant legal regimes that govern the waters of the Azov Sea and the Kerch Strait. Furthermore, it scrutinises the limitations and exceptions to compulsory dispute resolution under UNCLOS and provides a clear picture that not all aspects of the law of the sea dispute are excluded from the dispute settlement under UNCLOS because of the existence of the occupation of Crimea.

The concluding chapter, Chapter III provides an analysis of options on how it is possible to remove the barrier to jurisdiction under UNCLOS arising from the occupation of the Crimean Peninsula. It examines the potential resolution of the occupation dispute through conditional decisions and Article 288(2) of UNCLOS. Moreover, it provides additional options by evaluating the possibility to determine the occupation of Crimea by using the alternative mechanisms outside the provisions of UNCLOS. It involves the evaluation of the possibility of the determination of the occupation through bilateral agreements and the roles that could be played to determine the status of the occupation by international institutions such as the UN Security Council, UN General Assembly, ICJ, ICC, and the establishment of a special tribunal in confirming the factuality of the Crimean occupation. This chapter provides insights into how jurisdiction under UNCLOS can be maintained and how to determine the Crimean occupation from various legal perspectives.

CONCLUSIONS

The dissertation determines whether the occupation of Crimea impacts the activation of the dispute settlement system under Part XV UNCLOS, and it offers recommendations on how the Crimean occupation can be removed as an obstacle to the dispute settlement under UNCLOS. Its main conclusions can be summarised as follows:

1. Since 2014, the status of Crimea as an occupied territory has led to several disputes between Ukraine and the Russian Federation. These disputes have been submitted to numerous international courts and tribunals, including the ICJ, ICC, ECtHR, and investment arbitration tribunals. These proceedings were initiated by Ukraine against the Russian Federation under various agreements, including ICSFT, CERD, and UNCLOS. However, due to the jurisdictional limits of the judicial institutions adjudicating on the basis of these agreements, the issue of the occupation of Crimea could not be directly addressed. Instead, the focus was on specific violations under these conventions, reflecting a strategic approach of Ukraine chosen in order to avoid jurisdictional challenges. Therefore, the occupation of Crimea has thus far not been legally determined in the context of those legal disputes.
2. UNCLOS lacks provisions for the status of maritime zones affected from occupied land territory. That said, the arbitral tribunal in the *Coastal State Rights Dispute*, adjudicating on the basis of Part XV UNCLOS, recognised its jurisdiction over some of the Ukrainian submissions. This implies that not all maritime disputes which affect occupied territory, or territory whose legal status is disputed, are beyond the scope of Part XV UNCLOS. By participating in the dispute, the Russian Federation, objecting to the arbitral tribunal's jurisdiction *ratione materiae*, did not refer to the provisions of international humanitarian law. As a result, the provisions of UNCLOS are considered by both parties to the dispute as being those governing the waters around Crimea.
3. In the *Coastal State Rights Dispute*, the arbitral tribunal ruled that it could not address claims dependent on Ukraine being a coastal state over Crimea, adhering to the principle that it could not rule on territorial sovereignty. This decision did not at all support Russia's claims as being the coastal state of Crimea but rather recognises the existence of a dispute between Ukraine and the Russian Federation. The arbitral tribunal acknowledged the Russian Federation's claim to sovereignty over Crimea but refrained from analysing its legality. This thesis submits that the tribunal's neutral approach raises questions concerning the scope of the principle of non-recognition regarding Crimea's occupation. At the same time, it supports the idea that some UNCLOS provisions concerning coastal state rights can be applied without explicitly naming either Ukraine or the Russian Federation as a coastal state over the waters around Crimea in the dispute. The provisions of UNCLOS prohibit any state from violating such rights and obligations, which include warship immunity, freedom of navigation, and the protection and preservation of the marine environment.

As has been demonstrated, violations of these rights and obligations in the EEZ around Crimea can be determined regardless of the determination of who is the coastal state. Also, in *the Coastal State Rights Dispute*, Ukraine can potentially invoke Article 58 UNCLOS regarding the rights and duties of other states in the EEZ, and Article 59 concerning disputes arising between coastal states and other states in the EEZ. Violation of these provisions can be operationalized by reference to the possibility under Article 290(1) UNCLOS to request provisional measures to cease Russian activities.

4. Articles 88, 141, and 301 UNCLOS emphasise the peaceful uses of the seas and oceans. Two main conclusions can be drawn in this respect. First, Ukraine cannot invoke these provisions to hold the Russian Federation responsible for the violation of such "peaceful uses" by occupying the waters around Crimea, because it would most likely not be possible to argue in favour of the existence of a dispute concerning the interpretation or application of UNCLOS. Secondly, assuming *arguendo* that a dispute concerning the interpretation or application of UNCLOS exists, Ukraine cannot hold the Russian Federation responsible for the violation of such "peaceful uses" by treating waters around occupied Crimea as its own because such usage during occupation could be considered as covered by an optional exception concerning military activities under Article 298(1)(b) UNCLOS. Consequently, the arbitral tribunal under UNCLOS would not have the authority to make a ruling on this matter.
5. All coastal states of the Black Sea could bring claims regarding the Russian Federation's violations of certain rights and obligations established under UNCLOS provisions. These rights and obligations affect freedom of navigation and warship immunity as well as obligations to protect and preserve the marine environment. However, having a presumption that if such provisions of UNCLOS provide obligations *erga omnes partes,* as it is said in the legal scholarship, then, any state can claim violations of their rights in the waters of the Black Sea. Therefore, if a court or a tribunal under UNCLOS would find that these obligations are *erga omnes partes* then all state parties to UNCLOS can address these matters in the dispute settlement under UNCLOS.
6. Regardless of the Crimean occupation being an obstacle to comprehensive dispute settlement under UNCLOS between Ukraine and the Russian Federation, several issues involved in the dispute do not depend on the occupation but could still not be solved within UNCLOS provisions. In this respect, applicability of UNCLOS provisions in the waters around Crimea in the Azov Sea and the Kerch Strait depends on the status of the Azov Sea and the Kerch Strait. So, if waters within the Azov Sea and the Kerch Strait are covered by a historical title, the optional exception under Article 298(1)(a) applies. Thus, the Crimean occupation does not affect existing limitations and optional exceptions on jurisdiction concerning matters falling under Ukrainian and the Russian Federation's reservations to jurisdiction under UNCLOS. If the waters of the Azov Sea or the Kerch Strait are recognised as internal waters, these

waters are not fully excluded from the application of UNCLOS. The dispute related to such waters could qualify as a dispute concerning the interpretation or application of UNCLOS. Several provisions of UNCLOS, namely the Preamble, Articles 2, 123 and Part XII, Part XIII, Part XIV and Part XV, are applicable in the internal waters and could be invoked by Ukraine in waters of the Azov Sea and the Kerch Strait regardless of the Crimean occupation. Also, some parts of the overall dispute, in particular those related to maritime delimitation, marine scientific research or fisheries management, can be solved within the compulsory conciliation under Annex V UNCLOS. Admittedly, though, with respect to the interpretation or application of Articles 15, 74 and 83 relating to maritime boundary delimitation, or those involving historic bays or titles, the occupation of Crimea could serve as an obstacle to the jurisdiction of the compulsory conciliation as being as part of the concurrent consideration of the unsettled dispute concerning sovereignty.

7. Even though the optional exception under Article 298(1)(a) UNCLOS excludes disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to maritime boundary delimitations from compulsory dispute settlement procedures under UNCLOS, Articles 74(3) and 83(3) UNCLOS can still be invoked before UNCLOS courts and tribunals. These provisions establish an obligation to cooperate, in particular, to enter into provisional arrangements of a practical nature and not to jeopardise or hamper the reaching of a boundary agreement.
8. In the solely theoretical scenario, if the UN Security Council adopted a resolution confirming the Crimean occupation, it would not fall under the optional exception under Article 298 UNCLOS. Since making decisions about the determination of the coastal state over the Crimean Peninsula falls beyond the scope of jurisdiction under UNCLOS as outlined in Article 288, the optional exception under Article 298 related to the UN Security Council would not be triggered.
9. The UN General Assembly is entitled to request an advisory opinion from the ICJ relating to the occupation, and legal status, of Crimea. Due to already established precedents in general international law, an advisory opinion by the ICJ is considered as entailing an authoritative statement of international law on the questions with which it deals. Thus, an advisory opinion by the ICJ, if it is asked carefully and by avoiding the direct questions on sovereignty, could establish the fact of the Crimean occupation. A nearly unanimous and worldwide supported resolution of the UN General Assembly with a statement of the fact of Crimean occupation could also play a positive role in the determination of the legal status of Crimea. The creation and annual holding of the Crimea Platform can help to gather the required international recognition of the legal determination of the Crimean occupation.
10. International law experts have advocated the establishment of a special tribunal with jurisdiction to address the Russian aggression against Ukraine. Therefore,

such a special tribunal can confirm the occupation of Crimea. However, since the tribunal has not yet been established, the main questions nowadays are if and by whom it could be established, and what the scope of its jurisdiction would be. The most beneficial options for the legal determination of the status of Crimea will arguably be institution-based (creation of a tribunal through a treaty between Ukraine and the UN, preferably with UN General Assembly support) or a treaty-based approach (create a tribunal based on a multilateral international treaty). Determining the legal status of Crimea following the Russian occupation is crucial for addressing violations of rights and obligations provided by UNCLOS in waters around Crimea.

11. After such determination, two scenarios exist. First, to bring the case back to an arbitral tribunal under Annex VII of UNCLOS for the resolution of those issues that fell outside of the jurisdiction *ratione materiae* of the arbitral tribunal in *the Coastal State Rights Dispute*. Secondly, to provide the special tribunal on the Russian aggression against Ukraine with jurisdiction not only to establish the crime of aggression, military occupation and annexation of Crimea by the use of force against Ukraine, but also with jurisdiction to address issues concerning rights of Ukraine as a coastal State. This may involve interpreting UNCLOS provisions and awarding reparations based on the law of the sea jurisprudence. Thus, in both scenarios, after the legal determination of the Crimean occupation, claims that previously were considered outside of the jurisdiction provided by UNCLOS can be solved.

Academic Publications Related to the Dissertation

1. Gorbun, Olesia. "Crimean Occupation and UNCLOS Dispute Settlement: Navigating Territorial Sovereignty and Non-Recognition." *Baltic Journal of Legal and Social Sciences* 3 (2023): 20-29. https://doi.org/10.30525/2592-8813-2023-3-3
2. Gorbun, Olesia. "The Azov Sea and the Kerch Strait in the Light of Exceptions under Article 298(1) UNCLOS regarding Disputes Concerning Maritime Delimitation and Historical Titles." In *Modern Paradigm of Public and Private Law amidst Sustainable Development. Volume 1*. 135-160. Riga: Baltija Publishing, 2023. https://doi.org/10.30525/978-9934-26-331-6-7
3. Katuoka, Saulius, and Gorbun, Olesia. "A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea" in *Emerging New Legal Order: The Role of War in Ukraine* (forthcoming 2024).

Presentations at Scientific Conferences

1. The International Conference "Battlefield Ukraine: Exploring War and Justice", 17 November 2023.
2. The International Scientific Conference "The Black Sea Public Legal Readings", 10-12 September 2021.
3. The International Conference "COFOLA INTERNATIONAL 2021", 23 April 2021.
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SANTRAUKA

Tyrimo problema

2014 m. Rusijos Federacija okupavo ir aneksavo dalį Ukrainos suverenios teritorijos – Krymo pusiasalį (Autonominę Krymo Respubliką (ARC)). 2016 m. rugsėjo 16 d. Ukraina pateikė Rusijos Federacijai rašytinį pranešimą ir ieškinį pagal UNCLOS VII priedą[1035] ir inicijavo ginčą dėl pakrantės valstybės teisių Juodojoje jūroje, Azovo jūroje ir Kerčės sąsiauryje (toliau – *Pakrantės valstybės teisių ginčas*). Vėliau 2019 m. balandžio 1 d. Ukraina inicijavo dar vieną ginčą prieš Rusijos Federaciją dėl karinio jūrų laivo ir jo įgulos sulaikymo. 2019 m. balandžio 16 d. Ukraina taip pat pateikė prašymą Tarptautiniam jūrų teisės tribunolui (ITLOS) dėl laikinųjų apsaugos priemonių taikymo.

Vienas iš esminių *Pakrantės valstybių teisių ginčą* charakteruojančių požymių yra tai, kad Ukraina ir Rusijos Federacija tarpusavyje nesutaria dėl teisinio Krymo pusiasalio traktavimo nuo 2014 m. vykusių įvykių. Viena pusė teigia, kad Krymas buvo ankesuotas, kita – kad šis pusiasalis teisėtai tapo integralia Rusijos Federacijos dalimi.[1036] Rusijos Federacija neigia tribunolo jurisdikciją pagal UNCLOS VII priedą argumentuodama tuo, kad šiame ginče esminis klausimas yra susijęs su suvereniteto klausimais (pavyzdžiui, suvereniteto Krymo pusiasaliui).[1037] Net ginčo pavadinimas – *dėl pakrantės valstybės teisių Juodojoje jūroje, Azovo jūroje ir Kerčės sąsiauryje* – indikuoja, kad tribunolas turėtų spręsti pakrantės valstybės suvereniteto Krymo atžvilgiu klausimą. Paminėtina, kad didžioji dalis pažeidimų, susijusių su pakrantės valstybės teisėmis, atsirado būtent dėl Krymo okupacijos. Svarbu turėti omenyje ir tai, kad pagal UNCLOS 288 straipsnio 1 dalį, UNCLOS suteikia tribunolui jurisdikciją „ginčui, kuris susijęs su šios Konvencijos aiškinimu ar taikymu."

Dėl Rusijos Federacijos okupuotų ARC ir Sevastopolio miestų, Ukraina prarado žymią dalį teritorinės jūros bei išskirtinės ekonominės zonos (EEZ) kontrolės. Iš viso Ukraina prarado apie 100 000 iš 137 000 kvadratinių kilometrų Juodosios ir Azovo

1035 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982).

1036 Detali ginčo apžvalga pateikiama I skyriaus 1.3.2 poskyryje, ypač 1.3.2.1 dalyje (1.3.2.1 *Coastal State Rights Dispute*).

1037 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation (19 May 2018), §13, p. 5.

jūrų, kurių atžvilgiu Ukraina turi suverenitetą ir įgyvendina suverenias teises.[1038]

UNCLOS preambulėje pabrėžiama, kad „visus klausimus, susijusius su jūrų teise“ šalys turi spręsti vadovaudamosi „tarpusavio supratimo ir bendradarbiavimo dvasia“, „kaip svarbaus indėlio į taikos, teisingumo ir pažangos visoms pasaulio tautoms palaikymą“.[1039] Šią nuostatą praktiškai įgyvendina UNCLOS ginčų sprendimo institutas, įtvirtintas XV dalyje.

Kuomet Ukraina inicijavo *Pakrantės valstybės teisių ginčą,* Rusijos Federacija pareiškė, kad *ad hoc* tribunolas neturi jurisdikcijos šiam ginčui pagal UNCLOS VII skyrių.[1040] Vienas iš argumentų buvo tas, kad šis ginčas yra susijęs su Ukrainos suvereniteto Krymo atžvilgiu klausimais.[1041] Iš kitos pusės, Ukraina argumentavo, kad tinkamai interpretuojant Konvenciją, vien tik valstybės atsakovės teisių į teritoriją pareiškimas negali automatiškai paneigti tribunolo jurisdikcijos atitinkamame jūrų teisės ginče.[1042]

Valentin Schatz ir Dmyto Koval teigimu, nėra aišku, ar Rusijos suvereniteto Krymo atžvigliu primetimas negali būti traktuojamas kaip piktnaudžiavimas prieštaravimo teise.[1043] Peter Tzeng teigia, kad šių teiginių validumas priklauso nuo Ukrainos suvereniteto Krymo atžvilgiu įrodymo.[1044] Gaiane Nuridzhanian analogiškai mano, kad Ukrainos ginče jurisdikcinių iššūkių kelia tai, kad ginčas pagal UNCLOS kyla šalims nesutariant dėl Krymo anekcijos.[1045] Atsižvelgiant į tai kas išdėstyta, ginčą galima būtų traktuoti kaip nepatenkantį į tribunolo jurisdiciją.[1046] Iš tiesų, priimdamas sprendimą dėl preliminarių prieštaravimų tribunolas palaikė poziciją, kad ginčas susijęs su suvereniteto Krymo atžvilgiu klausimu. Atsižvelgiant į tai, Ukrainai pavesta peržiūrėti ir

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1038 Bohdan Ustymenko, Tetiana Ustymenko, „Maritime Security of Ukraine. A Reference Work. (13) The Prohibition Against Vessels and Ships Entering the 12-Mile Zone of the Crimean Peninsula“, *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183694; Bohdan Ustymenko, „Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take“, *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.

1039 UNCLOS preambulė.

1040 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), Award on Preliminary Objections (21 February 2020), §§32-34. Taip pat, *Coastal State Rights Dispute.*

1041 *Ibid.*, §43.

1042 *Coastal State Rights Dispute*, Written Observations and Submissions of Ukraine on Jurisdiction (27 November 2018), §19, pp. 8-9.

1043 Valentin Schatz ir Dmytro Koval, „Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS“, *EJIL: Talk! (blog)*, September 6, 2018. https://www.ejiltalk.org/insights-from-the-bifurcation-order-in-the-ukraine-vs-russia-arbitration-under-annex-vii-of-unclos/.

1044 Peter Tzeng, „Jurisdiction and Applicable Law under UNCLOS“, *The Yale Law Journal* 126, 1 (October 2016): 242.

1045 Gaiane Nuridzhanian, „Crimea in International Courts and Tribunals: Matters of Jurisdiction“, *Max Planck Yearbook of United Nations Law* 21 (2017): 392.

1046 *Ibid.*

pateikti peticiją iš naujo pagal galiojančią jurisdikciją.[1047]

Šioje disertacijoje nagrinėjami teismo ar tribunolo jurisdikcijos klausimai dėl ginčo objekto pagal UNCLOS. Atsižvelgiant į tai, tyrimas ribojamas tik ginčo objekto jurisdikcijos klausimais, o ne, pavyzdžiui, praplečiant jį iki UNCLOS 293 straipsnio, reguliuojančio teisės taikymo klausimus, analizės. Ginčo objekto jurisdikciją taip pat derėtų atskirti nuo ginčo priimtinumo instituto, kurio pagrindu galėtų būti pasiekiami tie patys tikslais, tačiau dėl visai kitokių priežasčių.

Pažymėtina, kad šioje disertacijoje nesikoncentruojama į Krymo teisinės padėties analizę. Remiantis JT Generalinės asamblėjos 2014 m. kovo 27 d. Rezoliucija Nr. 68/262 dėl Ukrainos teritorinio integralumo, traktuojama, kad Krymas yra okupuotas ir neteisėtai aneksuotas. Krymo kaip okupuotos ir neteisėtai aneksuotos teritorijos teisinė padėtis pripažinta įvairių tarptautinių subjektų, organizacijų, taip pat daugelio mokslininkų.[1048] Tyrimas taip pat paremtas prielaida, kad Rusijos Federacijos įvykdyta Krymo okupacija yra draudimo naudoti ginkluotą jėgą pažeidimas[1049] ir dėl to žodžiu „okupacija" disertacijoje siekiama atspindėti neteisėtą Krymo kontrolės pasikeitimą.

Rusijos Federacija nepripažįsta Krymo, kaip okupuotos ar aneksuotos teritorijos statuso.[1050] *Pakrantės valstybės teisių ginče* Rusijos Federacija ne kartą neigė tribunolo jurisdikciją pagal UNCLOS VII priedą argumentuodama, kad tai ginčas dėl teritorinio vientisumo.[1051] Rusijos Federacija naudoja analogiškus argumentus ir kituose ginčuose su Ukraina.[1052]

ITLOS *Ginče dėl trijų Ukrainos karo laivų ir dvidešimt keturių karininkų laive*, Rusijos Federacija 2019 m. balandžio 30 d. verbalinėje notoje prieštaravo Kerčės sąsiaurio ir Krymo teritorinės jūros kvalifikacijai.[1053] Rusijos Federacijos teigimu, Ukrainos pateikta Kerčės sąsiaurio ir teritorinės jūros kvalifikacija neleidžia šių problemų niekaip procesiškai spręsti Tribunole.[1054] 2019 m. gegužės 25 d. ITLOS priėmė nutarimą, reikalaujantį tučtuojau paleisti Ukrainos karinius laivus ir karininkus. Šiame nutarime ITLOS pabrėžė, kad Ukrainos ginamos teisės apima karinių laivų ir karinių pagalbinių

1047 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 1040*, §§197-198.

1048 Žr., I skyriaus 1.1.2 dalį (1.1.2. Occupation of Crimea in 2014).

1049 *Ibid.* Taip pat žr., Daniel Wisehart, „The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?", *EJIL: Talk!* (blog), March 4, 2014, https://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/. Jis padaro išvadą, kad Rusijos Federacijos ginkluotos jėgos Kryme panaudojimas pažeidžia tarptautinę teisę.

1050 *Coastal State Rights Dispute*, Preliminary Objections of the Russian Federation, *op. cit. 1037*, 4, §10.

1051 *Ibid.,* 10, §26.

1052 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation),* Preliminary objections of the Russian Federation (24 August 2020), 5, §23.

1053 Note verbale from the Embassy of the Russian Federation in the Federal Republic of Germany of 30 April 2019.

1054 *Ibid.*

laivų, taip pat karininkų imunitetą pagal Konvenciją ir bendrąją tarptautinę teisę.[1055]

Atkreiptinas dėmesys, kad laikinųjų priemonių stadijoje ITLOS tikrina tik *prima facie* jurisdikciją, o su suverenitetu susijusius klausimus sprendžia vėlesniais etapais. ITLOS negalėjo šioje stadijoje spręsti jurisdikcinių klausimų. Bet net vėlesniu etapu *Ginče dėl sulaikytų Ukrainos karinių laivų ir karininkų* pagal UNCLOS VII priedą arbitražas neįtraukė suvereniteto Krymo atžvilgiu klausimų Rusijos Federacijos preliminarių prieštaravimų nutarime. Taip buvo nuspręsta dėl to, kad Ukraina tęsė bylą remdamasi tuo, jog nebuvo būtinybės Tribunolui užimti bet kurią iš pozicijų Krymo teritorinio suvereniteto klausimu.[1056] Dėl to Rusijos Federacija sutinka, kad teritorinio suvereniteto Krymo atžvilgiu klausimas nėra ginčo dalis, tačiau nepaisant to, Rusijos Federacijos veiksmai prieš Ukrainos karinius laivus vis tiek galimai pažeidžia UNCLOS atitinkamas nuostatas.[1057]

Pakrantės valstybių teisių ginče Arbitražas nusprendė, kad neturi jurisdikcijos Ukrainos pareikštoms pretenzijoms ginče, kadangi sprendimui priimti būtina aiškiai arba netiesiogiai išspręsti suvereniteto Krymo atžvilgiu klausimą. Arbitražas negali priimti sprendimo dėl Ukrainos pareikštų pretenzijų, kadangi jos paremtos prielaida, kad Ukraina turi suverenias teises Krymo atžvilgiu.[1058]

Taigi vieno ginčo atveju buvo atmesta dalis argumentų, susijusių su pakrantės valstybės neapibrėžtumu, kito ginčo atveju ši problema nekilo iš viso, kadangi karinių laivų imuniteto klausimas nepriklauso nuo pakrantės valstybės statuso. Atsižvelgiant į tai, be suvereniteto Krymo atžvilgiu nustatymo, neįmanoma įvertinti, ar UNCLOS numatytos teisės ir pareigos gali būti ginamos UNCLOS numatytuose ginčų sprendimo organuose.

Paminėtina, kad suvereniteto ginčuose neaiškumų būta ir *Čiagoso jūrų saugomos teritorijos arbitraže* (Mauricijus prieš Jungtinę Karalystę).[1059] Šiame ginče Arbitražas teigė, kad tribunolas kategoriškai negali atmesti, kad tam tikrais atvejais menkavertis ginčas dėl teritorinio suvereniteto galėtų būti šalutiniu sprendžiant Konvencijos aiškinimo ir taikymo klausimą. Tribunolo teigimu, toks vertinimas ginče nebūtinas, todėl

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1055 *Detention of three Ukrainian naval vessels* (Ukraine v. Russian Federation), Provisional Measures, Order, 25 May 2019 ITLOS Reports 2018-2019 (Taip pat, *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS), §96, p. 306.

1056 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen,* Preliminary objections of the Russian Federation, *op. cit. 1052,* 5, §23.

1057 *Ibid.* Taip pat žr., I skyriaus 1.3.2 dalį, ypač 1.3.2.2 dalį (1.3.2.2. *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*).

1058 *Coastal State Rights Dispute,* Award on Preliminary Objections, *op. cit. 1040*, §197.

1059 *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom) (toliau – *Chagos MPA Arbitration*), Award (18 March 2015). Apibendrintai, Mauricijus ginčijo Jungtinės Karalystės sprendimą įsteigti saugomą jūrų teritoriją (SJT) aplink Čiagoso archipelagą. Mauricijaus nuomone, tokie veiksmai pažeidė UNCLOS ir kitas sutartis, kadangi Jungtinė Karalystė, nustatydama SJT, pažeidė Mauricijaus kaip pakrantės valstybės teises, o Jungtinė Karalystė neturėjo teisės vienašališkai keisti jūrų zonų, ypač esant Mauricijaus prieštaravimams, susijusiems su istorinėmis Čiagoso archipelago aplinkybėmis.

šios problemos neprivalo spręsti.[1060]

Klausimas, ar Krymo okupaciją galima būtų laikyti menkaverčiu teritorinio vientisumo ginču, kaip papildomu ginču dėl Konvencijos interpretavimo ir taikymo, buvo atsakytas. Nutarime dėl preliminarių prieštaravimų *Pakrantės valstybės teisių ginče* tribunolas teigė, kad šalių ginčas dėl suvereniteto Krymo atvžvilgiu nėra menkavertis ir papildantis esminį ginčą dėl Konvencijos interpretavimo ir taikymo. Priešingai, suvereniteto klausimas yra esminė prielaida, reikalinga Tribunolui priimti sprendimą dėl daugybės pretenzijų, kurias pareiškė Ukraina pagal Konvenciją. Šios pretencijos negali būti sprendžiamos neatsakant į klausimą, kuri valstybė įgyvendina suverenias teises Krymo atžvilgiu ir yra laikytina „pakrantės valstybe" Convencijos prasme.[1061]

Atitinkamai kyla klausimas, kurios UNCLOS numatytos teisės ir pareigos yra veikiamos Krymo okupacijos fakto? Kodėl vienu atveju Krymo okupacija yra būtina prielaida priimti tribunolo sprendimą pagal UNCLOS, o kitu – ne? Ar yra būdų pripažinti teismo ar tribunolo jurisdikciją pagal UNCLOS dėl Ukrainos pateiktų pretenzijų, kurios susijusios su Krymo okupacija?

Atsižvelgiant į tai, būtina analizuoti kokią įtaką Krymo okupacija daro UNCLOS nuostatų taikymui. Be to, būtina išanalizuoti, kurios problemos, susijusios su Krymo okupacija, gali būti išspręstos UNCLOS XV skyriuje numatytuose organizuose, kurios problemos negali būti išspręstos nepriklausomai nuo Krymo okupacijos fakto, ir ar yra alternatyvių būdų ginti galimai pažeistas UNCLOS įtvirtintas teises darant prielaidą, kad *Pakrantės valstybės teisių ginče* arbitražas neturi jurisdikcijos *ratione materiae.* Atitinkamai šioje disertacijoje koncentruojamasi į teismo ar tribunolo jurisdikcijos klausimą pagal UNCLOS nuostatas, tačiau nesiekiama spręsti klausimų, susijusių UNCLOS 293 straipsnio priimtinumu ar taikymu interpretuojant taikytiną teisę siekiant išplėsti šio teismo ar tribunolo jurisdikciją.

Temos aktualumas

Rusijos Federacijos neteisėtos Krymo okupacijos ir vėliau sekusios aneksijos kontekste buvo pažeistos esminės Ukrainos, kaip pakrantės valstybės, teisės Krymą supančiuose vandenyse. Krymo okupacija paveikė apie 73% vandenų, kuriuose Ukraina įgyvendino suverenias teises.[1062]

Net iki Krymo okupacijos tarp Ukrainos ir Rusijos Federacijos kaip pakrantės valstybių būta neapibrėžtumo dėl jų teisių ir pareigų įgyvendinimo Azovo jūroje ir Kerčės

1060 *Ibid.,* 90, §221.

1061 *Coastal State Rights Dispute*, Award on Preliminary Objections, *op. cit. 1040*, 58-59, § 195.

1062 „Percentage Calculator: 100000 Is What Percent of 137000? = 72.99", žiūrėta 10 September 2023, https://www.percentagecal.com/answer/100000-is-what-percent-of-137000#. Skaičiai, išreikšti kvadratiniais kilometrais, paremti Bohdan Ustymenko informacija, „Maritime Security of Ukraine. A Reference Work. (15) Necessary Legal Measures Ukraine Should Take", *BlackSeaNews*, December 19, 2021, https://www.blackseanews.net/en/read/183696.

sąsiauryje.[1063] Šios problemos dar labiau išryškėjo po Krymo okupacijos ir tebėra neišspręstos. Ukrainos galimybė apginti savo teisėtus interesus Krymą supančiuose vandenyse priklauso nuo UNCLOS interpretavimo ir taikymo, taip pat Krymo kaip Rusijos Federacijos okupuotos ir aneksuotos teritorijos pripažinimo.

Poreikis surasti atsakymus į aukščiau minėtus klausimus, susijusius su Krymo okupacija ir ginčų sprendimu UNCLOS sistemoje, ypač didelis, kadangi Rusijos Federacija ėmėsi visaapimančios karinės agresijos prieš Ukrainą. Tarptautinis ginkluotas konfliktas jau kelia tam tikras pasekmes. Manoma, kad šis konfliktas pakeitė valstybių konfliktų sprendimo supratimą ir ilgalaikės taikos tarptautinėje sistemoje siekį.[1064] Ginkluotos jėgos panaudojimo draudimas, kodifikuotas JT Chartijos 2 straipsnio 4 dalyje, istoriškai laikytas svarbiausia Chartijos nuostata.[1065] Be to, visuotinai priimta, kad valstybės turėtų spręsti tarpusavio konfliktus taikiomis priemonėmis pagal JT Chartijos 33 straipsnį, kol Saugumo Taryba priims sprendimą pagal 39 straipsnį.[1066] Šiais laikais, tvyrant tarptautinės kolektyvinės gynybos sistemos žlugimo nulemtai globalinei vertybinei krizei yra būtina išryškinti tarptautinės teisės viršenybę naudojant karinę jėgą.[1067] Priverstiniai ginčų sprendimo mechanizmai pagal UNCLOS yra vieni iš tarptautinės teisės viršenybės indikatorių.

Tarptautinis Teisingumo Teismas (toliau – ICJ) *Kontinentinio šelvo* byloje pagal 1982 m. specialųjį susitarimą tarp Libijos ir Maltos nurodė, kad Teismas negali viršyti savo jurisdikcijos, dėl kurios šalys tarpusavyje susitarė, tačiau ją privalo įgyvendinti visa apimtimi.[1068] Nepaisant to, kad dėl proceso pagal UNCLOS nebuvo byloje nuspręsta, tai iliustruoja teismo ar tribunolo tam tikrą požiūrį dėl jurisdikcijos. Todėl yra svarbu nustatyti, kaip UNCLOS nuostatos gali būti pilnai įgyvendinamos.

UNCLOS siūlo idealiai lanksčią sistemą, kurią galima adaptuoti be pakeitimų priklausomai nuo valstybių reikalavimų.[1069] Tuo pat metu sutarties šalimi tapusi valstybė

1063 Neaiškumų kėlė tai, kad nebuvo nustatytos ribos Azovo jūroje ir Kerčės sąsiauryje, taip pat neaiškus Azovo jūros ir Kerčės sąsiauro statusas pagal UNCLOS nuostatas.

1064 Anna Geis ir Ursula Schröder, „Global Consequences of the War in Ukraine: The Last Straw for (Liberal) Interventionism?" *Zeitschrift Für Friedens- Und Konfliktforschung* 11, 2 (1 October 2022): 296-297. Apie praktinę pusę, žr. Richard Higgott ir Simon Reich, „It's bifurcation, not bipolarity: understanding world order after the Ukraine invasion," Policy brief, vol. 16. Brussels: CSDS (2022), https://brussels-school.be/sites/default/files/CSDS%20Policy%20brief_2216.pdf.

1065 Antônio Augusto Cançado Trindade, „The Primacy of International Law over Force", iš *Promoting Justice, Human Rights and Conflict Resolution through International Law / La Promotion de La Justice, Des Droits de l'homme et Du Règlement Des Conflits Par Le Droit International* (Leiden: Brill Nijhoff, 2007), 1039.

1066 *Ibid.*

1067 *Ibid*., 1055.

1068 *Continental Shelf (Libyan Arab Jamahiriya/Malta),* (Judgment), 3 June 1985, ICJ. Rep 13, §19.

1069 Hayley Keen ir Charlotte Nichol, „Sea level rise: The primary challenge to effective implementation of UNCLOS, Written evidence (UNC0038)," *UK Parliament International Relations and Defence Committee Inquiry UNCLOS: fit for purpose in the 21st Century?* (12 November 2021): 3. Šaltinyje kalbėta

gali apsipręsti ir atstatyti galias, kurias prieš tai buvo delegavusi.[1070] Todėl yra svarbu palaikyti suteiktos jurisdikcijos balansą ir įgyvendinti ją visa apimtimi nei išplečiant, nei apribojant.

Atsižvelgiant į tai, disertacijos aktualumas paremtas Krymo okupacijos faktu, 73% vandens teritorijos, kurios atžvilgiu Ukraina įgyvendina suverenias teises, kontrolės praradimu ir atsakomybės už UNCLOS pažeidimus įgyvendinimo būtinumu, reikalaujančiu teisiogiai ir netiesiogiai nustatyti Ukrainos suverenitetą Krymo atžvilgiu.[1071]

Prieš 2022 m. vasario 24 d. visaapimančią Rusijos Federacijos karinę invaziją į Ukrainą, Rusija ir Ukraina derėjosi tik dėl Donestko ir Luhansko regionų. 2014-2015 m.[1072] derybu metu šios dvi valstybės siekė susitarti ir nutraukti ugnį Donestko ir Luhansko regionuose. Krymo klausimas šiuose susitarimuose nebuvo keltas. Realybė ta, kad prieš Rusijos visaapimančią agresiją, Krymas turėjo visas galimybes tapti ar išlikti Ukrainos ir Rusijos Federacijos užšaldyto konflikto dalimi. Taip nenutiko, kadangi krymo okupacijos teisėtumo klausimai buvo vis dažniau keliami po 2022 m. vasario 24 d. įvykių. Šios aplinkybės taip pat parodo temos aktualumą.

Aktualių šaltinių apžvalga

Nepaisant to, kad su Krymo okupacija susijusių tyrimų poreikis išryškėjo tik 2014 m., ginčų sprendimo pagal UNCLOS problemos buvo tiriamos nuo 1984 m. Taip pat naudotini dar iki 1984 m. priimti UNCLOS derybų dokumentai, susiję ir su XV UNCLOS dalimi. Ginčų sprendimo pagal UNCLOS nuostatas tema plačiai tirta daugelį kartų. Paminėtini plačiai cituoti autoriai, tokie kaip Alan Boyle[1073], Yoshifumi

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apie klimato kaitą. Tačiau autorė mano, kad idėjos galėtų būti pritaikomos ne tik klimato kaitos kontekste.

1070 José E. Alvarez, „State Sovereignty Is Not Withering Away: A Few Lessons for the Future", iš *Realizing Utopia: The Future of International Law*, edited by The Late Antonio Cassese (Oxford University Press, 2012), 31.

1071 Akcentuotina, kad nei vienas iš ginčų nėra išspręstas.

1072 Žr., Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk Agreement), *United Nations Peacemaker*, 5 September 2014, https://peacemaker.un.org/UA-ceasefire-2014; Memorandum on the Implementation of the Provisions of the Protocol on the Outcome of Consultations of the Trilateral Contact Group on Joint Steps Aimed at the Implementation of the Peace Plan (Implementation of the Minsk Agreement), *United Nations Peacemaker*, 19 September 2014. https://peacemaker.un.org/implementation-minsk-19Sept2014; Package of Measures for the Implementation of the Minsk Agreements, *United Nations Peacemaker*, 12 February 2015, https://peacemaker.un.org/ukraine-minsk-implementation15.

1073 Alan Boyle, „Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", *International & Comparative Law Quarterly* 46, 1 (1997); Alan Boyle, „Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea", iš *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford: Hart Publishing, 2003); Alan Boyle ir Christine Chinkin, *The Making of International Law*, (Oxford, New York: Oxford University Press, 2007); Alan Boyle, „The International Tribunal for the Law of the Sea and the Settlement of Disputes", iš *The Changing World of International Law in the Twenty-First Century:A Tribute to the Late Kenneth R. Simmonds* Joseph Jude Norton, Mads Tønnesson Adenæs ir Mary Footer (The Hague, Kluwer Law

Tanaka[1074], Natalie Klein[1075], Igor Karaman[1076], Louis Sohn[1077], Douglas Guilfoyle[1078],

International, 1998): 99–134; Alan Boyle, „Problems of compulsory jurisdiction and the settlement of disputes relating to straddling fish stocks," *International Journal of Marine and Coastal Law*, 14, 1 (1999): 1–25.

1074 Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (Cambridge: Cambridge University Press, 2019); Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press, 2018).

1075 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005); Natalie Klein, „The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?" *Proceedings of the ASIL Annual Meeting* 108 (2014): 359–364; Natalie Klein, „The Vicissitudes of Dispute Settlement under the Law of the Sea Convention" *International Journal of Marine and Coastal Law* 32 (2017): 332-363; Natalie Klein, „Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions," *Chinese Journal of International Law* 15, 2 (2016): 403-415; Natalie Klein ir McCreath Millicent, „Resolving international disputes concerning the marine environment", iš *Research Handbook on International Marine Environmental Law* (Cheltenham, UK: Edward Elgar Publishing, 2023): 124-149; Douglas Guilfoyle ir Natalie Klein, „The UN Convention on the Law of the Sea Dispute Settlement System, Written evidence (UNC0001)." *UK Parliament International Relations and Defence Committee Inquiry UNCLOS: fit for purpose in the 21st Century?* 12 November 2021.

1076 Igor V. Karaman, *Dispute Resolution in the Law of the Sea* (Leiden: Brill Nijhoff, 2012).

1077 Louis B. Sohn, „Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?" *Law and Contemporary Problems* 46, 2 (1983): 195–200.

1078 Douglas Guilfoyle, „Governing the oceans and dispute resolution: An evolving legal order?", iš *Global governance and regulation: Order and disorder in the 21st century* Leon Wolff ir Danielle Ireland-Piper (eds) (Routledge, 2018).

Robin Churchill[1079], J. G. Merrills[1080], A. O. Adede[1081], Saiful Karim[1082], Kate Parlett[1083], Alexander Proelss[1084], Sean D. Murphy[1085], Bjørn Kunoy[1086], David Anderson[1087], James

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1079 Robin Churchill, „Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means", iš *International Law and Dispute Settlement: New Problems and Techniques*, (Hart Publishing, 2010): 143–171; Robin Churchill, „Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During Its First Decade", iš *The Law of the Sea: Progress and Prospects* David Freestone, Richard Barnes & David M Ong (eds.) (Oxford: Oxford University Press, 2006): 388–416; Robin Churchill, „The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use", *Ocean Development & International Law* 48, 3–4 (2 October 2017): 216-238; Robin Churchill, „International Law Obligations of States in Undelimited Maritime Frontier Areas", iš *Frontiers in International Environmental Law: Oceans and Climate Challenges*, (Leiden: Brill Nijhoff, 2021): 141–170. Ir dar daugiau kitų jo darbų. Paminėtini šie ypatingos svarbos straipsniai: *International Journal of Marine and Coastal Law* apie ginčų sprendimą jūroje. Žr. taip pat vėliausią: Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2017", *International Journal of Marine and Coastal Law* 33, 4 (2018): 653-682; Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2018", *International Journal of Marine and Coastal Law* 34, 4 (2019): 539-570; Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2019", *The International Journal of Marine and Coastal Law* 35, 4 (2020): 621–659; Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2020", *The International Journal of Marine and Coastal Law* 36, 4 (2021): 539-573; Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2021", *The International Journal of Marine and Coastal Law* 37, 4 (2022): 575-609.

1080 John G. Merrills, „The Law of the Sea Convention", iš *International Dispute Settlement* (Cambridge: Cambridge University Press, 2011): 167–193.

1081 A. O. Adede, „The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention", *Ocean Development & International Law* 11, 1–2 (1982): 125–48; A. O. Adede, „The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary", iš *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Leiden: Brill Nijhoff, 2021).

1082 Saiful Karim, „Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System", iš *Litigating International Law Disputes*, edited by Natalia Klein (Cambridge: Cambridge University Press, 2014): 260–283.

1083 Kate Parlett, „Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals", *Ocean Development & International Law* 48, 3–4 (2017): 284–299.

1084 Alexander Proelss, „The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics* 46 (2018): 47–60; Alexander Proelss, „Implicated Issues and Renvoi Clauses: Challenges to the Regime for the Peaceful Settlement of Disputes under the Law of the Sea Convention", iš *Peaceful Management of Maritime Disputes* (London: Routledge, 2023): 29–54.

1085 Sean D. Murphy, „Creativity in Dispute Settlement Relating to the Law of the Sea", iš *By Peaceful Means: International Adjudication and Arbitration* Charles N. Brower ir kt. (Oxford, New York: Oxford University Press, 2023).

1086 Bjørn Kunoy, „The Scope of Compulsory Jurisdiction and Exceptions Thereto under the United Nations Convention on the Law of the Sea", *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 58 (2021): 78–141.

1087 David Anderson, „Peaceful settlement of disputes under UNCLOS", iš *Law of The Sea: UNCLOS as a Living Treaty* Jill Barrett ir Richard Barnes (eds.) (London, British Institute of International and Comparative Law, 2016): 385–415; David Anderson, „Strategies for dispute resolution: negotiating joint

Harrison[1088], Thomas A. Mensah,[1089] Lan Ngoc Nguyen[1090] ir daugelis kitų.[1091]

Teritorinio suveretito pagal tarptautinę jūrų teisę klausimus savo darbuose nagrinėjo Irina Buga[1092], Clive Schofield[1093], Paul C. Irwin[1094], Bernard H. Oxman[1095], Robert W. Smith ir Bradford Thomas[1096], Natalie Klein[1097], kt. Daugelis mano, kad ginčai dėl teritorinio suvereniteto įskaitant klausimus, susijusius su sausumos teritorija, nėra teismo ar tribunolo jurisdikcijoje pagal UNCLOS. UNCLOS to neapima[1098].

Okupuotos sausumos teritorijos sugeneruotų jūros zonų klausimą nagrinėjo

agreements", iš *Boundaries and Energy: Problems and Prospects* Gerald Blake, ir kt. (eds.), (London, Kluwer Law International, 1998): 473–484; David Anderson, „The role of ITLOS as a means of dispute settlement under UNCLOS", iš *International Marine Environmental Law: Institutions, Implementation and Innovations* Andree Kirchner (ed.) (The Hague, New York, London, Kluwer Law International, 2003): 19– 29, ir kiti.

1088 James Harrison, „Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", *Ocean Development and International Law* 48, 3-4 (2017): 269–283.

1089 Thomas Mensah, „The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea", *Max Planck Yearbook of United Nations Law* 2 (1998): 307–323; Thomas Mensah, „The role of peaceful dispute settlement in contemporary ocean policy and law", iš *Order for the Oceans at the Turn of The Century*, Davor Vidas ir Willy Østreng (eds.), (The Hague, Kluwer Law International, 1999): 81–94.

1090 Lan Ngoc Nguyen, *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (Cambridge: Cambridge University Press, 2023).

1091 Dėl didesnės apimties šaltinių sąrašo, žr. „Select Bibliography on Settlement of Disputes Concerning the Law of the Sea", iš *Yearbook International Tribunal for the Law of the Sea / Annuaire Tribunal international du droit de la mer, Volume 25 (2021)*, (Leiden: Brill Nijhoff, 2022): 165–168. Ten yra specifinis skyrius „Select Bibliography on Settlement of Disputes Concerning the Law of the Sea". Žurnalas *Yearbook International Tribunal for the Law of the Sea* leidžiamas kartą per metus.

1092 Irina Buga, „Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals", *International Journal of Marine and Coastal Law* 27, 1 (2012): 59–95.

1093 Clive Schofield, „Options to Avoid and Resolve Disputes over Island Sovereignty", iš *Peaceful Management of Maritime Disputes* (London: Routledge, 2023), 109–128.

1094 P. C. Irwin, „Settlement of Maritime Boundary Disputes - An Analysis of the Law of the Sea Negotiations", *Ocean Development & International Law* 8, 2 (1980): 114-115.

1095 Bernard H. Oxman, „Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals", iš *The Oxford Handbook of the Law of the Sea*, Donald R. Rothwell ir kt.(ed), (Oxford: Oxford University Press, 2015), 394-400.

1096 Robert W. Smith ir Thomas Bradford, „Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes", iš *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, Myron H. Nordquist ir John Norton Moore (eds), (Leiden: Brill Nijhoff, 1998).

1097 Natalie Klein ir Kate Parlett, *Judging the Law of the Sea* (Oxford, New York: Oxford University Press, 2022), 103-116.

1098 Pvz., Buga, *op. cit. 1092*, 68; Smith ir Bradford, *op. cit. 1096*: 55, 66; Sienho Yee, „The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections", *Chinese Journal of International Law* 13, 3 (2014): 663-688.

įvairūs mokslininkai[1099], įskaitant jūrų teisės taikymą ginkluoto konflikto metu[1100]. Tačiau tik naujausiuose darbuose kai kurie autoriai pamini vandenis šalia Krymo[1101].

Kalbant apie Krymą, iki 2014 m. buvo atlikta keletas istorinių analizių. Tačiau šios temos tyrimai sulaukė daugiau dėmesio po to, kai Rusija aneksavo ir okupavo Krymą. Literatūra šia tema apima diskusijas dėl tautų laisvo apsisprendimo, nenustatytų ginkluotųjų pajėgų (Rusijos karinio personalo), jėgos panaudojimo, neteisėto referendumo dėl prisijungimo prie Rusijos, Rusijos deklaracijos dėl Krymo, kaip sudedamosios Rusijos Federacijos dalies, ekonominių sankcijų taikymo, žmogaus teisių pažeidimų Kryme nuo okupacijos pradžios, investicijų apsaugos reguliavimo, taip pat teisinių veiksmų prieš Rusiją analizę įvairiuose teismuose ir tribunoluose. Visi šie dalykai yra susiję su Krymo aneksija ir okupacija[1102].

1099 Žr., pvz., Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2019), 47-48, 224. Dinstein mano, kad kai egzistuoja veiksminga kontrolė sausumoje, tai susisieja su bet kuriomis besiribojančiomis jūrų zonomis, įskaitant vidaus vandenis, teritorinę jūra ir kontinentinį šelfą. Taip pat žr., Eyal Benvenisti, *The International Law of Occupation*, (Oxford, New York: Oxford University Press, 2012); Bing Bing Jia, „The Terra Nullius Requirement in the Doctrine of Effective Occupation: A Case Study in: Law of the Sea", iš *From Grotius to the International Tribunal for the Law of the Sea*, Lilian del Castillo (ed.) (Leiden: Brill Nijhoff, 2015), 657-673.

1100 Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford, New York: Oxford University Press, 2011), 259-261; John Astley ir Michael Schmitt, „The Law of the Sea and Naval Operations", *Air Force Law Review* 42 (1997): 119-138; Vaughan Lowe, „The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea", iš *International Law Studies: The Law of Naval Operations*, Horace B. Robertson Jr (ed), (1991): 111, 130–3; George P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (Routledge, 1998): 7; Marco Longobardo, „The Occupation of Maritime Territory Under International Humanitarian Law", *International Law Studies* 95 (2019): 322-361.

1101 Raul Pedrozo, „Russia-Ukraine Conflict: The War at Sea", *International Law Studies*, US Naval War College, 100 (2023): 1-61; Eliav Lieblich ir Eyal Benvenisti, *Occupation in International Law. Elements of International Law*, (Oxford, New York: Oxford University Press, 2022).

1102 Robert Geiß, „Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind", *International Legal Studies* 91 (2015): 425-449; Christian Maxsen, „The Crimea Crisis: An International Law Perspective", *Heidelberg Journal of International Law* 74 (2014): 367-391; Antonello Tancredi, „The Russian Annexation of the Crimea: Questions Relating to the Use of Force", *Questions in International Law* 1, 5 (2014): http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/; Oleksandr Zadorozhnii, „To Justify against All Odds: The Annexation of Crimea in 2014 and the Russian Legal Scholarship", *Polish Yearbook of International Law* 35 (2015): 139-170; Lina Laurinavičiūtė ir Laurynas Biekša, „The Relevance of Remedial Secession in the Post-Soviet 'Frozen Conflicts'", *International Comparative Jurisprudence* 1, 1 (2015): 66–75; Ilona Khmelova, „Institute of Recognition in the Context of the Occupation and Annexation of the Crimea by the Russian Federation", *Ukrainian Journal of International Law* 2 (2016): 23-26; Alisa Gdalina, „Crimea and the Right to Self-Determination: Questioning the Legality of Crimea's Secession from Ukraine", *Cardozo Journal of International and Comparative Law* 24, 3 (2016): 531-564; Oleksandr Zadorozhnii, "The International Legal Personality of 'DPR' and 'LPR'", *Ukrainian Journal of International Law* 4 (2016): 5-11; Kit De Vriese, "The Application of Investment Treaties in Occupied or Annexed Territories and 'Frozen' Conflicts: Tabula Rasa or Occupata?", iš *Investments in Conflict Zones* (Leiden: Brill Nijhoff, 2020): 319–358; Christine Sim, „Parallel Proceedings Arising from Uncertain Territorial and Maritime Boundaries", iš *Investments in Conflict Zones*, (Leiden: Brill Nijhoff, 2020):

Tuo pat metu, teisės moksle mažai nagrinėta tema dėl Krymo okupacijos ir ginčų sprendimų pagal UNCLOS. Tai galima lengvai paaiškinti, nes Krymas okupuotas ir aneksuotas 2014 m.[1103], o Ukraina pateikė ginčą dėl pakrantės valstybės teisių Juodojoje jūroje, Azovo jūroje ir Kerčės sąsiauryje VII priedo arbitražui tik 2016 m. Praėjo devyneri metai nuo okupacijos ir septyneri metai nuo tada, kai buvo pradėta diskutuoti apie Krymo okupaciją ir ginčų sprendimą pagal UNCLOS. Nors buvo nemažai straipsnių šia tema, išsamus tyrimas dar nebuvo atliktas.

Tačiau verta pažymėti, kad yra nemažai teisės darbų *„mixed disputes“*, *„incidental issue“* ar *„implicates issue problem“* temomis jūrų teisės srityje, jie egzistavo iki Krymo okupacijos ar ginčų dėl vandenų aplink Krymą pagal UNCLOS[1104]. Be to, kai ginčai buvo pateikti, jie buvo analizuojami pagal kitą mišraus ginčo pavyzdį[1105]. Nors kai

209–245; Peter Tzeng, „Sovereignty over Crimea: A Case for State-to-State Investment Arbitration“, *Yale Journal of International Law* 41, 2 (2016): 459-468; Cameron Miles, „Lawfare in Crimea: Treaty, Territory, and Investor–State Dispute Settlement“, *Arbitration International* 38, 3 (2022): 135–150; Saba Pipia, „Tensions in Crimean Waters: Can Russia's Actions Amount to Threat of Force?“, *EJIL: Talk!* (blog), July 28, 2021. https://www.ejiltalk.org/tensions-in-crimean-waters-can-russias-actions-amount-to-threat-of-force/; Andrii Voitsikhovkyi ir Oleksandr Bakumov, „Armed Aggression of the Russian Federation against Ukraine as a Threat to the Collective Security System“ [in Ukrainian: "Zbroyna ahresiya Rosiys'koyi Federatsiyi proty Ukrayiny yak zahroza systemi kolektyvnoyi bezpeky"], *Law and Safety* 88, 1 (2023): 134-145.

1103 "Condemning the ongoing temporary occupation of part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter "Crimea") – by the Russian Federation, and reaffirming the non-recognition of its annexation". Žr., Jungtinių Tautų Generalinės Asamblėjos rezoliucija Nr. A/RES/77/229 „Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)“, 15 December 2022.

1104 Buga, *op. cit. 1092,* 59–95; Wensheng Qu, „The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond“, *Ocean Development & International Law* 47, 1 (2016): 40–51; Jia Bing Bing, „The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge“, *German Yearbook of International Law* 57 (2015): 4; Miguel García García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Leiden: Brill Nijhoff, 2015), 26-28; ir kt.

1105 Robert Volterra, ir kt., „The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait“, *The International Journal of Marine and Coastal Law* 33, 3 (2018): 616; Sandrine W. De Herdt, „Mixed Disputes“, *The International Journal of Marine and Coastal Law* 37, 2 (2022): 358–367; Xinxiang Shi ir Chang Yen-Chiang, „Order of Provisional Measures in Ukraine versus Russia and Mixed Disputes Concerning Military Activities“, *Journal of International Dispute Settlement* 11, 2 (2020): 278–294; Viktoriia Hamaiunova, „Legal Position of LOS Tribunal Regarding Mixed Disputes“, *Technology Transfer: Innovative Solutions in Social Sciences and Humanities* 3 (18 May 2020): 80–83; Ke Song, „The Battle of Ideas under LOSC Dispute Settlement Procedures“, *The International Journal of Marine and Coastal Law* 38, 2 (2023): 207–227; Yoshifumi Tanaka, „Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases“, *International Law Studies* 96 (2020): 223-256; Alexander Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits*, (Leiden: Brill Nijhoff, 2022): 28; Harrison, „Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation“, *op. cit. 1088,* 275–278; Peter Tzeng, „The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction“, *New York University Journal of International Law and Politics* 50 (2018): 447–508.

kurie mokslininkai naudoja „mišraus ginčo“ sąvoką apibūdinti ginčą dėl jūrų erdvių ribų nustatymo[1106], kiti sąvoką naudoja platesniame kontekste, naudojant ją apibrėžti ginčus, susijusius su jūrų teisės klausimais sprendžiamais pagal UNCLOS, kartu su išorės klausimais[1107], ar ginčo teisės klausimus pagal UNCLOS 298 straipsnio neprivalomas išimtis[1108]. Sąvokos *„invidental issue“* ar *„implicated issue problem“* jūrų teisės mokslininkų naudojamos apibrėžti atvejus, kai jūros teisės ginčas kelia ir išorines problemas[1109]. Bendrai, įmanoma nustatyti šių apibrėžčių panašumus, nes visos jos vienu ar kitu būdu bando apibrėžti situaciją, kai teismo ar tribunolo jurisdikcijos ginčas turi išorinį elementą. Bet kokiu atveju, nors ir nėra aiškaus pasirinkimo kaip apibrėžti problemą ar kaip ją spręsti, ši disertacija prisideda prie teisės mokslo dėl būdų kaip panaudoti UNCLOS normas ar pateikti teisės apibrėžtis neišplečiant dalykinės teismo ar tribunolo jurisdikcijos pagal UNCLOS VII priedą.

Tarp teisės darbų Krymo okupacijos ir ginčų sprendimo pagal UNCLOS temomis galima identifikuoti dvi sritis. Kai kurie darbai orientuojasi į vykstančius ginčus *ad hoc* arbitražiniose tribunoluose pagal UNCLOS VII priedą ir ankščiau ITLOS spręstas situacijos dėl laikinųjų apsaugos priemonių. Šiuose straipsniuose taip pat apžvelgiami bendrieji jūrų teisės klausimai bei kaip Ukrainos ir Rusijos ginčai iškelia svarbius aspektus. Kiti siekia įvertinti Ukrainos inicijuotų teisinių veiksmų prieš Rusiją veiksmingumą ne tik UNCLOS ginčų sprendimo rėmuose, bet ir kituose teismuose bei tribunoluose.

Tarp pirmųjų yra tie, kurie analizavo *Coastal State Rights* ginčą[1110], *Detention of*

1106 Buga, *op. cit. 1092,* 60; Qu, *op. cit. 1104,* 45; Song, *op. cit. 1105,* 220-221; Hamaiunova, *op. cit. 1105,* 80; Volterra, ir kt., *op. cit. 1105,* 616.

1107 Herdt, *op. cit. 1105,* 359; Shi ir Yen-Chiang, *op. cit. 1105,* 10; Bing, „The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenge“, *op. cit., 1104,* 4; García-Revillo, *op. cit. 1104,* 26.

1108 Tanaka, „Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases“, *op. cit. 1105,* 238; Shi ir Yen Chiang, *op. cit. 1105,* 10.

1109 Peter Tzeng, „The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond“, *EJIL: Talk! (blog)*, October 14, 2016. https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/; Peter Tzeng, „Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy“, *Denver Journal of International Law & Policy* 46, 1 (2017), https://digitalcommons.du.edu/djilp/vol46/iss1/3; Tzeng, „The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction“, *op. cit. 1015,* 447–508; Volterra, ir kt., *op. cit. 1105,* 614–622; Fabian Simon Eichberger, „Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues“, *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht / Heidelberg Journal of International Law* 81, 1 (21 April 2021): 239–240; Loris Marotti, „Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals“, iš *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, ed. Angela Del Vecchio ir Roberto Virzo (Cham: Springer International Publishing, 2019) 399; Matina Papadaki, „Incidental Questions as a Gatekeeping Doctrine“, AJIL Unbound 116 (January 2022): 170–175; ir kt.

1110 „*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation)“, PCA Case Repository, žiūrėta 16 June 2023, https://pca-cpa.org/en/

Ukrainian Naval Vessels and Servicemen ginčą[1111] ir *detention of three Ukrainian naval vessels* ginčą[1112], įskaitant juos visas ar dalį jų kartu.[1113] *Šiuose straipsniuose daugiausia dėmesio skiriama konkretiems klausimams, susijusiems su Ukrainos ir Rusijos Federacijos ginčais, trumpai apžvelgiama situacija ir pateikiamos išvados.* Pagrindinis dėmesys skiriamas vertinimui, ar ginčas dėl Krymo statuso nesutrukdys ginčų sprendimui

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cases/149/. Žr. detaliau: Tzeng, „The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond", *op. cit. 1109*; Tzeng, „Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy", *op. cit. 1109*; Volterra, ir kt., *op. cit. 1105,* 614–622; Schatz ir Koval, „Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS", *op. cit. 1043*; Massimo Lando ir Nilüfer Oral, „Jurisdictional Challenges and Institutional Novelties – Procedural Developments in Law of the Sea Dispute Settlement in 2020", *The Law & Practice of International Courts and Tribunals* 20, 1 (2021): 191–221; Valentin Schatz, „The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections", *Review of Central and East European* Law 46, 3–4 (2021): 400–415; Dmytro Koval, „The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next", *Lex Portus* 7, 1 (2021): 7–30.

1111 „*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation)", PCA Case Repository, žiūrėta 16 June 2023, https://pca-cpa.org/en/cases/229/. Žr., Yoshifumi Tanaka, „Military Activities or Law Enforcement Activities? Reflections on the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen", *The Korean Journal of International and Comparative Law* 11, 1 (2023): 1–26.

1112 *Detention of three Ukrainian naval vessels,* Provisional Measures, ITLOS. Žr. straipsnius: Tullio Treves, „The International Tribunal for the Law of the Sea and Other Law of the Sea Jurisdictions (2020)", *The Italian Yearbook of International Law Online* 30, 1 (2021): 321–355; Maria Pia Benosa, „Limits on the Use of Force at Sea in the Jurisprudence of ITLOS: From M/V Saiga to Ukraine/Russia", iš *Case-Law and the Development of International Law* (Leiden: Brill Nijhoff, 2021), 208–224; Yurika Ishii, „Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation): Provisional Measures Order (ITLOS)", *International Legal Materials* 58, 6 (2019): 1147–1166; Shi ir Yen-Chiang, *op. cit. 1105;* Tanaka, „Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the ARA Libertad and Ukraine v. Russia Cases", *op. cit. 1105.* Taip pat žiūrėti tinklaraščių įrašus, James Kraska, „Did ITLOS Just Kill the Military Activities Exemption in Article 298?", *EJIL: Talk!* (blog), May 27, 2019. https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/; Yurika Ishii, „The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order", EJIL: Talk! (blog), May 31, 2019, https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/.

1113 James Kraska, „The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?", *EJIL: Talk!* (blog), December 3, 2018. https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/; Shi ir Yen-Chiang, *op. cit. 1105*; Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2019", *op. cit. 1079*; Robin Churchill, „Dispute Settlement in the Law of the Sea: Survey for 2020", *op. cit. 1079*; Nilüfer Oral, „Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS", *International Law Studies* 97 (2021): 478–508; Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits*, *op. cit. 1105,* 93–116; Hosang Boddens, „An Analysis of Some Recent Maritime Challenges from the Perspective of the International Law of Military Operations", *Adelaide Law Review* 43, 2 (2022): 752- 765.

pagal UNCLOS ir po sprendimo – kodėl tribunolas padarė tam tikras išvadas, kas laikoma karine veikla ir pan. Dėl to padaugėjo teisės darbų, nagrinėjančių ginčus dėl teritorinio suvereniteto jūros teisės srityje ir skirtumus tarp karinės ir teisėsaugos veiklos, Azovo jūros ir Kerčės sąsiaurio teisinio statuso.

Valentin Schatz ir Dmytro Koval paskelbė keletą publikacijų apie Krymą ir jį supančius vandenis bei dėl ginčų pagal UNCLOS[1114]. Pvz., savo straipsnyje „Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov, (Part III): The Jurisdiction of the Arbitral Tribunal", Schatz ir Koval nustatė galimus trukdžius tribunolo jurisdikcijai. Autoriai nurodo, kad tinklaraščio įraše negali pateikti galutinės išvados apie visus analizės metu iškeltus klausimus. Papildomai dalyje „The Problem of Incidental Sovereignty Questions" jie pamini poreikį tolimesnei analizei.

Valentin Schatz ir Dmytro Koval atskirai pateikė nuomones dėl *Coastal State Rights* ginčo[1115].

Oleksandr Zadorozhnii „The Arbitration Process in Accordance with the UN Convention on the Law of the Sea of 1982 and the Recourse to the International Court of Justice as a Way to Resolve Disputes between Ukraine and the Russian Federation: The Effectiveness, Advantages, Disadvantages" pateikia kai kuriuos tarptautinius teisinius veiksmus, kad Rusija būtų laikoma atsakinga už agresiją prieš Ukrainą ir to pasekmes[1116]. Maryna Rabinovych „The Interplay between Ukraine's Domestic Legislation on Conflict and Uncontrolled Territories and Its Strategic Use of "Lawfare" before Russia's 2022 Invasion of Ukraine – A Troubled Nexus?" analizuoja ryšį tarp vidaus ir tarptautinės teisės Ukrainoje prieš invaziją ir nagrinėja galimą tokio ryšio poveikį

1114 Valentin Schatz ir Dmytro Koval, „Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part III", *Völkerrechtsblog*, January 15, 2018, https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-3/; Valentin Schatz ir Dmytro Koval, "Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS", *op. cit. 1043;* Valentin Schatz, „The Award Concerning Preliminary Objections in Ukraine v. Russia: Observations Regarding the Implicated Status of Crimea and the Sea of Azov", *EJIL: Talk! (blog)*, March 20, 2020. https://www.ejiltalk.org/the-award-concerning-preliminary-objections-in-ukraine-v-russia-observations-regarding-the-implicated-status-of-crimea-and-the-sea-of-azov/; Koval, „The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next", *op. cit. 1110*; Schatz, „The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections", *op. cit. 1110.*

1115 Schatz, „The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the UNCLOS Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections", *op. cit. 1110*; Koval, „The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next", *op. cit. 1110.*

1116 Oleksandr Zadorozhnii, „The Arbitration Process in Accordance with the UN Convention on the Law of the Sea of 1982 and the Recourse to the International Court of Justice as a Way to Resolve Disputes between Ukraine and the Russian Federation: The Effectiveness, Advantages, Disadvantages" [in Ukrainian: "Arbitrazhnyy protses vidpovidno do Konventsiyi OON z mors'koho prava 1982 r. ta zvernennya do Mizhnarodnoho Sudu OON yak sposoby rozv'yazaty spory mizh Ukrayinoyu i Rosiys'koyu Federatsiyeyu: efektyvnist', perevahy, nedoliky"], *Ukrainian Journal of International Law* 2 (2016): 7-15.

būsimiems Ukrainos teisiniams veiksmams prieš Rusiją, trumpai paminint ginčus pagal UNCLOS[1117].

Nilüfer Oral „Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS" nagrinėjo ginčus tarp Ukrainos ir Rusijos, atsižvelgiant į istorinį konflikto dėl Krymo ir Juodosios jūros laivyno Osmanų imperijos laikotarpiu, SSRS ir laikotarpiu po buvusios SSRS žlugimo. Padaroma išvada, kad šie ginčai yra svarbus papildymas prie pastarojo meto atvejų, kai pagrindiniai ginčytini suvereniteto klausimai yra nagrinėjami pagal UNCLOS ginčų sprendimo procedūras[1118].

Peter Tzeng buvo vienas pirmųjų, kurie parašė straipsnį, aktualų šiai disertacijai: „Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy"[1119]. Šiame straipsnyje analizuojamas teritorinio suvereniteto klausimų poveikis, lyginant Ukrainos ir Rusijos situaciją su bylomis *Mauricijus prieš Jungtinę Karalystę* ir *Filipinai prieš Kiniją*. Straipsnyje pateikiama bendra apžvalga, kaip tribunolas gali nuspręsti dėl savo jurisdikcijos, užuot sutelkęs dėmesį tik į situaciją aplink Krymo vandenis ir ginčų sprendimą pagal UNCLOS. Vėliau jo susidomėjimas labiau perėjo į investicijų teisinės apsaugos aspektus, susijusius su Krymo okupacija[1120].

Todėl analizė šiuo klausimu sutelkta ne tik į klausimus, susijusius su Krymu ir UNCLOS ginčų sprendimu, bet ir į panašius Krymo klausimus kituose teismuose ir tribunoluose.

Gaiane Nuridzhania savo straipsnyje „Crimea in International Courts and Tribunals: Matters of Jurisdiction" pateikia bendra įvairių tarptautinių teismų jurisdikcijos santykių Krymo klausimu apžvalga[1121].

Lawrence Hill-Cawthorne „International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study" analizavo dezagregacijos konceptą tarptautinė teisėje – tai apima platesnių ginčų skaidymą į atskirus teisinius ieškinius pagal skirtingas tarptautines taisykles ir jurisdikcijas. Todėl kaip atvejo analizę jis pateikė Ukrainos ir Rusijos Federacijos ginčų apžvalgą. Jo pagrindinis dėmesys skiriamas trims teismų

1117 Maryna Rabinovych, „The Interplay between Ukraine's Domestic Legislation on Conflict and Uncontrolled Territories and Its Strategic Use of "Lawfare" before Russia's 2022 Invasion of Ukraine – A Troubled Nexus?", *Review of Central and East European Law* 47, 3–4 (2022): 268–297.

1118 Oral, *op. cit*. 1113.

1119 Tzeng, „Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy", *op. cit. 1109,* 3-8. Prieš straipsnį aktualu žiūrėti tinklaraščio įrašą: Tzeng, „The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond", *op. cit. 1109.*

1120 Peter Tzeng, "Investment Protection in Disputed Maritime Areas", *The Journal of World Investment and Trade* 19, 5–6 (2018): 828–859; Peter Tzeng, „Investments on Disputed Territory: Indispensable Parties and Indispensable Issues", *Brazilian Journal of International Law* 14, 2 (2017):122-138; Peter Tzeng, „Sovereignty over Crimea: A Case for State-to-State Investment Arbitration", *op. cit*. 1102. Taip pat verta paminėti jo tinklaraščio įrašą: Peter Tzeng, „Conditional Decisions: A Solution for *Ukraine v. Russia* and Other Similar Cases?", *EJIL: Talk!* (blog), March 20, 2020, https://www.ejiltalk.org/conditional-decisions-a-solution-for-ukraine-v-russia-and-other-similar-cases/.

1121 Gaiane Nuridzhanian, „Crimea in International Courts and Tribunals: Matters of Jurisdiction", *Max Planck Yearbook of United Nations Law Online* 21, 1 (2018): 378–403.

praktikoje pastebėtiems požiūriams, kai tribunolai nagrinėja ieškinius, kurie, atrodo, turi jurisdikciją ir yra susiję su platesnio pobūdžio ginču, nepriklausančiu jų jurisdikcijai. Baigdamas jis aptaria galimas priežastis, kodėl tribunolas tam tikrais atvejais gali pasirinkti vieną požiūrį, o ne kitus[1122].

Iš šios literatūros analizės matyti, kad nustatyta tyrimo problema aktuali ne tik dabar, bet ir anksčiau nebuvo visapusiškai išnagrinėta ir apskritai nagrinėjama labai mažai. Ankstesniuose tyrimuose, susijusiuose su jurisdikcija pagal UNCLOS ir (ar) Krymo okupacija, trūksta išsamios ir nuodugnios Krymo okupacijos įtakos veiksmingoms ginčų sprendimo procedūroms analizės.

Tyrimo naujumas

Nors yra keletas teisės srities darbų mišrių ginčų tema[1123], tačiau ši disertacija pateikia naujus argumentus, kurie galėtų būti naudojami mišriame jūros teisės ginče, kai negalima nustatyti pakrantės valstybės. Kai kurie autoriai daugiausia dėmesio skyrė jurisdikcijai pagal UNCLOS, o kiti – Krymo statusui. Šiuo metu nėra išsamių tyrimų, kuriuose būtų sujungtos šios dvi temos. Nors teisės mokslas pradėjo spręsti jūrų teisės klausimus dėl mišrių ginčų, susijusių su Krymu,[1124] vis tik dar trūksta išsamios analizės, kuri taip pat apima UNCLOS nuostatų, į kurias dar nebuvo pakankamai atsižvelgta, vertinant Ukrainos ir Rusijos Federacijos ginčui taikytiną teisę. Pvz., UNCLOS 58, 59 straipsnius ir 74 straipsnio 3 dalį. Taigi šioje disertacijoje pateikiamas visapusiškas tyrimas, apjungiantis Krymo okupacijos ir ginčų sprendimo pagal UNCLOS klausimą, įvertinant pakrantės valstybių teises ir pareigas Krymo vandenyse, pateikiamas teisinis UNCLOS nuostatų, taikomų nepriklausomai nuo Krymo statuso, aiškinimas, taip pat siūlomi variantai, kaip nustatyti Krymo okupacijos statusą, siekiant išspręsti su juo susijusius klausimus pagal UNCLOS nuostatas. Be to, tyrimas naujas, nes siūlo kaip Ukrainos ieškinys *Coastal State Rights* ginče vis tiek gali būti išspręstas taikant UNCLOS nuostatas.

Teorinė ir praktinė reikšmė

Teorinė šios disertacijos reikšmė – ginčo dėl suvereniteto tarp pajūrio valstybių reikšmės sprendžiant ginčus dėl jūros teisės, remiantis Krymo okupacijos pavyzdžiu, įvertinimas. Disertacijoje siūloma kaip aiškinti kai kurias UNCLOS nuostatas, atsižvelgiant į jų taikymą ir neatsižvelgiant į esamą ginčą dėl šalių suvereniteto. Todėl šios disertacijos indėlis gali būti vertinamas kaip naujų argumentų, kuriais būtų galima remtis mišrios jūros teisės ginčo atveju, kai negalima nustatyti pakrantės valstybės, pateikimas.

1122 Lawrence Hill-Cawthorne, „International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study", *International & Comparative Law Quarterly* 68, 4 (2019): 783-785.

1123 Žr. disertacijoje pateikiamoje literatūros.

1124 Peter Tzeng, „The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond", *op. cit. 1109*; Tzeng, „Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitmacy", *op. cit. 1109*; Volterra, ir kt., *op. cit. 1105,* 616 ; ir kt.

Atsižvelgiant į šio tyrimo aktualumą teorinėje ir mokslinėje sferoje, pažymėtina jo praktinė reikšmė.

Pradžiai, šio tyrimo rezultatai bus naudingi vykstančiame arbitražiniame tribunole, *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* ginče ir (ar) ateities sprendimuose kitose panašiose bylose.

Antra, šiame tyrime pateikta analizė ir išvados, kurios bus padarytos, gali būti naudingos nustatant atsakomybę už UNCLOS pažeidimus, pagal kuriuos ginčų sprendimo institucija pagal UNCLOS turi tiesiogiai ar netiesiogiai nuspręsti dėl Ukrainos suvereniteto Krymo atžvilgiu.

Trečia, disertacija gali padėti nustatyti, kokios priemonės galėtų būti veiksmingiausios siekiant valstybės atsakomybės, taip pat suteikti dar vieną požiūrį į teisingumo ir taikaus ginčų tarp valstybių svarbą.

Dar, toks tyrimas galėtų būti naudingas atliekant tolesnius tyrimus, susijusius su UNCLOS ginčų sprendimo veiksmingumu, taip pat su okupacijos vaidmeniu įvairiuose tarptautinės jūrų teisės ginčuose. Tai taip pat gali būti įdomu atliekant tolesnius tyrimus, apimančius gilesnį ir visapusišką tam tikrų UNCLOS straipsnių aiškinimą ir taikymą bei mechanizmą, kuriuo Rusijos Federacija patraukiama atsakomybėn už tarptautinės teisės ir ypač tarptautinės jūrų teisės pažeidimus. Tyrimo rezultatai galėtų būti panaudoti skaitant paskaitas ir ruošiant mokomąją medžiagą tarptautinės jūrų teisės ir valstybių atsakomybės temomis.

Tyrimo objektas ir tikslai

Sprendžiant tyrimo problemą, **tikslas** – išsiaiškinti, kokie klausimai priklauso teismo ar tribunolo jurisdikcijai pagal UNCLOS, atsižvelgiant į Krymo okupaciją ir kaip vis dar galėtų būti sprendžiami klausimai, kuriuos paveikė Krymo okupacijos faktas, pagal UNCLOS nuostatas.

Tyrimo tikslui pasiekti nustatomi šie **tyrimo uždaviniai**:

1) įvertinti Krymo okupaciją analizuojant jos istorinį ir teisinė kontekstą, apibrėžiant esminius teisinius terminus bei konceptus, susijusius su ja bei UNCLOS ginčų sprendimu, bei analizuojant šį reiškinį tarptautinių ginčų sprendimų kontekste;
2) nustatyti UNCLOS ginčų sprendimo institucijų jurisdikcijos imtį dėl Ukrainos ir Rusijos Federacijos teisių ir pareigų Krymo jūrų zonose Juodojoje ir Azovo jūrose bei Kerčės sąsiauryje bei privalomo UNCLOS ginčų sprendimo ribojimus ir išimtis dėl Krymo okupacijos;
3) analizuoti ir pateikti galimybes kaip išspręsti Krymo okupacijos klausimą, kaip galimą suvereniteto ginčą tarp Ukrainos ir Rusijos Federacijos, pagal UNCLOS nuostatas, kurios gali būti taikomos bei išanalizuoti kaip gali būti atliepti Ukrainos, kaip pakrantės valstybės, teisių pažeidimai pagal UNCLOS.

Ginamasis teiginys:

Ginčų sprendimas pagal UNCLOS gali būti taikomas tik tam tikra apimtimi sprendžiant Ukrainos ir Rusijos Federacijos ginčus dėl vandenų aplink okupuotą Krymą.

Metodologija

Disertacija paremta valstybių ir teismų praktikos bei teisės doktrinos analize. Ji pagrįsta bendrais tarptautinės teisės mokslui reikšmingais tyrimo metodais (pozityvistine tarptautinės teisės analize, paremta dogmatine ir doktrinine prieiga). Jame kritiškai vertinami teismų ir tribunolų priimti sprendimai.

Naudoti šie metodai pasiekti tyrimo tikslui:

- Aprašomasis metodas naudojamas bendrai temos apžvalgai disertacijos pradžioje pateikti.
- Istorinis metodas naudojamas suprasti kokios jūrų zonos ribojosi su Krymu bei jų delimitaciją prieš ir po Krymo okupacijos.
- Lingvistinis metodas ir logikos metodas naudoti interpretuojant UNCLOS nuostatas, teismų praktiką ir kitus teisinius dokumentus.
- Analizės metodas naudotas nagrinėjant UNCLOS teisių ir pareigų pažeidimus bei Krymo okupaciją. Tas pats metodas naudojamas nagrinėjant bylas dėl tribunolo sprendimų, susijusių su jurisdikcijos nebuvimu dėl suvereniteto klausimų. Jis taip pat naudojamas nustatant visus įmanomus ginčų sprendimo būdus pagal UNCLOS tarp Ukrainos ir Rusijos dėl Rusijos Federacijos okupuoto ir aneksuoto Krymo.

Pastebėtina, kad nė vienas iš anksčiau paminėtų metodų nėra pranašesnis už kitą. Visi metodai taikomi kartu detaliai analizei ir visapusiškam tyrimui.

Disertacijos struktūra

Disertacija padalinta į įvadą ir tris dėstymo dalis, kurios padalintos į mažesnes dalis, taip pat išskiriamos išvados ir rekomendacijos, literatūros sąrašas, pateikiama santrauka. Struktūra pasirinkta siekiant pateikti sisteminę skirtingų aspektų, susijusiu su Krymo okupacija ir ginčų nagrinėjimu pagal UNCLOS, analizę.

Bendroji dalis pateikiama pirmojoje dalyje. Šioje dalyje pateikiama informacija apie Krymo okupaciją ir ginčų sprendimo procedūras pagal UNCLOS. Joje tyrinėjamas istorinis Krymo okupacijos kontekstas, atsekant ištakas nuo įvykių, vykusių iki okupacijos, ir apimant tolesnius įvykių po to, įskaitant įvykius po 2022 m. vasario 24 d. Be to, pateikiami pagrindinių sampratų teisiniai ypatumai, aktualūs žvelgiant į okupaciją tarptautinės humanitarinės teisės ir tarptautinės jūrų teisės kampu bei analizuojant UNCLOS ir Ukrainos bei Rusijos Federacijos, kaip jos šalių, ginčų sprendimo mechanizmą. Pirmoji dalis taip pat apima informaciją kaip Krymo okupacijos klausimas pateikiamas tarptautiniuose ginčuose, įskaitant bylas, iškeltas Tarptautiniame Teisingumo Teisme, Europos Žmogaus Teisių Teisme ir investicijų tribunoluose. Dalis baigiama analizuojant specifinius ginčus tarp Ukrainos ir Rusijos Federacijos pagal UNCLOS, konkrečiai, *Coastal State Rights* ir *Detention of Ukrainian Naval Vessels and Servicemen*.

Antrojoje dalyje nagrinėjama klausimo esmė, atsakant į klausimą, kokie klausimai priklauso UNCLOS ginčų tarp Ukrainos ir Rusijos Federacijos institucijų jurisdikcijai, atsižvelgiant į Krymo okupaciją. Joje paaiškinamos Juodosios jūros, Azovo jūros ir Kerčės sąsiaurio pakrantės valstybių teisės ir pareigos. Ši išsami analizė apima

teritorinę jūrą, gretutinę zoną, išskirtinę ekonominę zoną ir kontinentinį šelfą. Pateikiama sudėtingos teisinės bazės, reglamentuojančios Azovo jūrą ir Kerčės sąsiaurį, analizė, padedanti įveikti sunkumus nustatant atitinkamus teisinius režimus, reglamentuojančius Azovo jūros ir Kerčės sąsiaurio vandenis. Be to, išsamiai nagrinėjami privalomo ginčų sprendimo pagal UNCLOS apribojimai ir išimtys bei pateikiamas aiškus vaizdas, kad ne visi ginčo dėl jūrų teisės aspektai neįtraukiami į ginčų sprendimą pagal UNCLOS dėl Krymo okupacijos.

III dalyje pateikiama galimybių analizė, kaip būtų galima pašalinti kliūtis, kylančias dėl Krymo pusiasalio okupacijos, jurisdikcijai pagal UNCLOS. Jame nagrinėjamas galimas ginčo dėl okupacijos sprendimas priimant sąlyginius sprendimus ir UNCLOS 288 straipsnio 2 dalis. Be to, pateikiamos papildomos galimybės nustatyti Krymo okupaciją naudojant alternatyvius mechanizmus, kurie nepatenka į UNCLOS nuostatas. Tai apima galimybę nustatyti okupaciją dvišaliais susitarimais ir vaidmenis, kuriuos galėtų atlikti nustatant okupacijos statusą tarptautinės institucijos, tokios kaip JT Saugumo Taryba, JT Generalinė Asamblėja, Tarptautinis Teisingumo Teismas, Tarptautinis Baudžiamasis Teismas ar specialaus tribunolo, patvirtinančio Krymo okupacijos faktą, įsteigimas. Šioje dalyje pateikiama įžvalgų, kaip galima išlaikyti jurisdikciją pagal UNCLOS ir kaip nustatyti Krymo okupaciją iš įvairių teisinių perspektyvų.

IŠVADOS

Disertacijoje nustatoma, ar Krymo okupacija turi įtakos ginčų sprendimo sistemos aktyvavimui pagal UNCLOS XV dalį, ir pateikiamos rekomendacijos, kaip būtų galima pašalinti Krymo okupaciją, kaip kliūtį ginčų sprendimui pagal UNCLOS. Jos pagrindines išvadas galima apibendrinti taip:

1. Nuo 2014 m. Krymo, kaip okupuotos teritorijos, statusas sukėlė kelis ginčus tarp Ukrainos ir Rusijos Federacijos. Šie ginčai buvo perduoti įvairiems tarptautiniams teismams ir tribunolams, įskaitant Tarptautinį Teisingumo Teismą, Tarptautinį Baudžiamąjį Teismą, Europos Žmogaus Teisių Teismą ir investicijų arbitražo tribunolus. Šiuos procesus Ukraina pradėjo prieš Rusijos Federaciją pagal įvairius susitarimus, įskaitant ICSFT, CERD ir UNCLOS. Tačiau dėl šių susitarimų pagrindu ginčus sprendžiančių teisminių institucijų jurisdikcijos ribų Krymo okupacijos klausimas negalėjo būti tiesiogiai sprendžiamas. Vietoj to dėmesys buvo sutelktas į konkrečius pažeidimus pagal šias konvencijas, atspindint strateginį Ukrainos požiūrį, pasirinktą siekiant išvengti jurisdikcijos iššūkių. Todėl šių teisinių ginčų kontekste Krymo okupacija iki šiol nebuvo teisiškai nustatyta.
2. UNCLOS nėra nuostatų dėl jūrų zonų, paveiktų okupuotos sausumos teritorijos, statuso. Nors, arbitražas *Coastal State Rights* ginče, remiantis UNCLOS XV dalimi, pripažino savo jurisdikciją dėl kai kurių Ukrainos pareiškimų. Tai reiškia, kad ne visi jūriniai ginčai, turintys įtakos okupuotai teritorijai arba teritorijai, kurios teisinis statusas ginčijamas, nepatenka į UNCLOS XV dalies taikymo sritį. Dalyvaudama ginče Rusijos Federacija, prieštaraudama arbitražo teismo jurisdikcijai *ratione materiae*, nesirėmė tarptautinės humanitarinės teisės nuostatomis. Dėl to abi ginčo šalys UNCLOS nuostatas laiko tomis, kurios reglamentuoja vandenis aplink Krymą.
3. *Coastal State Rights* ginče, arbitražas nusprendė, kad negali nagrinėti pretenzijų, kurios susijusios su tuo, kad Ukraina yra Krymo pakrantės valstybė, laikydamasis principo, kad jis negali pasisakyti dėl teritorinio suvereniteto. Šis sprendimas nepatvirtino Rusijos teiginių, kad ji yra Krymo pakrantės valstybė, greičiau pripažįstamas ginčas tarp Ukrainos ir Rusijos Federacijos. Arbitražo teismas pripažino Rusijos Federacijos pretenzijas į Krymo suverenitetą, bet susilaikė nuo teisėtumo analizės. *Šioje disertacijoje teigiama, kad tribunolo neutralus požiūris kelia klausimų dėl Krymo okupacijos nepripažinimo principo apimties.* Kartu, tai reiškia, kad kai kurios UNCLOS nuostatos dėl pakrantės valstybių teisių gali būti taikomos, neįvardijant nei Ukrainos, nei Rusijos Federacijos kaip pakrantės valstybės dėl vandenų aplink Krymą ginčo metu. UNCLOS nuostatos draudžia bet kuriai valstybei pažeisti tokias teises ir pareigas kaip karo laivų imunitetas, laivybos laisvė, jūrų aplinkos apsauga ir išsaugojimas. Kaip buvo parodyta, šių teisių ir pareigų pažeidimai išskirtinėje ekonominėje zonoje aplink Krymą gali būti nustatyti neatsižvelgiant į tai, kas yra pakrantės valstybė. Taip pat *Coastal State Rights* ginče Ukraina potencialiai

gali taikyti UNCLOS 58 straipsnį dėl kitų valstybių teisių ir pareigų išskirtinėje ekonominėje zonoje ir 59 straipsnį dėl ginčų tarp pakrantės valstybių ir kitų valstybių išskirtinėje ekonominėje zonoje. *Šių nuostatų pažeidimas gali būti aktualus remiantis UNCLOS 290 straipsnio 1 dalimi galimybe prašyti laikinųjų priemonių Rusijos veiklai nutraukti.*

4. UNCLOS 88, 141 ir 301 straipsniai akcentuoja taikų jūrų ir vandenynų naudojimą. Šiuo atžvilgiu galima padaryti dvi pagrindines išvadas: pirma, Ukraina negali remtis šiomis nuostatomis, kad Rusijos Federacija būtų atsakinga už tokio „taikaus naudojimo" pažeidimą okupuojant vandenis aplink Krymą, nes greičiausiai nebūtų įmanoma įrodyti ginčo egzistavimo dėl UNCLOS aiškinimo ar taikymo. Antra, pareziumuojant *arguendo*, kad ginčas dėl UNCLOS aiškinimo ar taikymo egzistuoja, Ukraina negali laikyti Rusijos Federacijos atsakinga už tokio „taikaus naudojimo" pažeidimą, kai vandenis aplink okupuotą Krymą ji traktuoja kaip savo, nes tokiam naudojimui okupacijos metu gali būti taikoma neprivaloma išimtis dėl karinės veiklos pagal UNCLOS 298 straipsnio 1 dalies b punktą. Todėl arbitražas pagal UNCLOS neturėtų įgaliojimų priimti sprendimo šiuo klausimu.
5. Visos Juodosios jūros pakrantės valstybės galėtų reikšti pretenzijas dėl Rusijos Federacijos kai kurių teisių ir pareigų pažeidimų pagal UNCLOS nuostatas. Šios teisės ir pareigos turi įtakos laivybos laisvei ir karo laivų imunitetui, taip pat įsipareigojimams saugoti ir išsaugoti jūrų aplinką. Tačiau darant prielaidą, kad jei tokios UNCLOS nuostatos numato įsipareigojimus *erga omnes partes*, kaip sakoma teisės doktrinoje, tai bet kuri valstybė gali pareikšti ieškinį dėl jų teisių pažeidimo Juodojoje jūroje. Todėl, jei teismas ar tribunolas pagal UNCLOS nustatytų, kad šie įsipareigojimai yra *erga omnes partes*, visos UNCLOS šalys gali kelti šiuos klausimus spręsdamos ginčus pagal UNCLOS.
6. Nepaisant to, kad Krymo okupacija trukdo visapusiškam ginčų sprendimui pagal UNCLOS tarp Ukrainos ir Rusijos Federacijos, keli su ginču susiję klausimai nepriklauso nuo okupacijos, bet vis tiek negali būti išspręsti pagal UNCLOS nuostatas. *Šiuo atžvilgiu UNCLOS nuostatų taikymas vandenyse aplink Krymą Azovo jūroje ir Kerčės sąsiauryje priklauso nuo Azovo jūros ir Kerčės sąsiaurio statuso.* Taigi, jei Azovo jūros ir Kerčės sąsiaurio vandenims taikomos istoriškai susiklosčiusios teisės, taikoma neprivaloma išimtis pagal 298 straipsnio 1 dalies a punktą. Taigi, Krymo okupacija neturi įtakos esamiems jurisdikcijos apribojimams ir neprivalomoms išimtims, susijusioms su Ukrainos ir Rusijos Federacijos išlygomis dėl jurisdikcijos pagal UNCLOS. Jei Azovo jūros arba Kerčės sąsiaurio vandenys pripažįstami vidaus vandenimis, šiems vandenims UNCLOS netaikoma. Ginčas dėl tokių vandenų galėtų būti kvalifikuojamas kaip ginčas dėl UNCLOS aiškinimo ar taikymo. Kelios UNCLOS nuostatos, konkrečiai preambulė, 2, 123 straipsniai ir XII, XIII, XIV, XV dalys, yra taikytinos vidaus vandenims ir Ukraina jomis galėtų pasinaudoti Azovo jūros bei Kerčės sąsiaurio vandenimis, nepaisant Krymo okupacijos. Be to, kai kurios bendro ginčo dalys, ypač susijusios su jūrų ribų nustatymu, moksliniais jūrų

tyrimais arba žuvininkystės valdymu, gali būti išspręstos per privalomą taikinimo procedūrą pagal UNCLOS V priedą. Vis dėlto, kalbant apie 15, 74 ir 83 straipsnių, susijusių su jūrų sienų delimitavimu arba su istorinėmis įlankomis ar istoriškai susiklosčiusiomis teisėmis, aiškinimą ar taikymą, Krymo okupacija galėtų tapti kliūtimi privalomo taikinimo jurisdikcijai, kartu nagrinėjant neišspręstą ginčą dėl suvereniteto.

7. Net jei neprivaloma išimtis pagal UNCLOS 298 straipsnio 1 dalies a punktą neįtraukia ginčų dėl 15, 74 ir 83 straipsnių, susijusių su jūrų sienų delimitavimu, aiškinimo ar taikymo iš privalomų ginčų sprendimo procedūrų pagal UNCLOS, 74 straipsnio 3 dalis ir 83 straipsnio 3 dalis vis tiek gali būti taikoma prieš UNCLOS teismus ir tribunolus. Šios nuostatos nustato įpareigojimą bendradarbiauti, visų pirma, sudaryti laikinus praktinio pobūdžio susitarimus ir nekelti pavojaus arba trukdyti pasiekti susitarimą dėl sienų.
8. Vien tik teoriniu atveju, jei JT Saugumo Taryba priimtų rezoliuciją, patvirtinančią Krymo okupaciją, jai nebūtų taikoma neprivaloma išimtis pagal UNCLOS 298 straipsnį. Kadangi sprendimų dėl Krymo pusiasalio pakrantės valstybės nustatymo priėmimas nepatenka į UNCLOS jurisdikcijos sritį, kaip nurodyta 288 straipsnyje, neprivaloma išimtis pagal 298 straipsnį, susijusi su JT Saugumo Taryba, nebūtų taikoma.
9. JT Generalinė Asamblėja turi teisę prašyti Tarptautinio Teisingumo Teismo konsultacinės išvados dėl Krymo okupacijos ir teisinio statuso. Dėl jau nusistovėjusių precedentų bendrojoje tarptautinėje teisėje laikoma, kad Tarptautinio Teisingumo Teismo konsultacinė išvada yra autoritetingas tarptautinės teisės pareiškimas joje nagrinėjamais klausimais. Taigi, Tarptautinio Teisingumo Teismo konsultacinė išvada, jeigu ji būtų pateikta atsargiai ir vengiant tiesioginių klausimų apie suverenitetą, galėtų nustatyti Krymo okupacijos faktą. Teigiamą vaidmenį nustatant Krymo teisinį statusą taip pat galėtų suvaidinti beveik vienbalsė ir viso pasaulio remiama JT Generalinės Asamblėjos rezoliucija su Krymo okupacijos fakto konstatavimu. Krymo platformos sukūrimas ir kasmetinis rengimas gali padėti surinkti reikiamą tarptautinį Krymo okupacijos teisinio nustatymo pripažinimą.
10. Tarptautinės teisės ekspertai pasisakė už specialaus tribunolo, turinčio jurisdikciją nagrinėti Rusijos agresiją prieš Ukrainą, įsteigimą. Toks specialus tribunolas gali patvirtinti Krymo okupaciją. Tačiau kadangi tribunolas dar nėra įsteigtas, pagrindiniais klausimai šiuo metu yra ar ir kas galėtų jį įsteigti bei kokia būtų jo jurisdikcijos apimtis. Naudingiausi Krymo statuso teisinio nustatymo variantai, be abejonės, bus institucinis (tribunolo sukūrimas sudarant Ukrainos ir JT sutartį, pageidautina su JT Generalinės Asamblėjos parama) arba sutartimi pagrįstas metodas (sukuriant tribunolą, pagrįstą daugiašale tarptautine sutartimi). Nustatyti teisinį Krymo statusą po Rusijos okupacijos yra labai svarbu sprendžiant UNCLOS numatytų teisių ir pareigų pažeidimus vandenyse aplink Krymą.

11. Po tokio nustatymo egzistuoja du scenarijai. Pirma, grąžinti bylą arbitražo teismui pagal UNCLOS VII priedą, kad būtų išspręsti klausimai, kurie nepatenka į arbitražo teismo jurisdikciją *ratione materiae* nagrinėjant *Coastal State Rights* ginčą. Antra, suteikti Rusijos agresijos prieš Ukrainą specialiajam tribunolui jurisdikciją ne tik nustatyti agresijos nusikaltimą, karinę okupaciją ir Krymo aneksiją panaudojant jėgą prieš Ukrainą, bet ir jurisdikciją spręsti klausimus, susijusius su Ukrainos, kaip pakrantės valstybės, teisėmis. Tai gali apimti UNCLOS nuostatų aiškinimą ir kompensacijų skyrimą remiantis jūrų teisės jurisprudencija. Taigi abiem atvejais, teisiškai nustačius Krymo okupaciją, ieškiniai, kurie anksčiau buvo laikyti už UNCLOS numatytos jurisdikcijos ribų, gali būti svarstomi.

Autorės publikacijos disertacijos tema:

1. Gorbun, Olesia. „Crimean Occupation and UNCLOS Dispute Settlement: Navigating Territorial Sovereignty and Non-Recognition." *Baltic Journal of Legal and Social Sciences* 3 (2023): 20-29. https://doi.org/10.30525/2592-8813-2023-3-3
2. Gorbun, Olesia. „The Azov Sea and the Kerch Strait in the Light of Exceptions under Article 298(1) UNCLOS regarding Disputes Concerning Maritime Delimitation and Historical Titles". Iš *Modern Paradigm of Public and Private Law amidst Sustainable Development. Volume 1*. 135-160. Riga: Baltija Publishing, 2023. https://doi.org/10.30525/978-9934-26-331-6-7
3. Katuoka, Saulius, and Gorbun, Olesia. „A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea". Iš *Emerging New Legal Order: The Role of War in Ukraine* (bus paskelbta 2024).

Pranešimai mokslinėse konferencijose

1. The International Conference "Battlefield Ukraine: Exploring War and Justice", 17 November 2023.
2. The International Scientific Conference "The Black Sea Public Legal Readings", 10-12 September 2021.
3. The International Conference "COFOLA INTERNATIONAL 2021", 23 April 2021.
4. The International Conference "Sustainability in the face of the Global Crisis" (SOCIN 2020), 14 October 2020.

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2011-2017 m. Teisės magistro laipsnis, Jaroslavo Išmintingojo nacionalinis teisės universitetas.

Pagrindinė patirtis, susijusi su disertacija
2022 m. liepa – 2023 m. kovas ITLOS-Nippon Foundation Capacity-Building and Training Programme on Dispute Settlement under UNCLOS dalyvė, Tarptautinis jūrų teisės tribunolas, Hamburgas, Vokietijos Federacinė Respublika.
2021 m. liepa – 2021 m. rugsėjis stažuotoja Teisės tarnyboje, Tarptautinis jūrų teisės tribunolas, Hamburgas, Vokietijos Federacinė Respublika.
2018 m. rugpjūčio mėn. ir 2019 m. rugpjūčio mėn. lektorė ELSA Summer Law School of Maritime Law, Odesoje, Ukrainoje.

Kita su disertacija susijusi patirtis
2024 m. vasario 6-7 d. Trečiosios Alumni Yeosu Jūrų teisės akademijos, kurią organizavo Okeanų ir žuvininkystės ministerija ir Korėjos jūrų institutas, pranešėja (online).
2023 m. spalio 2024 m. vasario mėn. baigta UAA Arbitration Academy (online).
2022 m. lapkritis – 2023 m. sausis UNITAR Tarptautinės aplinkosaugos teisės, Sutarčių teisės ir Tarptautinės teisės kursų užbaigimas (online).
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Gorbun, Olesia

THE CRIMEAN OCCUPATION AND DISPUTE RESOLUTION UNDER THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: doctoral dissertation. – Vilnius: Mykolas Romeris University, 2024. P. 334.

Bibliogr. 224-274 p.

The thesis "The Crimean Occupation and Dispute Resolution under the 1982 United Nations Convention on the Law of the Sea" provides an in-depth analysis of the legal complexities surrounding the occupation of Crimea by the Russian Federation and the dispute settlement mechanisms under the United Nations Convention on the Law of the Sea (UNCLOS). The thesis examines the extent to which disputes over land sovereignty fall outside the provisions of UNCLOS and identifies which law of the sea matters can still be adjudicated between Ukraine and the Russian Federation by courts or tribunals under the jurisdiction provided by UNCLOS in the waters of the Black Sea, Sea of Azov, and the Kerch Strait. It offers a new approach to interpreting certain provisions of UNCLOS, provides a detailed analysis based on the legal status of waters surrounding the Crimean Peninsula, and clarifies that the Crimean occupation is not the sole obstacle to resolving the law of the sea disputes between Ukraine and the Russian Federation. The thesis explores options to overcome jurisdictional barriers under UNCLOS arising from the Crimean occupation, suggests solutions for determining the Crimean occupation from various legal perspectives, and due to this, provides insights into maintaining jurisdiction under UNCLOS.

Disertacijoje „Krymo okupacija ir ginčų sprendimas pagal 1982 m. Jungtinių Tautų jūrų teisės konvenciją" išsamiai analizuojami su Rusijos Federacijos įvykdyta Krymo okupacija susiję sudėtingi teisiniai klausimai ir ginčų sprendimo mechanizmai pagal Jungtinių Tautų jūrų teisės konvenciją (UNCLOS). Disertacijoje nagrinėjama, kokiu mastu ginčai dėl sausumos suvereniteto nepatenka į UNCLOS nuostatų taikymo sritį, ir nustatoma, kokius jūrų teisės klausimus tarp Ukrainos ir Rusijos Federacijos vis dar gali spręsti teismai ar tribunolai pagal UNCLOS numatytą jurisdikciją Juodosios jūros, Azovo jūros ir Kerčės sąsiaurio vandenyse. Joje siūlomas naujas požiūris į tam tikrų UNCLOS nuostatų aiškinimą, pateikiama išsami analizė, grindžiama Krymo pusiasalį supančių vandenų teisiniu statusu, ir paaiškinama, kad Krymo okupacija nėra vienintelė kliūtis, trukdanti spręsti Ukrainos ir Rusijos Federacijos jūrų teisės ginčus. Disertacijoje nagrinėjamos galimybės įveikti jurisdikcijos kliūtis pagal UNCLOS, kylančias dėl Krymo okupacijos, siūlomi Krymo okupacijos nustatymo sprendimai iš įvairių teisinių perspektyvų ir dėl to pateikiamos įžvalgos dėl jurisdikcijos taikymo pagal UNCLOS.

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THE CRIMEAN OCCUPATION AND DISPUTE RESOLUTION UNDER THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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