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CRIMEAN OCCUPATION AND UNCLOS DISPUTE SETTLEMENT: NAVIGATING TERRITORIAL SOVEREIGNTY AND NON-RECOGNITION

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Abstract. The article examines the interplay between the Crimean occupation and UNCLOS compulsory dispute settlement procedures, exploring how the fact of Crimea's occupation can be established and UNCLOS dispute settlement procedures applied. It also investigates the contradiction within the Annex VII Arbitral Tribunal's award in the *Coastal State Rights Dispute* due to Crimea's occupation. The study concludes that to address violations made by the Russian Federation under the provision of UNCLOS Crimea's occupation, Ukraine can seek an advisory opinion from the International Court of Justice. Strengthening Ukraine's position requires a legally binding decision on Crimea's occupied status and Ukraine's coastal state status, possibly through an ad hoc tribunal with jurisdiction. Supporting evidence from other courts may be valuable, despite their lack of direct jurisdiction over the matter of occupation. The article also discusses the principle of non-recognition and the tribunal's neutral approach to accommodate both parties in its award in *Coastal State Rights Dispute*.

Key words: a dispute concerning interpretation or application of UNCLOS, Coastal State Rights Dispute, dispute between Ukraine and Russia, international law, law of the sea, state responsibility.

Introduction. Land retains its fundamental role in establishing sovereignty and asserting States' claims over both terrestrial and maritime areas. The territorial aspect remains as a prime feature, serving as «the physical foundation» for authority, jurisdiction, nationality, and thus providing the basis for peace and security (Klein, 2018: 253). Under international law, only States can claim maritime title. States possess distinct rights and responsibilities over various maritime zones that extend from their coastlines. Thus, within the baselines of a coastal state lie internal waters, where full sovereignty is exercised, and just outside it lies the territorial sea, which is also subject to a coastal state's sovereignty, except for the right of innocent passage granted to vessels of other states. Additionally, a coastal state is entitled to a contiguous zone for specific purposes and an exclusive economic zone, which can extend up to 200 miles from its baselines. The coastal state also possesses sovereign rights over its continental shelf, which can extend up to 200 miles or more, depending on the specific seabed configuration and assessment process for the extent of an outer continental shelf. As the distances from the coast increase, the coastal state's rights gradually decrease until reaching the high seas, an area over which no state exercises sovereignty (Klein, 2018: 253-534; UNCLOS art. 8(2), art. 2, art. 18-19, art. 33, art. 56, art. 76).

The compulsory dispute settlement procedures included in Part XV of United Nations Convention on the Law of the Sea (UNCLOS or Convention) have been widely recognized as one of its most notable accomplishments of «a legal order for the seas and oceans» (Holst 2023: 284). Thus, the question goes how the sovereignty over the territory, namely Crimean occupation, and disputes under UNCLOS interact with each other.

Relevance of the issue. Since the full-scale invasion of Ukraine by the Russian Federation on 24 February 2022, the relations between these two countries certainly made a stronger shift to regulation by international humanitarian law than it was in 2014. Since 2014, when Crimea was illegally occupied by the Russian Federation, Ukraine instituted *Dispute Concerning Coastal State Rights in*

the Black Sea, Sea of Azov, and Kerch Strait (further *Coastal State Rights Dispute*) on 16 September 2016 under Annex VII of UNCLOS. Thus, it could be considered that despite the occupation and international humanitarian law as general law, law of the sea acts as a special law, and by this, «*lex specialis derogat legi generali*».

Analysis of recent research and publications. Territorial sovereignty and disputes settlement under UNCLOS was covered by vast amount of legal scholarship. For example, it was done by such well-known lawyers and scholars as Alan Boyle (1997, 2003), Yoshifumi Tanaka (2018, 2019), Natalie Klein (2005, 2014, 2018), Igor Karaman (2012), Robin Churchill (2010, 2017), Sandrine W. De Herdt (2022), Lan Ngoc Nguyen (2023) and many more ('Select Bibliography on Settlement of Disputes Concerning the Law of the Sea', 2022).

Crimean occupation as a part of *Coastal State Rights Dispute* between Ukraine and the Russian Federation was addressed by Peter Tzeng (2016, 2017); Oleksandr Zadorozhnii (2016); Robert G. Volterra, Giorgio F. Mandelli, and Álvaro Nista (2018); Gaiane Nuridzhanian (2018); Valentin Schatz and Dmytro Koval (2018, 2021); Massimo Lando and Nilüfer Oral (2021), etc.

However, the possible scenario of applying the approach taken by Mauritius in regard Chagos Archipelago and UK have not yet been investigated, which, together with the increasing discussions on this issue and preliminary objection award in *Coastal State Rights Dispute* by the Annex VII Tribunal, has led to the need for comprehensive research.

Methodology. The article applies a case study approach, focusing on the Crimean occupation, to examine the complexities and implications of the dispute settlement procedures within the framework of UNCLOS. The research methods include legal analysis of relevant international treaties and case law, as well as examination of primary and secondary sources to provide a comprehensive understanding and reach the established aim of the article.

The aim of the article is to answer the question how the Crimean occupation and compulsory dispute settlement procedures under UNCLOS interact with each other; what possible scenario of establishing the fact of occupation of Crimea with further applicability of compulsory dispute settlement procedures under UNCLOS is; and why there is a contradiction within the award of Annex VII Arbitral Tribunal in Coastal State Rights Dispute because of the occupation of Crimea.

1. An overview of UNCLOS and its compulsory dispute settlement procedures

The compulsory jurisdiction provided in Part XV, section 2 of UNCLOS does not extend to all international legal disputes. It is limited to disputes falling within the scope of the Convention. It is provided in Article 288, namely, it is «jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part».

Thus, to invoke the jurisdiction provided by UNCLOS, the party bringing the dispute must identify specific provisions of the Convention that it claims have been violated by the opposing party. While the Convention covers various aspects, it does not address every issue that may arise in relation to the sea. Consequently, there may be cases where a dispute pertains to matters concerning the sea but does not involve any provisions of the UNCLOS (Chandrasekhara Rao & Gautier 2018: 90).

Applicability of the jurisdiction under UNCLOS involving contested land sovereignty issues remained ambiguous under UNCLOS for quite a long time. The text of UNCLOS does not provide explicit guidance on this matter. The only reference is found in its Article 298(1)(a)(i), which allows States to make declarations excluding maritime delimitations from compulsory dispute settlement, but it does not clarify whether concurrent land sovereignty issues are also excluded in the absence of such declarations. However, there are indications that court or tribunal under UNCLOS may have the authority to address ancillary land issues as long as they are not the central subject of the dispute and do not rely on a supplementary jurisdictional basis (Buga 2005: 91).

The ambiguity of applicability of the jurisdiction under UNCLOS involving contested land sovereignty issues was solved by recent law of the sea jurisprudence. Thus, the first one to answer this

question was the *Chagos Marine Protected Area Arbitration* between Mauritius and United Kingdom (further *Chagos MPA Arbitration*). In this case, one of Mauritius' claims was that the UK lacked the authority to declare an MPA or other maritime zones over the Chagos Archipelago because it did not qualify as the «coastal» State under Articles 2, 55, 56, and 76 of UNCLOS.

Firstly, the Annex VII Tribunal isolates the real issue in the case and identifies the object of the claim (para. 208), evaluates where the relative weight of the dispute lies (para. 211).

In particular it asks «[i]s dispute primarily a matter of the interpretation and application of the term «coastal State», with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a «coastal State» merely representing a manifestation of that dispute?» and gives the answer that «[t]here is an extensive record, extending across a range of fora and instruments, documenting the Parties' dispute over sovereignty contrast, prior to the initiation of these proceedings» (para. 211). The Arbitral tribunal highlights the argument of Mauritius that «the consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the MPA» (para. 211). Thus, in its award dated March 18, 2015, the arbitral tribunal determined that this claim was related to a dispute concerning land sovereignty, which fell beyond the scope of the Convention. As a result, the tribunal concluded that it lacked jurisdiction over the matter (paras. 219–221).

In *the South China Sea Arbitration* between the Republic of Philippines and the People's Republic of China, Annex VII Tribunal addresses among other issues also the source of maritime entitlements and the status of certain maritime features in the South China Sea. Thus, it rules that in its Award on Jurisdiction and Admissibility that claims «could be understood to relate to sovereignty if [...] either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty» (para. 153). Another jurisprudence involving into a law of the sea dispute matters of sovereignty became *the Coastal State Rights Dispute*.

2. Analysis of the Coastal State Rights Dispute

The case involves a dispute between Ukraine and the Russian Federation, arising from events in Crimea in 2014. Ukraine claims that Russia invaded and occupied Crimea, while Russia asserts that a referendum resulted in Crimea's reunification with Russia. Due to this, Ukraine alleges that the Russian Federation that «various unauthorized activities of the Russian Federation occurring subsequently to these events violate Ukraine's rights under [UNCLOS]» (paras. 1–7). The Arbitral Tribunal notes that the parties hold different views regarding the nature of the dispute, the extent of its jurisdiction, and the existence of a dispute over sovereignty over Crimea. Thus, Russian Federation argues that the Arbitral Tribunal does not have the right to consider Ukraine's case because it pertains to sovereignty over Crimea, rather than the interpretation or application of UNCLOS. Ukraine, on the other hand, asserts that the dispute being examined by the Arbitral Tribunal relates to the interpretation or application of UNCLOS, thus giving the Tribunal jurisdiction (paras. 43–45).

The Arbitral Tribunal evaluates the nature of the dispute, the extent of its jurisdiction, and the existence of a dispute over sovereignty over Crimea.

2.1. The nature of the dispute

The main argument of the Russian Federation is the question of Ukraine's «coastal State rights» depends on the Tribunal's determination of which state has sovereignty over the relevant maritime zones, which hinges on Ukraine's sovereignty over Crimea. They argue that Ukraine seeks to restore Crimea's sovereignty through legal and diplomatic means. The Russian Federation argues that Ukraine's claims are based on allegations of aggression and annexation by Russia, and they challenge these accusations. They emphasize that the core issue of disputed land sovereignty cannot be bypassed by calling Russia an aggressor. The Russian Federation contends that Ukraine's objective is

to secure a favourable determination on the sovereignty of Crimea, which falls outside the scope of the Convention (paras. 46–57).

In return, Ukraine asserts that the dispute before the Tribunal concerns the interpretation or application of UNCLOS. It claims that Russia has violated its rights guaranteed under the Convention «through a campaign of exclusion, exploitation, and usurpation across the Black Sea, the Sea of Azov, and the Kerch Strait». Ukraine argues that its references to «coastal State» and «sovereignty» are in line with the provisions of the Convention and confirm that the dispute involves its interpretation and application. The objective of Ukraine's claims is to address Russia's actions in the maritime areas and protect its resources and cultural heritage, not to challenge the status of Crimea as part of Ukraine (paras. 58–62).

The Tribunal in this respect concludes that while Ukraine frames its dispute as violations of its rights under UNCLOS, many of its claims are based on the assumption that Crimea belongs to Ukraine, and it is the «coastal State» under UNCLOS. However, if the status of Crimea as part of Ukraine is not established, the Tribunal cannot address these claims without resolving the sovereignty issue over Crimea (paras. 151–154).

2.2. The extent of the jurisdiction

The Russian Federation argues that the jurisdiction of the Arbitral Tribunal is limited to disputes concerning the interpretation or application of the Convention, and it does not include disputes over territorial sovereignty (paras. 65–73). On the other hand, Ukraine contends that the Tribunal has a broad jurisdictional grant to address all issues related to the law of the sea. They argue that the term «any dispute» in Article 286 reflects the intent of UNCLOS to grant the tribunal broad jurisdiction. Ukraine also points to the *Chagos MPA Arbitration* where it was established that when a dispute relates to the interpretation or application of the Convention, the jurisdiction of a court or tribunal extends to making necessary findings of fact and ancillary determinations of law to resolve the dispute. Therefore, according to Ukraine, a respondent's claim of sovereignty cannot automatically negate the tribunal's jurisdiction under Articles 286 and 288 UNCLOS, and in certain cases, the tribunal can address the underlying sovereignty dispute as part of its resolution process (paras. 74–77).

The Tribunal in this respect believes that the main issue in this case is whether a sovereignty dispute over Crimea exists and, if so, whether it is related to the maritime dispute brought by Ukraine before the Tribunal (paras. 161).

2.3. The existence of a dispute over sovereignty over Crimea

The Arbitral Tribunal examines the argument regarding the existence of a sovereignty dispute over Crimea. It determines that the principles of non-recognition, good faith, and estoppel do not bar the Russian Federation's claim. The Tribunal also rejects Ukraine's assertion that the claim is implausible. Furthermore, the Tribunal concludes that resolving the question of sovereignty over Crimea is essential to addressing Ukraine's claims under the Convention. As a result, the Tribunal lacks jurisdiction over claims dependent on Ukraine's sovereignty over Crimea and advises Ukraine to revise its submissions accordingly (paras. 162–188).

Undoubtedly, the central issue in this case revolves around the sovereignty dispute concerning Crimea. Similar to *Chagos MPA Arbitration* between Mauritius and the United Kingdom, Annex VII arbitral tribunal cannot determine the coastal State without addressing the underlying questions of sovereignty. However, from the perspective of the view of the illegal occupation, this part of the Award brings more questions than answers.

3. Occupation and dispute related to sovereignty over Crimea under UNCLOS: another perspective

When the law of the sea acts as a special law, and by this, «*lex specialis derogat legi generali*», even if certain parts of the sea are occupied, the occupying power does not have the right to explore and exploit natural resources within the «occupied» maritime zones. By this, «the displaced government

retains its rights under [UNCLOS] and the occupant must allow the occupied State to exercise such rights, or at least cooperate with the occupied State in exploitation of the resources due to the long-term environmental, political and economic effects of such actions» (Friedman 2021: 437).

However, the reality shows that such occupation has to be established before alleging the occupying state of its violation of articles of UNCLOS. It reflects a lot of similarities with the Chagos Archipelago and Mauritius case.

The Chagos Archipelago is a group of islands located in the Indian Ocean. It was detached from the colony of Mauritius in 1965 and is currently part of the British Indian Ocean Territory. The UK removed the entire Chagossian population from the archipelago between 1968 and 1973, and today it no longer has a permanent population. In 1966, the largest island in the archipelago, Diego Garcia, was leased to the United States as a strategic airbase (Nguyen 2016: 121-122). The archipelago has been the subject of disputes between Mauritius and the United Kingdom regarding sovereignty and the establishment of a Marine Protected Area to preserve marine biodiversity. Mauritius has asserted its rights to sovereignty over the archipelago and initiated earlier mentioned *Chagos MPA Arbitration*. When the Arbitral Tribunal declined its jurisdiction in this case, Mauritius gained support within United Nations General Assembly (UNGA) that adopted Resolution 71/292 on Request for an advisory opinion of the International Court of Justice (ICJ) on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965” on 22 June 2017. Later, after the Advisory Opinion was issued, Mauritius initiated a maritime delimitation dispute with Maldives in the International Tribunal for the Law of the Sea (ITLOS). Thus, the Special Chamber of ITLOS concluded that there was no involved question of sovereignty over the Chagos Archipelago, based on the determinations made by the ICJ in its *Advisory Opinion concerning Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and Resolution 73/295 adopted by UNGA on 22 May 2019 (para. 246). By this, the Special Chamber does not directly address the question of sovereignty. However, based on the ICJ’s Advisory Opinion, the Chamber essentially settles the sovereignty dispute between the United Kingdom and Mauritius over the Chagos Archipelago with a binding effect. This case’s unique circumstances make it unclear if it impacts on the future determinations on sovereignty over territory within the law of the sea dispute settlement (De Herdt 2022: 367).

The *Chagos MPA Arbitration* and *Coastal State Rights Dispute* share a similarity in having an unresolved dispute over territorial sovereignty.

The possible scenario in case of occupation of Crimea is to apply the approach taken by Mauritius in regard to the Chagos Archipelago. By this, it does make sense to ask UNGA to issue a resolution seeking an advisory opinion from ICJ regarding the status of Crimea as occupied by the Russian Federation. However, even though the situation with Chagos Archipelago seems similar to Crimea, it has a very distinct difference. Thus, ICJ in its Advisory Opinion highlights the functions of the UNGA concerning decolonization (para. 163), it also was mentioned by Special Chamber in its Award on Preliminary Objections (para. 226). There is no certainty that ICJ Advisory Opinion can provide any emphasis in a special role of UNGA concerning illegal annexation and occupation. In this respect it would be important to strengthen Ukraine’s position against Russia’s illegal annexation and ongoing occupation of Crimea since 2014 and to seek a more definitive and legally binding decision on the status of Crimea as occupied and Ukraine as its coastal state. Given the recent full-scale invasion of Ukraine by the Russian Federation and discussions about establishing an ad hoc tribunal (Vasiliev 2022, Corten & Koutroulis 2022, Trahan 2023, Pylypenko 2023, McDougall 2023, etc) if such a tribunal is formed, it could be asked for legally binding decision confirming the status of Crimea as occupied by the Russian Federation since 2014. One of the most important issues is that the relevant ad hoc tribunal has to be granted this jurisdiction to do so, and it should be agreed that its decision would be legally binding. The supporting evidence that can be used are decisions of other courts, such as ECHR, ICJ, ICC. Even though they do not have direct jurisdiction to establish the

matter of occupation, they do legal evaluation of the situation that could be referred to as «authoritative power».

From the perspective of general international law, the illegality of acquiring territory through the threat or use of force is a principle of customary international law. It was confirmed in a number of cases (*Military and Paramilitary Activities in and against Nicaragua*, paras. 187–190; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 88).

The International Law Commission recognized the prohibition of aggression and illegal use of force as *jus cogens* (Report of the International Law Commission 2001: 283-284, paras. 4–5). *Jus cogens* or a peremptory norm of general international law is defined as «a norm accepted and recognized 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» (VCLT, art. 53).

Article 41(2) of the International Law Commission Articles on State Responsibility provides the obligation of non-recognition stating that «[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation». Meanwhile, Article 40 states that «1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation».

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 (Talmon 2006: 114). UNGA Resolution 68/262 calls upon states not to recognize any alteration of Crimea's status. The Tribunal in *Coastal State Rights Dispute* acknowledges this non-recognition principle, however, 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» (para. 177). According to the Tribunal «without prejudice to the meaning of the phrase «not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol», 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» (para. 177).

By this, according to the Tribunal, it «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» (para. 178).

The approach taken reveals the reality by claiming not to violate the principle of non-recognition. Nevertheless, at the same time it also acknowledges the existence of a dispute between Ukraine and the Russian Federation. This creates a contradiction within the tribunal's award. 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. 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.

While criticizing the approach taken by the Tribunal, it is important to see another side. And another side is that the essential characteristic of the settlement of disputes is that jurisdiction shall be based on consent (Gautier 2022: 1062). Obviously, 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 (Holst 2023: 284).

And by this, the Tribunal faced quite a challenging situation. In case, 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. Also, considering 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 (*the South China Sea Arbitration Award on Jurisdiction and Admissibility*, para. 10; *the South China Sea Arbitration Award*, para. 53). By this, 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 Russian Federation.

Conclusions. The results of the study confirm the complexity of the situation with the occupation of Crimea and Annex VII Arbitral Tribunal under UNCLOS. The *Chagos MPA Arbitration* and *Coastal State Rights Dispute* both have unresolved disputes over territorial sovereignty. To address the situation with Crimea, Ukraine can follow Mauritius' approach with the Chagos Archipelago, seeking an advisory opinion from the ICJ through the UNGA. However, it's important to note that the ICJ's advisory opinion may not provide clear emphasis on the role of the UNGA concerning illegal annexation or occupation. To strengthen Ukraine's position against Russia's actions, a more definitive and legally binding decision on Crimea's status as occupied and Ukraine as its coastal state is needed. Establishing an ad hoc tribunal with the jurisdiction to make such a decision and ensuring its decision is legally binding would be crucial. Supporting evidence from other courts like the ECHR, ICJ, and ICC can also be useful, despite their lack of direct jurisdiction on the matter of occupation.

According to general international law, acquiring territory through the threat or use of force is illegal, and this principle is considered a peremptory norm. Article 41(2) of the International Law Commission Articles on State Responsibility outlines the obligation of non-recognition, aiming to maintain the illegality of the situation and prevent any actions implying recognition of its legality. In the *Coastal State Rights Dispute*, the tribunal acknowledges the non-recognition principle but also acknowledges the existence of a dispute between Ukraine and Russia. This creates a contradiction within the award, as applying the non-recognition principle would mean there should be no dispute. However, the tribunal may have chosen a neutral position to accommodate both parties and avoid potential challenges to its jurisdiction.

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