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JURISDICTION IN INTERNATIONAL LAW

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The textbook covers topics related to the concept and types of jurisdiction, the peculiarities of the exercise of jurisdiction by states in criminal, human rights, economic and environmental issues, the jurisdiction of international universal and regional courts, as well as the problems of competition and conflicts of jurisdictions. The textbook is intended for students majoring in 'International Law' and all those interested in international law.

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INTRODUCTION

It is important for every lawyer to understand the theoretical basics, features of the jurisdiction of a state and of an international court, grounds for extraterritorial jurisdiction in different fields of international cooperation, as well as to know how to resolve different conflicts of jurisdiction in Public and Private International Law.

The textbook is designed for foreign students of the educational program 'International Law' (language of tuition – English) and is aimed at facilitating for them mastering the course 'Jurisdiction in International Law' in the fourth year of study. It covers such themes as the concept of jurisdiction in international law, criminal jurisdiction of states, jurisdiction of states in economic, environmental and human rights issues, jurisdiction of international universal and regional courts, 'advisory jurisdiction' of international courts, forum shopping, multiple proceedings and overlap of jurisdictions.

Moot cases are an integral part of the textbook which will enable students to apply the acquired theoretical knowledge in practice, to develop their ability to logically and professionally substantiate their point of view on different issues of jurisdiction in international law. Besides, the textbook contains assignments and questions for individual work with details on how to accomplish them. The assignments develop the ability to study complex issues independently as well as boost research potential of future lawyers. The textbook takes into account multicultural environment in which the students of the Program study, thus, referring not just to the European states and organizations, but also to African, American and Asian countries. Furthermore, some parts of the textbook and individual tasks refer to jurisdictional issues resulting from the proceedings instituted by Ukraine before universal and regional courts against Russia in the aftermath of its aggression. It is of paramount importance to equip our foreign students, who will become diplomats and lawyers in our partner states, with the basics of the theory of jurisdiction which may become a helpful practical instrument in bringing the aggressor and its agents to international responsibility.

ABBREVIATIONS

ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
CIS	Commonwealth of Independent States
CITES	Convention on the International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
DRC	Democratic Republic of the Congo
FTAIA	Foreign Trade Antitrust Improvements Act
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EU	European Union
GATT	General Agreement on Tariffs and Trade
IACtHR	Inter-American Court of Human Rights
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ITLOS	International Tribunal for the Law of the Sea
NAFTA	North-American Free Trade Agreement
NGO	Non-Governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PPMs	processes and production methods
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

TOPIC 1
THE CONCEPT OF JURISDICTION IN INTERNATIONAL LAW

The concept of jurisdiction in the doctrine. For every lawyer, regardless of whether he or she is working in domestic or international law, 'jurisdiction' is a constant companion[1]. The Vienna Convention on the Law of Treaties (1969) is usually called a 'treaty on treaties', while the customary rules of international law on jurisdiction are called 'law on laws'[2]. The concept of jurisdiction is one of the fundamental institutes in international law which paves the way for the correct application of other legal rules and principles.

The term 'jurisdiction' has a lot of different meanings in law and doctrine. One of the meanings of this word, derived from Latin, is 'to speak the law' (in Latin – *ius dicere*). In Ancient Rome, the word '*jurisdictio*' meant 'justice', 'judicial proceedings', 'dispute resolution'. It was also interpreted as the magistrate's power 'to determine the law and, in accordance with it, to settle disputes concerning persons and property within his forum (sphere of authority)'[3]. As far as the competence of the courts (judicial jurisdiction) in the Roman Empire is concerned, A. Matthaeus, one of the most influential commentators of Roman criminal law texts, stated in his '*De criminibus'* (1622) that '[r]egarding a competent court, a primary rule of law is that the accuser follows the court of the accused'[4]. This rule is applied to both civil and

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[1] Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. Introduction: Defining State Jurisdiction and Jurisdiction in International Law / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. P. 4.

[2] Ryngaert C. Jurisdiction in International Law. Oxford: Oxford University Press, 2015. 2nd ed., preface.

[3] Allen S., et al. P. 4.

[4] Ryngaert C. Jurisdiction in International Law. P. 52.

criminal law cases[5] and mirrors modern principles of the resolution of jurisdictional conflicts. Only after the fall of the Roman Empire, and especially from the High Middle Ages on, when kingdoms and empires with more certain boundaries were built, did scholarly attention turn to sovereignty problems surrounding the extraterritorial application of laws[6]. For example, in one of the first theories of extraterritorial jurisdiction, Bartolus stated, that a state's law could bind its nationals abroad if the legislator had the explicit intent to do so[7].

It was only from the seventeenth century on, the principle of territoriality in public international law became gradually entrenched in European legal thought: the theory that a person who moved to another territory did not carry his personal laws with him, but became subject to the laws of that territory, gained ascendancy[8]. Scholars perceived jurisdiction which was interpreted in line with the Peace of Westphalia as congruent with sovereign territorial borders'[9]. For example, I. Kant in his 'Perpetual Peace' lays out his most comprehensive ideas of his international doctrine of law which may be considered to be based on a traditional state-centred and sovereignty-driven understanding of jurisdiction as protecting the matters falling exclusively in the sovereign domain of every country[10].

The nineteenth century witnessed the European colonialism which gave the power to some nations to assert jurisdiction over huge territories, even remote ones[11]. Western powers imposed a system known

[5] Ibid.
[6] Ryngaert C. Jurisdiction in International Law. P. 52-53.
[7] Ryngaert C. Jurisdiction in International Law. P. 53.
[8] Ryngaert C. Jurisdiction in International Law. P. 54.
[9] Beaulac S. The *Lotus* Case in Context: Sovereignty, Westphalia, Vattel, and Positivism / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. P. 43.
[10] Wittich S. Immanuel Kant and Jurisdiction in International Law / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. P. 85.
[11] Yahaya N. The European Concept of Jurisdiction in Colonies / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. 65.

as extraterritoriality when their extraterritorial courts – not local courts – had jurisdiction over Westerners in Japan (1856–1899), the Ottoman Empire/Turkey (1825–1923), and China (1842–1943)[12]. Despite the territorial organization of the international system, a process of harmonization of legal rules has taken place across geographical spaces in both colonial and postcolonial eras[13]. In most contemporary academic discussions of extraterritoriality, the express or implicit point of reference is nineteenth-century positivism – the notion that all law emanates from nation-states, each sovereign within its territory[14]. The arch-positivist J. Austin, for example, wished to define sovereignty in strictly territorial terms, however, toward the end of his 'Province of Jurisprudence Determined', even Austin had to admit grudgingly that law does in fact frequently operate extraterritorially[15].

The issue of jurisdiction has been duly elaborated in modern academic literature. It was highlighted in the works of prominent authors, such as M. Evans, M. Shaw, C. Ryngaert, S. Allen, A. Mills, M. Fitzmaurice, D. Costelloe, B. Chimni, P. Gragl, E. Guntrip, K. Tuori, S. Beaulac, N. Yahaya, S. Wittich, H. Quane, P. Berman, M. Valverde, Sh. McVeigh, D. Kritsiotis, K. Trapp, W. Vandenhole, J. Summers, N. Ruskola, Th. Phan, R. Alford, D. Lim, J. Cotter, S. Diamond, M. Masingill, B. Peter, V. Lopez-Balboa, J. Myers, Z. Tropin, M. Gnatovskyy, A. Korynevych, T. Korotkyy, N. Dromina, K. Purynova, V. Popko, V. Kononenko, etc. These authors explore the notion and types of jurisdiction in Public and Private International Law, main restrictions of jurisdiction of a state within national boundaries and in international territories, the issue of conflict of jurisdictions, the peculiarities of a state jurisdiction in criminal, economic, environmental and human rights matters, as well as jurisdiction of international courts and tribunals.

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[12] Kayaoğlu T. Introduction: Extraterritoriality in British Legal Imperialism / *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. Cambridge: Cambridge University Press. 2010. P. 1-16.

[13] Chimni B. The International Law of Jurisdiction: A TWAIL Perspective. *Leiden Journal of International Law*. 2022. Vol. 35, Iss. 1. P. 29-54.

[14] Ruskola T. Colonialism without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China. *Law and Contemporary Problems*. 2008. Vol. 71, No. 3. P. 235.

[15] Ibid.

There are plenty of definitions of 'jurisdiction of a state' in modern doctrine which concern the right of a state to decide on the application or non-application of certain legislative, executive or judicial measures on a particular issue; its legal authority to create mandatory rules, implement them and ensure their enforcement; the possibility of a state to apply its domestic law to events, objects and individuals abroad, in situations provided by international law. The Oxford Handbook of Jurisdiction in International Law (2019) defines the jurisdiction as the 'ability (as well as the limits thereof) for a state or other regulatory authority to exert legal power – in making, enforcing and adjudicating normativity – over persons, things, and places'[16]. 'Jurisdiction' is described in 'International Law' edited by M. Evans (2nd ed., 2006) as 'the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons' as well as 'the scope of the right of an international tribunal, such as the International Court of Justice or the International Criminal Court, to adjudicate upon cases and to make orders in respect of the parties to them'[17]. Malcolm Shaw in his 'International Law' (6th ed., 2008) argues that jurisdiction concerns 'the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs'[18]. Article 2 of the Draft Declaration on Rights and Duties of States, which was adopted by the UN International Law Commission in 1949 and can be regarded as the international legal doctrinal codification, stipulates: every state has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law[19]. Looking through the given definitions, we may conclude that legal scholars link

[16] Beaulac S. P. 41.
[17] International Law. Evans M.D. (ed.). Oxford: Oxford University Press. 2006. 2nd ed., P. 335-336.
[18] Shaw M. International Law. Cambridge: Cambridge University Press. 2008. 6th ed. P. 645.
[19] Draft Declaration on Rights and Duties of States with Commentaries (1949). URL: https://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf.

the concept of jurisdiction to state sovereignty, on the one hand, and to international courts, on the other.

The doctrine of international law analyzes the correlation between concepts of 'sovereignty' and 'jurisdiction' of a state. Sovereignty is usually defined as the highest power of a state to be independent in internal and foreign relations as well as full supremacy of a state on its own territory, in relation to its own national natural and legal persons, as well as independence in international relations. The supremacy of a state within its territory embraces the jurisdiction of that state, thus, jurisdiction stems from the sovereignty or, in other words, sovereignty is primary and jurisdiction is derivative from the sovereignty. If one state exercises its powers beyond its national territory, it may conflict with another state's jurisdiction.

'Jurisdiction' is also defined as the power of a court to adjudicate cases and issue orders, or the territory within which a court may properly exercise its power[20]. Concerning the jurisdiction of international courts, lawyers usually perceive it in relation to subject matter of a case (substantive jurisdiction – *ratione materiae*), persons involved in the case (personal jurisdiction – *ratione personae*), place and time of the events linked to that case (spatial jurisdiction – *ratione loci* and temporary jurisdiction – *ratione temporis*), respectively. Today, the issues of jurisdiction of international courts are governed by international treaties, in particular statutes, rules of procedure and customary norms of international law. The legal doctrine considers some issues regarding jurisdiction of international courts which relate to such important problems, as the analysis of the existence of an international dispute as such, reservations of the parties to the dispute excluding the jurisdiction of a court, compliance by the parties with the procedural requirements of international treaties before the referral of a dispute to the court for consideration, admissibility of complaints, bifurcation of the proceedings, etc. These problems were considered by some regional and universal international courts in disputes related

[20] Cornell Law School: Legal Information Institute. Jurisdiction. URL: https://www.law.cornell.edu/wex/jurisdiction.

to the Russian Federation aggression against Ukraine, for example, in cases on the 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, 2017 and 2019); on the allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation, International Court of Justice, 2022); on the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation, International Tribunal for the Law of the Sea, 2019, and arbitral tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea, 2022); on the coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation, arbitral tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea, 2020).

Some authors claim that in Public International Law the notion of 'jurisdiction' is usually used in a broader sense than it is used domestically or in Private International Law: in Public International Law, it encompasses any exercise of regulatory power, while in national legal orders and in Private International Law, it relates specifically to the powers of courts and tribunals[21]. This textbook will consider mainly the issues of jurisdiction in Public International Law, such as the jurisdiction of a state in relation to international crimes, in economic and environmental issues, in human rights issues, jurisdiction of international universal and regional courts. However, their consideration is certain to involve the analysis of some jurisdictional issues pertaining to national and Private International Law.

The concept of jurisdiction in international conventional law and court practice. The term 'jurisdiction' is not explicitly defined in modern conventional law. In some treaties, the jurisdiction is

[21] Mills A. Rethinking Jurisdiction in International Law. *The British Yearbook of International Law*. 2014. Vol. 84, No. 1. P. 194.

considered as the extension of the sovereign power of states to certain territories, persons or objects. For example, the UN Convention on the Law of the Sea (1982) in Article 56 'Rights, jurisdiction and duties of the coastal State in the exclusive economic zone' proclaims that in the exclusive economic zone, the coastal state has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment[22]. Since 2004, the UN General Assembly has been working towards the development of 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. Article VIII of the Antarctic Treaty (1959) provides that in order to facilitate the exercise of their functions under the present Treaty, designated observers, scientific personnel and members of the staffs shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect to all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions[23].

Some treaties refer basically to the jurisdiction of a national or international court. For example, the UN Convention on Jurisdictional Immunities of States and Their Property (2004) refers to 'immunity from jurisdiction of the courts of another State', 'immunity from jurisdiction in a proceeding before a court of another State' and 'exercise of jurisdiction by the court'[24]. The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) also refers to the jurisdiction of national courts. The Rome Statute of the International Criminal Court (1998) in Article 5 'Crimes within the jurisdiction of the Court' envisages that the jurisdiction of

[22] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[23] The Antarctic Treaty (1959). URL: https://treaties.un.org/doc/Publication/UNTS/Volume%20402/volume-402-I-5778-English.pdf.
[24] United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). URL: https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

the Court shall be limited to the most serious crimes of concern to the international community as a whole and that the Court has jurisdiction in accordance with its Statute with respect to the following crimes: the crime of genocide; crimes against humanity; war crimes; the crime of aggression[25]. The UN Convention on the Law of the Sea in Article 187 refers to the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in relation to certain categories of disputes.

In some other international agreements, the jurisdiction is applied in relation to criminal matters. For example, Article 5 of the International Convention Against the Taking of Hostages (1979) provides that each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences which are committed in its territory or on board a ship or aircraft registered in that State; by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory; in order to compel that State to do or abstain from doing any act; or with respect to a hostage who is a national of that State, if that State considers it appropriate[26].

Some treaties draw attention to the separation of national jurisdictions of states or national jurisdiction of a state and an international body. Article 4 of the UN Convention Against Corruption (2004) envisages that nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law[27]. The Vienna Convention on Diplomatic Relations (1961) makes a difference between the jurisdiction of a sending state and the jurisdiction of a receiving state concerning the immunities of a diplomatic agent in civil, criminal and other matters. The UN Charter (1945) draws a

[25] Rome Statute of the International Criminal Court (1998). URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

[26] International Convention Against the Taking of Hostages (1979). URL: https://treaties.un.org/doc/db/terrorism/english-18-5.pdf.

[27] United Nations Convention Against Corruption (2004). URL: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

line between jurisdiction of a state and that of the United Nations. Article 2(7) thereof proclaims that nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[28].

Jurisdiction was also defined in decisions of international courts. For example, in *Territorial Jurisdiction of the International Commission of the River Oder*, the Permanent Court of International Justice noted, albeit in relation to the 'jurisdiction' not of a state but of the International Commission of the River Oder, that '[t]he Court considers that this word [i.e. "jurisdiction"] relates to powers possessed by the Commission under treaties in force; the questions referred to the Court relate to the territorial limits of these powers'[29]. The term 'jurisdiction' was also equated with 'powers' in the Court's advisory opinion on *the Jurisdiction of the European Commission of the Danube between Galatz and Braila*[30]. In the advisory opinion on *Nationality Decrees Issued in Tunis and Morocco* the same court concentrated on the notion of domestic jurisdiction and noted, in relation to Article 15(8) of the Covenant of the League of Nations, that '[t]he words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern interest of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge'[31]. The question of jurisdiction has arisen between France and Turkey before the Permanent Court of International Justice following the collision between a steamship 'Boz-Kourt' flying the Turkish flag and a steamship 'Lotus' flying the French flag, which occurred in 1926. In its judgment in the *S.S. 'Lotus'* case, the court proclaimed: 'Now the first and foremost restriction

[28] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.
[29] Costelloe D. Conceptions of State Jurisdiction in the Jurisprudence of the International Court of Justice and the Permanent Court of International Justice / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip, E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. Oxford: Oxford University Press. 2019. P. 460.
[30] Ibid.
[31] Costelloe D. P. 463.

imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention … It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law'[32]. In the *Nuclear Tests case* (Australia v. France, 1974) the International Court of Justice emphasized 'that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded'[33].

The classification of jurisdiction. The jurisdiction can be classified under the following criteria:

1) subjects – international and national;

2) content – law-making (legislative, prescriptive), judicial (adjudicative) and executive (enforcing, prerogative);

3) nature of the regulated relations – administrative, civil and criminal;

[32] The Case of the *S.S. 'Lotus'* (France v. Turkey). Judgement of the Permanent Court of International Justice of 1927. P. 18-19. URL: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf.

[33] Nuclear Tests case (Australia v. France). The Judgment of the International Court of Justice of 1974. P. 259. URL: https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf.

4) scope – full and limited;

5) extent – territorial and extraterritorial.

Jurisdiction is inherent to those subjects of international law who have the powers not only to create legal rules, but also to ensure their enforcement, namely, to states, international intergovernmental organizations, international courts. The general rule is that national jurisdiction, i.e., the jurisdiction of a state, is primary, and international jurisdiction, i.e., jurisdiction of intergovernmental bodies including international courts, is secondary and derives from the national jurisdiction. This is explained by the very nature of international law where the primary subjects are states which create other subjects such as international organizations and empower them with specific functions. Once created, such secondary subjects of international law exercise their jurisdiction which sometimes restricts state sovereignty and collides with national jurisdiction. Meanwhile, such a state of affairs may be explained by the fact that states agreed to transfer some portion of their sovereign powers to international bodies in order to boost international cooperation and solve important problems in the international arena. For example, states have the right – not an obligation – to recognize as compulsory the jurisdiction of the International Court of Justice, but if they accepted its jurisdiction in the settlement of interstate disputes, they have to obey it and enforce the judgments delivered by the Court.

Law-making (legislative, prescriptive) jurisdiction is sometimes called 'the jurisdiction to prescribe', or 'jurisdiction to legislate', which means the limits on the law-making powers of the government, in other words, the power of a state to establish mandatory rules for individuals and legal entities, and the permissible scope of application of the laws of each state[34]. Judicial (adjudicative) jurisdiction is referred to as 'the jurisdiction to adjudicate', which means the power of a state to subordinate individuals and legal entities to judgments of its courts and other decision-making bodies, and the limits on the powers of the judicial branch of government[35]. Executive (enforcing, prerogative)

[34] Mills A. Rethinking Jurisdiction in International Law. P. 195.

[35] Ibid.

jurisdiction is called 'the jurisdiction to enforce', which means the power of a state to enforce its legal rules, including through detention, arrest, investigation, trial and punishment for violating such rules, and the limits on the executive branch of government responsible for implementing law[36]. The Council of Europe Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law (1997) upholds the same classification of jurisdiction of states: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce[37]. Some scholars question the above classification of jurisdiction: they argue that sometimes the conduct of the judiciary may be characterized as either prescriptive (when the judge from a 'common law' system is participating in law-making) or enforcement (when the judge is ordering the seizure of a person or assets)[38]. Some authors argue that jurisdiction to adjudicate and jurisdiction to enforce have common features, since both are targeted at the application and enforcement of the law.

By nature of the regulated relations jurisdiction may be administrative, civil and criminal. The term administrative jurisdiction describes the authority of the administrative courts to adjudicate in the area of administrative law[39]. Civil jurisdiction refers to disputes between individuals, or between an individual and another private entity, such as a company or organization, in which one party is the victim of an offense or negligence done by the opposing party and resulting in loss or damage[40]. Criminal jurisdiction deals with offenses which are deemed to be perpetrated against the government or society, and aims to punish people who commit crimes, rather than settle disputes

[36] Ibid.
[37] The Council of Europe. Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law (1997). URL: https://rm.coe.int/09000016804b0085.
[38] Mills A. Rethinking Jurisdiction in International Law. P. 195.
[39] German Federal Administrative Court. Administrative Jurisdiction. URL: https://www.bverwg.de/en/rechtsprechung/verwaltungsgerichtsbarkeit.
[40] Maryland Trial Lawyers. The Difference Between Civil and Criminal Jurisdiction. URL: https://www.belsky-weinberg-horowitz.com/the-difference-between-civil-and-criminal-jurisdiction/.

between individual parties[41]. Bilateral and multilateral agreements on mutual assistance in civil and criminal matters contain some provisions relating to civil or criminal jurisdiction of state authorities, e.g. European Convention on Mutual Assistance in Criminal Matters (1959), Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001), Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes Connected with the Downing of Malaysia Airlines Flight MH17 (2014), Agreement between Ukraine and the Republic of Turkey on Legal Assistance and Cooperation in Civil Matters (2000), Treaty between Ukraine and the United Arab Emirates on Mutual Legal Assistance in Civil and Commercial Matters (2012), etc.

By scope jurisdiction may be full and limited. It is a general rule that states enjoy full sovereignty and exercise full jurisdiction over all persons and objects within their national territories. It follows from the nature of the sovereignty of states that while a state is supreme internally, that is within its own territorial frontiers, it must not intervene in the domestic affairs of another nation[42]. States also exercise jurisdiction over their own nationals in foreign and international territories. It means that in some cases the jurisdiction of State A may be limited, or restricted, by the jurisdiction of another State B due to the established principles of international law which may grant, for example, the authority to State's B official bodies to prosecute and bring to trial a criminal who is a national of State A but committed crime on the territory of State B. Or another example, when the jurisdiction of State A is restricted by the jurisdiction of State B in relation to the personnel of a military base of State B which is situated on the State's A territory in accordance with bilateral inter-state agreement.

By extent jurisdiction may be territorial or extraterritorial. As it has been mentioned above, states exercise full jurisdiction over all persons and objects within their national territories, in other words, their jurisdiction is territorial. Meanwhile, in some cases international

[41] Ibid.
[42] Shaw M. P. 647.

law allows states to exercise their jurisdiction extraterritorially, i.e., outside their national boundaries, at the territories of other states or in international territories, with due regard to the principles of international law.

The restrictions of jurisdiction of a state within its own territory under Public International Law. As we have mentioned above, states exercise full civil, criminal and administrative jurisdiction over all persons and objects within their national boundaries. But in some cases, even this full jurisdiction may be restricted under international law.

1. The head of state, the head of government, the minister for foreign affairs and other high state officials visiting another state enjoy immunity from the jurisdiction of the host state. States' representatives in international intergovernmental organizations as well as officials of such organizations also enjoy immunity from jurisdiction of the host state where the organizations have their headquarters. Diplomatic agents and consular officers enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving state except in some cases. The premises of diplomatic missions, consular offices, international intergovernmental organizations, special missions, as well as the land on which they are located, are also exempted from such jurisdiction. But one should remember that the immunity of visiting high state officials, representatives of international organizations, diplomatic agents or consular officers from the jurisdiction of the receiving state does not exempt them from the jurisdiction of the sending state.

2. Aircraft and maritime vessels when located within the territory of a foreign state (aircraft – in the airspace or at an airport; maritime vessels – in the territorial sea or a sea port) are under the jurisdiction of that state. Meanwhile, these aircraft and vessels continue to remain under the jurisdiction of the state of registration of the aircraft or the flag state of the vessel. The receiving state shall not, as a general rule, interfere in events on board a foreign aircraft or vessel unless the offense affects the interests and security of that state.

3. Countries that have military forces or military bases abroad have the right to exercise their jurisdiction over relevant personnel

and objects situated in foreign states. International agreements, usually called status of force agreements, establish the framework under which a state's military forces can operate in a foreign country[43]. Some of them, like the United Nations agreements for the peace-keeping operations, provide exclusive jurisdiction of member states over peacekeepers for criminal or civil liability[44].

4. Jurisdictional immunities of states and immunity of a foreign state's property from the jurisdiction of other states' courts is a well established principle of international law. In other words, the courts of State A cannot exercise their full jurisdiction over the acts of State B, and they also do not have the right to seize the property of State B, except in cases established by international law.

5. The jurisdictional issues concerning some water objects like international rivers, international channels and straits, are decided on the basis of international agreements between the riparian or coastal states, but the general rule is that such states operate within their own territorial jurisdiction which may be subject to the restrictions established by international law. The right of innocent passage of ships through the territorial sea of other states is another restriction of the coastal state's jurisdiction within its own boarders.

6. There may be some restrictions of a state's criminal jurisdiction in relation to criminal offenses conducted by foreigners on its own territory due to the established principles of international criminal law. According to international humanitarian law, in the event of an armed conflict or occupation, the criminal jurisdiction of the state exercising effective control over the territory is prevailing over the jurisdiction of the state which territory is occupied or is under armed conflict.

7. The jurisdiction of a state may be limited on the basis of the priority of international jurisdiction, i.e., the jurisdiction of international *ad hoc* tribunals such as for the former Yugoslavia and Rwanda. The statutes

[43] Lersch B. and Sarti J. The Establishment of Foreign Military Bases and the International Distribution of Powers. *UFRGS Model United Nations*. 2014. Vol. 2. P. 89.

[44] Giles Sh. Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict Through Their Own Misconduct. *American University International Law Review*. 2017. Vol. 33, Iss. 1. P. 150.

of these *ad hoc* tribunals envisage the priority of their jurisdiction over national criminal courts: they may request national courts to transfer proceedings in cases to them for consideration.

The restrictions of jurisdiction of a state in international territories under Public International Law. According to international law, the jurisdiction of a state extends to objects located outside the state territory: aircraft in international airspace, maritime ships on the high seas; space objects in the outer space; artificial islands and installations on the high seas and in the International Seabed Area; scientific stations in Antarctica. Meanwhile, there are some exceptions to this rule.

The principle of exclusive jurisdiction of the flag state is important to ensure safe navigation on the high seas for all states. It means that a vessel on the high seas is subject to the exclusive jurisdiction of the flag state, and no state has the right to interfere in its activities, except as provided by international treaties, in particular the UN Convention on the Law of the Sea. The Convention provides for the following exceptions to this rule:

1. Right to visit: under Article 110, a merchant vessel on the high seas may be stopped and boarded by a warship or a specially authorized vessel of another state in exceptional cases, if there is reasonable ground for suspecting that the ship is engaged in piracy, slave trade, unauthorized broadcasting, the ship is without nationality, or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship[45].

2. Hot pursuit: under Article 111, the hot pursuit of a foreign ship on the high seas may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State while being in its internal waters, territorial sea, contiguous zone, exclusive economic zone or continental shelf[46].

[45] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[46] Ibid.

3. Pollution: Article 221 envisages the right of States to take and enforce measures beyond the territorial sea, i.e., including on the high seas, proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences[47].

4. Collisions: under Article 97, in the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national[48].

5. Straddling and highly migratory fish stocks: under Article 116, all States have the right for their nationals to engage in fishing on the high seas subject to their treaty obligations and the rights and duties as well as the interests of coastal States[49]. Under Article 21 of the Fish Stocks Agreement (1995), a State Party that is also a member of a regional organization or arrangement has the right to board and inspect fishing vessels on the high seas flying the flag of another State Party in order to ensure compliance with conservation and management measures established by that organization or arrangement, even if the latter State Party is not a member of that organization or arrangement[50].

The restrictions to the principle of exclusive jurisdiction of the flag state on the high seas is linked to the so-called 'functional jurisdiction', which refers to coastal states' limited jurisdiction over the activities in 'their' maritime zones (the territorial sea, the contiguous zone, the

[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995). URL: https://treaties.un.org/doc/Treaties/1995/08/19950804%2008-25%20AM/Ch_XXI_07p.pdf.

exclusive economic zone, and the continental shelf), and, to a limited extent, to any State's jurisdiction over certain activities on the high seas, such as piracy and the trade in slaves[51]. Such jurisdiction is in the first place geared towards protecting coastal states' own legitimate interests, although exceptionally also towards protecting common concerns[52].

In other international areas, like Antarctica, International Seabed Area, outer space or celestial bodies, states retain their exclusive right to exercise their jurisdiction over persons and objects there. For example, Article VIII of the Outer Space Treaty (1967) proclaims that a State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body[53]. Article 12 of the Moon Agreement (1979) envisages that States Parties shall retain jurisdiction and control over their personnel, vehicles, equipment, facilities, stations and installations on the moon[54]. The only exception exists in relation to the International Seabed Area: while states retain their jurisdiction over their nationals, entities and objects in the Area, the regulation and monitoring of compliance with rules on mineral exploration and exploitation activities in the Area falls under International Seabed Authority jurisdiction.

Conflict of jurisdictions. One of the urgent problems discussed in modern academic literature is the conflict of jurisdictions. In Public International Law, competition (conflict) of jurisdictions of states may be defined as the simultaneous establishment of the jurisdiction of different states over the same person (persons) or object (objects),

[51] Ryngaert C. The Concept of Jurisdiction in International Law / *Research Handbook on Jurisdiction and Immunities in International Law*. Orakhelashvili A. (ed.). Cheltenham: Edward Elgar Publishing Limited. 2015. P. 58.
[52] Ibid.
[53] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967). URL: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html.
[54] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979). URL: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/moon-agreement.html.

as well as the exercise or attempt to exercise their jurisdiction over them. For example, a person with dual nationality is subject to military service in States A and B which consider him or her their own national; nevertheless, being on the territory of State C that person avoids military service in both States A and B, which may seek to exercise their executive jurisdiction over him or her. Another example is the competition between territorial and quasi-territorial jurisdictions: when a vessel of one state is in the territorial waters of another state, it is subject to the civil, administrative and criminal jurisdiction of the territorial state and of its flag state. Such competition may also be called competition between full and limited jurisdictions.

The increase in cross-border (transnational) crimes has led to a growing number of cases in which multiple states have jurisdiction to prosecute and to take such cases to trial[55]. In certain situations, the parallel progression of cases in separate jurisdictions can compromise the outcome of investigations, eventually resulting in what is known as a violation of the *ne bis in idem* principle, also known as *double jeopardy*[56]. Such a principle ensures that no individual is prosecuted for the same act in different states. In such situations, a decision must be made regarding which state is better placed to prosecute and ultimately bring the case to trial, but conflicts of jurisdiction may arise from parallel investigations without any coordination between the different states' national authorities involved[57]. In the absence of a treaty, different models to avoid or settle the conflict of criminal jurisdictions are used in the practice of states, for example, under the principle of subsidiarity, a state with traditional links to crime (for example, based on the principles of territoriality, active personal jurisdiction or passive personal jurisdiction) has primary jurisdiction, while states with jurisdiction under other grounds (for example, under the principle of protection or the universality principle) may apply only when states with primary jurisdiction are unwilling or

[55] Eurojust. Conflicts of Jurisdiction. URL: https://www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-application-judicial-cooperation-instruments/conflicts-of-jurisdiction.
[56] Ibid.
[57] Ibid.

unable to prosecute a person. For example, if a crime was committed on the territory of State A by its national, and if State A is willing and able to prosecute the suspected perpetrator, then no other state should exercise extraterritorial criminal jurisdiction. But if a crime was committed on the territory of State A by a national of State B against a national of State C, all three states are entitled to exercise jurisdiction but within the limits of international law. State D could also exercise universal jurisdiction, but only when State A (exercising territorial jurisdiction), State B (exercising active personality jurisdiction) and State C (exercising passive personality jurisdiction) were unwilling or unable to prosecute the crime. The principle of subsidiarity, or complementarity, is the cornerstone in resolving the conflict of jurisdictions between national criminal courts and the International Criminal Court: Article 1 of the Rome Statute (2002) provides that the Court shall be complementary to national criminal jurisdictions.

Some international conventions stipulate that states must cooperate in determining the priority of jurisdictions. For example, Article 42(5) of the UN Convention Against Corruption (2003) stipulates that if a State Party exercising its jurisdiction has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions[58]. Article 22(5) of the Council of Europe Convention on Cybercrime (2001) provides that when more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution[59].

The objective of Council Framework Decision 2009/948/JHA of 30 November 2009 on Prevention and Settlement of Conflicts of

[58] United Nations Convention Against Corruption (2004). URL: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[59] Council of Europe Convention on Cybercrime (2001). URL: https://rm.coe.int/1680081561.

Exercise of Jurisdiction in Criminal Proceedings is to promote closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings, with a view to improving the efficient and proper administration of justice[60]. The Framework Decision sets out the procedure according to which the competent authorities of the EU Member States contact each other when they have reasonable grounds to believe that parallel proceedings are taking place in another Member State (s). The decision lays down the basis for the direct participation of these authorities in the consultations in order to find an effective agreement as to which of the Member States involved is best suited to prosecute the offender[61]. In its judgments in *Nottebohm* and *Barcelona Traction* cases, the International Court of Justice emphasized that in the particular fields of diplomatic protection, nationality, status of legal entities there must be the 'genuine connection' between natural or legal persons and a state entitled to exercise its jurisdiction. The concept of 'effective' or 'genuine link' has since been generalized as a precondition for the exercise of a state's jurisdiction in almost all branches of Public International Law such as law of the sea, air and outer space law, etc.

In Private International Law, the problem of the conflict of jurisdictions concerns the power of a certain national court to adjudicate the matter (jurisdiction to adjudicate). The conflict of substantive law of different countries on civil, family or commercial matters is always accompanied by a conflict of jurisdictions. A court of State A first determines whether it or the court of State B has jurisdiction, and then determines which state's law will be applied in resolving a particular case. Thus, prescriptive jurisdiction relates to the law of a particular state which must be applied, and judicial (adjudicative) jurisdiction relates to the court of a particular state which must hear and resolve the case. In majority of countries the problems of conflict

[60] The Council Framework Decision 2009/948/JHA on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings (2009). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009F0948&-from=ET.

[61] Ibid.

of laws and conflict of jurisdictions are usually regulated in one piece of legislation. Matters of 'jurisdiction' are implemented in the field of private legal relations through rules of Private International Law, including both rules of 'jurisdiction' – determining when a court will hear a case – and rules of 'choice of law' – determining which law governs a disputed issue and thereby the scope of application of that law[62].

Although the plaintiff decides where to sue, the courts in that location may not have jurisdiction, or they may have jurisdiction but be unwilling to exercise it[63], or more than one court in different countries may start proceedings on the same matter. Traditionally, civil-law and common-law countries have followed different approaches in determining which court has jurisdiction in a civil action when the parties have not agreed on or submitted to the forum[64]. Civil-law countries start from the premise that there is one principal place where a suit can be filed: the domicile of an individual or the seat of legal persons such as a corporation ('general jurisdiction'); in addition to these general bases of jurisdiction, a suit ordinarily may be brought in the courts of the place to which the suit has a special connection, e.g., where a tort was committed or where its effects were felt, where the alleged breach of a contract occurred, or, if title to real property is involved, where the property is located ('specific jurisdiction')[65].

EU Regulation 44/2001 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters recognizes that certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market, that is why provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member

[62] Mills A. Rethinking Jurisdiction in International Law. P. 200.
[63] Britannica. Jurisdiction. URL: https://www.britannica.com/topic/conflict-of-laws/Jurisdiction.
[64] Ibid.
[65] Ibid.

State, are essential[66]. The Regulation stipulates the basic principle for the resolution of the conflict of jurisdictions: jurisdiction is to be exercised by the court of the EU country in which the defendant is domiciled, regardless of his/her nationality. One of the goals of the Convention on Choice of Court Agreements (2005) is to enhance inter-state judicial co-operation by establishing uniform rules on jurisdiction in civil or commercial matters. Article 5 provides that the court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State[67]. There are plenty of sources of Private International Law governing the conflict of jurisdictions, e.g., the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), the Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1988 and 2007), the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019). In addition to the rules of national legislation and international treaties which help states to avoid the conflict of jurisdictions, there are some legal doctrines used in court practice for this purpose, such as *forum non conveniens, lis pendes*, international comity, etc. which will be dealt with in the following chapters.

Some authors make a conclusion that one of the main distinctions between the principles of jurisdiction in Public and Private International Law is that in the former the connecting factors leading to the exercise of jurisdiction of a state are territoriality and nationality, while in the latter – domicile (residence, habitual residence) which, unlike the concept of nationality, is not based on a legal connection between a person and a state but rather on the territorial connections of the person

[66] Council Regulation 44/2001 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (2000). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0044.

[67] Convention on Choice of Court Agreements (2005). URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

with a state[68]. The exact definitions of domicile, residence, or habitual residence may vary between legal systems, but they generally involve an examination of the factual connections between the person and territory (such as the duration of physical presence)[69].

To sum up, we may conclude that modern legal doctrine and treaty law witness that jurisdiction has become an established institute of international law which has its own principles and sources. Along with such institutes as international legal personality, international recognition, international responsibility, etc. it embraces all branches of international law and, thus, may be characterized as a system-wide institute of international law.

Tasks and questions for individual work:

1. Read the S.S. 'Lotus' case (PCIJ, France v. Turkey, 1927)[70] and answer the following questions:

1) what are the facts of the case?

2) what questions did the Court have to decide?

3) what were the main arguments of France related to criminal jurisdiction?

4) what were the main arguments of Turkey related to criminal jurisdiction and what provisions of its Criminal Code did the state rely on?

5) how did the Court interpret the relevant provisions of the Convention of Lausanne (1923)?

6) what rules of international and national law relating to jurisdiction did the Court establish in the case?

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[68] Mills A. Private Interests and Private Law Regulation in Public International Law Jurisdiction / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip, E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. Oxford: Oxford University Press. 2019. P. 349.

[69] Ibid.

[70] The Case of the *S.S. 'Lotus'* (France v. Turkey). Judgement of the Permanent Court of International Justice of 1927. URL: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf.

7) did, in the Court's opinion, general international law contain a rule prohibiting Turkey from prosecuting Lieutenant Demons?

8) what was the final judgment of the Court in the case?

2. Consider the moot cases and answer the questions:

Moot case 1. If a citizen of State A commits a crime in State B against a national of State C, which State will exercise jurisdiction over the offender and under what principles of jurisdiction?

Moot case 2. If a national of State A divorces with a national of State B, they are domiciled in State C, and their dispute concerns the status of the immovable property situated in State D, which state will exercise its adjudicative jurisdiction, or the courts of which state will decide the matter?

Moot case 3. State A exercises territorial enforcement jurisdiction in the form of prosecution against a person whom it has abducted from State B's territory, and that the abduction was purely for the purpose of securing the abductee/accused presence in State A's territory for prosecution. Earlier a lawful arrest warrant was issued by State A for the arrest of the accused but State B did not consent to State A's exercise of enforcement jurisdiction in the form of arrest in its territory. Is the abduction legal for the purpose of the exercise of enforcement jurisdiction of State A over the accused person?

To consider this moot case, please study the following judgments of national and international courts: *United States v. Alvarez-Machain* (USA), *R v. Plymouth Justices, ex parte Driver* (UK), *Öcalan v. Turkey* (ECtHR).

TOPIC 2
CRIMINAL JURISDICTION OF STATES

In criminal proceedings, the exercise of enforcement jurisdiction will, principally, take the form of arrest, detention, prosecution, and the carrying out of any resulting sentence[71]. A lawful exercise of enforcement criminal jurisdiction is, subject to very limited exceptions, strictly territorial – states are prohibited from exercising enforcement jurisdiction in the territory of another state absent the consent of the territorial state or some other permissive rule under international law[72]. The five principles that allow states to claim jurisdiction over crimes are: territoriality – depends on the place of committing a crime, active nationality – depends on the nationality of the criminal, passive nationality – depends on the citizenship of the victim of the crime, protection – depends on whether the interests of the state are violated, universality – depends on whether the violation is considered a threat to all mankind. The principles of active and passive nationality, protection, and universality allow a state to exercise its criminal jurisdiction in some circumstances outside its territory (extraterritorially).

International treaties usually indicate two ways of establishing criminal jurisdiction of states: mandatory jurisdiction and optional jurisdiction. The phrase 'Each State Party *shall take* such measures as may be necessary to establish its jurisdiction' is often used to describe mandatory jurisdiction, while the phrase 'Each State Party *may also establish* its jurisdiction' is used to describe optional jurisdiction. The former is usually exercised by a state if the offence is committed in the territory of this state; on board a ship flying the flag of that state or on

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[71] Trapp K. Jurisdiction and State Responsibility / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. P. 365.
[72] Ibid.

board an aircraft registered in that state; by a person who is a national of the state, etc. The latter is usually exercised by a state if the crime is committed against a national of that state, when the crime is committed by a stateless person whose habitual residence is on the territory of the state, etc.

Some international treaties provide the possibility for states to exercise their extraterritorial criminal jurisdiction not just in relation to natural but also to legal persons. Thus, the International Convention for the Suppression of the Financing of Terrorism (2000) provides in Article 5 that each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence abroad[73].

The principle of territoriality. One of the main and the earliest jurisdictional principles in conventional international law is the principle of territoriality. It means that all crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the national courts of that state, and this rule is also applied to foreign citizens and stateless persons who committed crimes within the territorial jurisdiction of the state[74]. Such offenders are to be prosecuted according to the domestic law of the 'territorial' state. For example, according to Article 15(1) of the UN Convention Against Transnational Organized Crime (2000), each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the regulated offences when the offence is committed in the territory of that State Party, or the offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed[75].

[73] International Convention for the Suppression of the Financing of Terrorism (2000). URL: https://treaties.un.org/doc/db/terrorism/english-18-11.pdf.
[74] Shaw M. P. 653.
[75] United Nations Convention Against Transnational Organized Crime (2000). URL: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

Such provision which is typical for many conventions governing transnational crimes means that the 'flag state jurisdiction' principle considers the aircraft and maritime vessels as quasi territory of a state where such a state is entitled to exercise its criminal jurisdiction.

The principle of territoriality is more extensive than at first appears since it encompasses not only crimes committed wholly on the territory of a state but also crimes in which only part of the offence has occurred in the state[76]. Some states have recently shown an increased tendency to broaden the ambit of their criminal law by extending the principle of territoriality to crimes which occur overseas but have an impact within the forum state, or where only a small part of the conduct constituting the offence takes place in the forum state[77]. This tendency has been particularly apparent in the prosecution of business crimes, corruption and international fraud, and increasingly arises in the context of the regulation of the Internet and financial crimes crossing international and electronic borders[78].

There are the subjective and objective principles of territoriality. In the first case (subjective territoriality principle), a state has the right to exercise criminal jurisdiction over a crime in which one element takes place in that state, e.g., when the crime was originated on its territory but completed abroad. In the second case (objective territoriality principle), a state has the right to exercise criminal jurisdiction over a crime that is generally committed outside the territory of the state, but its consequences appear at its territory and affect its interests. The objective territoriality principle is sometimes called 'the effects doctrine'. Both principles are applicable to nationals of a state and to foreigners. For example, in a case when a person fires a weapon across a frontier killing somebody in the neighboring state, both the state where the gun was fired and the state where the injury actually

[76] Shaw M. P. 654.
[77] Report of the Task Force on Extraterritorial Jurisdiction. P. 142. URL: https://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf.
[78] Ibid.

took place have jurisdiction to try the offender, the former under the subjective territorial principle of territoriality and the latter under the objective territorial principle[79].

There are examples of the application of both principles in international law. In the *Lockerbie* case, on 21 December 1988, Pan Am Flight 103 delivering transatlantic flight was destroyed by a bomb that had been planted on board while being in flight over the Scottish town of Lockerbie. The accident killed 243 passengers and 16 crew members, besides, as the result of the crash 11 residents of the town were also killed. The bomb was planted on board in Malta, that is why, in theory, Malta could have exercised its jurisdiction over criminals who were Libyan nationals, under the principle of subjective territoriality. Meanwhile, it is known that Great Britain exercised its jurisdiction under the principle of objective territoriality, because the bomb had been exploded over the territory of Scotland. In the '*S.S. Lotus*' case, the principle of objective territoriality (also called 'effects doctrine' by the court) was applied: Turkey exercised its criminal jurisdiction over the French national for the offense (unintentional killing of Turkish nationals) whose effects appeared at the Turkish quasi territory (vessel) due to the collision of French and Turkish ships on the high seas.

The Criminal Code of Ukraine (2001) defines the following rules in Article 6 'The validity of the law on criminal liability for crimes committed on the territory of Ukraine': 1) persons who have committed crimes on the territory of Ukraine shall be subject to criminal responsibility under this Code; 2) a crime is recognized as committed on the territory of Ukraine if it was started, continued, ended or terminated on the territory of Ukraine; 3) a crime is recognized as committed on the territory of Ukraine if its perpetrator or at least one of the accomplices acted on the territory of Ukraine. The first part of the Article which is the general manifestation of the territoriality principle means that all Ukrainian nationals as well as foreigners who committed crimes within the Ukrainian borders may appear before national courts even if subsequently, they escaped to another country. The other

[79] Shaw M. P. 654.

two parts of the Article proclaim the variations of the principle – the subjective and objective territoriality principles.

There are some exemptions to the exercise of criminal jurisdiction of a state on its own territory, i.e., the immunity of certain categories of persons and objects, which is established by international law and considered in the previous chapter. For example, due to the principle of flag state jurisdiction, a state whose flag the ship flies and where the ship was registered is entitled to exercise criminal jurisdiction over persons and events on board when the ship is sailing on the high seas as well as in the territorial waters (territorial sea) of a foreign state. The receiving state shall not, as a general rule, interfere in events on board a foreign vessel unless the offense affects the interests and security of that state. Under Article 27(1) of the UNCLOS, which may be regarded as incorporating 'the effects doctrine' principle, the criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: if the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances[80]. Thus, when a ship is passing in transit through the territorial sea of another state (exercises its right of an innocent passage) without entering its internal waters, the territoriality principle is not applied except for in some cases. But according to Article 27(2) of the Convention, if a vessel is leaving the internal waters of the state and then passes to its territorial sea, the territoriality principle applies: a coastal state has a right to exercise its criminal jurisdiction over that vessel, if necessary, without exemptions.

[80] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

Another example of the exclusions from the principle of the territoriality is provided for in bilateral agreement concerning the Channel Tunnel, that established a land connection between the UK and France, – the Protocol concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance relating to the Channel Fixed Link (1991), according to which each country allowed another to exercise criminal jurisdiction within its territory[81].

The principle of active nationality. Sometimes it is also called 'active personality principle'. According to this principle, the criminal law of a state applies to all its citizens and stateless persons permanently residing in a state regardless their location: when the offender is outside the state territory, and hence outside the territorial principle of jurisdiction, namely in territories with international and mixed legal regime (e.g., the high seas or EEZ) or in another state. The principle permits a state to prosecute its nationals for crimes committed anywhere in the world if, at the time of the offence, they were such nationals[82]. Under this principle, State A is entitled to exercise jurisdiction over its national or a stateless person permanently residing in State A, who committed a crime in State B. For example, in *Ivan Demjanjuk* case, the basis for the US criminal jurisdiction in *Demjanjuk v. Petrovsky* litigation was the principle of active nationality.

Treaties refer to the active personality principle in relation to different crimes. For example, according to Article 15(2) of the UN Convention Against Transnational Organized Crime, or Article 42(2) of the UN Convention Against Corruption, a State Party may establish its jurisdiction over a regulated offence when the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory. The rules for the exercise of personal jurisdiction of a state over certain categories of nationals who are within the international territory are also provided by treaties, such as the Antarctic Treaty, the Outer Space Treaty, the Moon Agreement, UNCLOS, etc.

[81] Shaw M. P. 657.
[82] Report of the Task Force on Extraterritorial Jurisdiction. P. 144.

The Criminal Code of Ukraine envisages in Article 7 'Validity of the law on criminal responsibility for crimes committed by citizens of Ukraine or stateless persons outside Ukraine' that: 1) citizens of Ukraine and stateless persons permanently residing in Ukraine who have committed crimes outside Ukraine shall be subject to criminal responsibility under this Code, unless otherwise provided by international treaties of Ukraine, the binding nature of which has been approved by the Verkhovna Rada of Ukraine; 2) if these persons have been criminally punished outside Ukraine for the committed crimes, they may not be prosecuted in Ukraine for these crimes. Thus, part one of the Article enshrines the active nationality principle which is applied both to Ukrainian nationals and stateless persons permanently residing in Ukraine. Part two of the Article stipulates the principle of criminal law – *ne bis in idem*.

To conclude, a state may extend its jurisdiction to its citizens, even when they are in the territory of another state. The exercise of such jurisdiction is possible only after the citizen returns to his/her state, where criminal prosecution may be implemented, if necessary. If a state of the nationality tries to exercise its enforcement jurisdiction in relation to its citizen on the territory of another state the question of competition of jurisdictions arises, which must be resolved by separate agreements on cooperation. In the absence of the latter, the priority should be given to territorial jurisdiction.

The principle of passive nationality. Sometimes it is also called 'passive personality principle'. According to this principle, the citizenship of the victim becomes the basis for exercising the extraterritorial criminal jurisdiction of a state. In other words, a state is entitled to prosecute a foreigner for a crime committed outside its territory against one of its nationals[83]. Thus, State A may assume jurisdiction over a foreigner who committed a crime in State B against a national of State A[84]. For example, in *Augusto Pinochet* case Spain claimed jurisdiction under the

[83] Report of the Task Force on Extraterritorial Jurisdiction. P. 146.
[84] Ibid.

active personality principle, because its nationals became the victims of the crimes perpetrated by the dictator in Chile.

The implementation of the principle of passive nationality differs in states: in some states, it applies to all crimes, in others – to the most serious ones, such as terrorism. In some cases, the legislation of state provides for the conditions on the basis of which the principle is applied, for example: there must be the statement (communication) of the victim; the alleged perpetrator must be present in the territory of a state exercising criminal jurisdiction; an alleged act must be criminalized under the legislation of both states, etc. No problems arise when State B, on the territory of which a crime was committed against a citizen of State A, agrees to the exercise of criminal jurisdiction by State A. But if it disagrees the conflict of jurisdictions arises. The passive personality jurisdiction would be exercised only if the territorial state or state of the suspect's nationality (i.e., the state with active personality jurisdiction) did not act[85].

A number of international treaties provide for the jurisdiction of a state on the basis of the principle of passive nationality. This principle is enshrined in the conventions relating to terrorism. For example, the Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010) in Article 8(2) proclaims that each State Party may establish its jurisdiction over regulated offence when the offence is committed against a national of that State[86]. Under Article 5(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), each State Party shall take such measures as may be necessary to establish its jurisdiction over the regulated offences when the victim is a national of that State if that State considers it appropriate[87].

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[85] Ibid.

[86] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010). URL: https://www.icao.int/secretariat/legal/Docs/beijing_convention_multi.pdf.

[87] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). URL: https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf.

Article 8 of the Criminal Code of Ukraine 'The validity of the law on criminal responsibility for crimes committed by foreigners or stateless persons outside Ukraine', *inter alia*, proclaims that foreigners or stateless persons not permanently residing in Ukraine shall be responsible in Ukraine under this Code if they have committed abroad serious or particularly serious crimes against the rights and freedoms of citizens of Ukraine. Thus, this part of Article 8 stipulates the principle of passive nationality.

The principle of protection. Sometimes it is also called 'protective principle', 'the principle of security', or 'real principle'. Under the principle, a state has the right to respond to a crime committed abroad when the crime directly affects its essential interests. The extraterritorial criminal jurisdiction of a state based on this principle arises in cases when the security of its interests violated by a crime cannot be ensured for various reasons by another state in whose territory the crime was committed or of which the offender is a national. Thus, State A may assume criminal jurisdiction over a foreigner who is a national of State B and committed a crime against vital interests of State A in State C. The principle may be applied if the foreigner falls under the executive jurisdiction of State A. For example, in *Adolf Eichmann* and *Ivan Demjanjuk* cases Israel relied on the protective principle claiming criminal jurisdiction over the alleged perpetrators.

State jurisdiction on the basis of the principle of protection can be exercised only in relation to certain categories of crimes defined in national law. Examples of such crimes which violate essential interests of states include: crimes committed against the state's sovereignty, territorial integrity, political independence, constitution or national security; crimes committed against the state's financial stability; crimes committed against the security of government officials, diplomatic and consular agents; terrorism; cybercrime; corruption; illicit trafficking of military weapons, narcotic drugs and psychotropic substances; money laundering; crimes committed against environmental security or safety of sea and air traffic, etc.

There are no examples in conventional law of the criminal jurisdiction which would be based on the principle of protection, nevertheless, some authors believe that it may be driven from *erga omnes* obligations[88]. The protective jurisdiction was not given substantive consideration until the early twentieth century, because it has traditionally been treated as being a part of, and justified under, two other well-established and broader rights in international law, both of which were used by States in order to protect their vital interests, namely self-defence and necessity[89].

Article 8 of the Criminal Code of Ukraine 'The validity of the law on criminal responsibility for crimes committed by foreigners or stateless persons outside Ukraine', *inter alia*, proclaims that foreigners or stateless persons not permanently residing in Ukraine shall be responsible in Ukraine under this Code if they have committed abroad serious or particularly serious crimes against the interests of Ukraine. Thus, this part of Article 8 stipulates the principle of protection.

The principle of universality. The principle of universality is the most debated one among scholars and politicians. It provides for the possibility of criminal prosecution of crimes against international law, regardless of the place of the crime, the nationality of the offender and that of the victim. For example, the universality principle means the application of criminal law of State A to a foreigner (national of State B) who is in the territory of State A and who has committed a crime against international law in the territory of any other state (State C) with no harm to the interests of State A (unlike protective principle).

The rationale behind this principle is as follows: it is based on the notion that certain crimes are so harmful to international interests that

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[88] Garrod M. The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality. *International Criminal Law Review*. 2012. Vol. 12. P. 763-826.

[89] Garrod M. Rethinking the Protective Principle of Jurisdiction and its Use in Response to International Terrorism. Thesis submitted to the University of Sussex for the degree of Doctor of Philosophy. 2015. P. 39. URL: http://sro.sussex.ac.uk/id/eprint/54997/1/Garrod%2C_Matthew.pdf.

states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim[90]. A state has no right to establish its jurisdiction on the basis of this principle unilaterally: its application is allowed only in cases provided for by the norms of international treaties or customs. The implementation of the universality principle is often justified by the reference to the need to protect common interests of the entire international community, in particular those which are ensured by *erga omnes* obligations. Therefore, not only the injured state on the territory of which the crime was committed or whose national committed the crime, but any other state is entitled to prosecute the offender. The universality principle has a subsidiary nature: it is applied when other 'traditional' principles cannot be applied.

According to the Princeton Principles on Universal Jurisdiction (2001), universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction[91]. According to the Principles, serious crimes under international law which justify the application of universal jurisdiction are: piracy; slavery; war crimes; crimes against peace; crimes against humanity; genocide; and torture[92]. The resolution of the Institute of International Law on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005) emphasizes that universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of

[90] Xavier Ph. The principles of universal jurisdiction and complementarity: How do the two principles intermesh? *International Review of the Red Cross*. 2006. Vol. 88, Iss. 862. P. 377.

[91] Princeton University Program in Law and Public Affairs. The Princeton Principles on Universal Jurisdiction (2001). URL: http://hrlibrary.umn.edu/instree/princeton.html.

[92] Ibid.

any link of active or passive nationality, or other grounds of jurisdiction recognized by international law[93]. According to the resolution, universal jurisdiction is primarily based on customary international law, but it can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person[94].

It is a matter for domestic law whether the presence of the accused is required for the exercise of the jurisdiction of the particular domestic court, and different states adopt different approaches[95]. The narrow concept of universal jurisdiction enables a person accused of international crimes to be prosecuted only if he or she is available for trial[96], i.e., a state has the right to prosecute a person as soon as this person finds himself or herself on its territory. Whereas the broader concept includes the possibility of initiating proceedings in the absence of the person sought or accused (trial *in abstentia*)[97]. Meanwhile, international treaties envisage the narrow concept of universal jurisdiction, because a trial without the presence of the accused would be a significant violation of his or her rights.

Article 100 of UNCLOS provides that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State[98]. This provision does not link the exercise of criminal jurisdiction to the state territory, the nationality of the offender and that of the victim. Today, the principle of universality is enshrined in many conventions relating to war crimes, crimes against humanity or other international crimes. For example, under Article 49 of the Geneva Convention on

[93] Institute of International Law. Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005). URL: https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf.
[94] Ibid.
[95] Shaw M. P. 672.
[96] Xavier Ph. P. 379.
[97] Xavier Ph. P. 379-380.
[98] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts[99]. The Study of the International Committee of the Red Cross on Customary International Humanitarian Law, which was published in March 2005, provides for in Rule 157 that states have the right to vest universal jurisdiction in their national courts over war crimes, where serious violations of international humanitarian law are said to constitute war crimes[100].

Under Article 5(2) of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, each State Party shall take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him[101]. If the perpetrator is the national of a state, the latter will exercise its criminal jurisdiction in accordance with the active nationality principle, but if such a state does not have any link to the offender, it will exercise its criminal jurisdiction in accordance with the universality principle. This Convention was the subject of consideration in *Ex parte Pinochet* (No. 3), where UK courts were forced to give their interpretations to the universal jurisdiction. *Hissène Habré* case involved the interpretation of the principle by national courts of Belgium and Senegal as well as the International Court of Justice, and the UN Committee against Torture.

[99] Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949). URL: https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf.

[100] Kritsiotis D. The Establishment, Change, and Expansion of Jurisdiction through Treaties Kritsiotis D. The Establishment, Change, and Expansion of Jurisdiction through Treaties / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. P. 283.

[101] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). URL: https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf.

The latter observed that 'since the Convention is not self-executing, in order to establish universal jurisdiction over acts of torture it is necessary to pass a law establishing the relevant procedure and substantive rules'[102]. The ICJ asserted that 'the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1)'[103].

Article 14 of the Convention stipulates: each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible[104]. This provision was interpreted by many experts as if States Parties to the Convention were subject to an obligation to provide civil remedies to victims of torture, which would necessitate the exercise of prescriptive jurisdiction and the provision of a basis of adjudicative jurisdiction which can be invoked by such victims on the basis of universality principle too[105]. The Committee against Torture has consistently expressed the view that this obligation applies regardless of where the torture is committed, at least in the absence of compensation from the courts of the territorial state, which would appear to necessitate a basis of universal civil jurisdiction[106]. The United Kingdom and the United States have long resisted the idea

[102] Decision of the Committee Against Torture under Article 22, Paragraph 7, of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Communication No. 181/2001 submitted by Suleymane Guengueng et al. CAT/C/36/D/181/2001. 19 May 2006. URL: https://digitallibrary.un.org/record/575800.

[103] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Judgment of the International Court of Justice of 2012. URL: https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf.

[104] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). URL: https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf.

[105] Mills A. Private Interests and Private Law Regulation in Public International Law Jurisdiction. P. 342.

[106] Mills A. Private Interests and Private Law Regulation in Public International Law Jurisdiction. P. 342-343.

that their courts are under any obligation to ensure compensation for victims of torture committed outside their territory; the United States has, however, given its courts the power to do so (subject to exhaustion of local remedies) through the Torture Prevention Act 1991, apparently taking the view that universal civil jurisdiction may be exercised as a matter of right rather than obligation[107].

Meanwhile, one should remember that the Convention on the Prevention and Punishment of the Crime of Genocide (1948) does not contain the universality principle. Its Article VI proclaims: persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction[108]. The obligation contained in Article VI of the Convention has come under examination in the *Case Concerning Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Yugoslavia), where the International Court of Justice recalled that the genocide occurring in Srebrenica of July 1995 was not carried out in the territory of Serbia and Montenegro[109]. In its judgment of 2007, the Court stated that '[e]ven if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI'[110]. The Court noticed that this article obliges only 'the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction

[107] Mills A. Private Interests and Private Law Regulation in Public International Law Jurisdiction. P. 343.
[108] Convention on the Prevention and Punishment of the Crime of Genocide (1948). URL: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[109] Kritsiotis D. P. 265.
[110] Ibid.

on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so'[111].

The criminal laws of such states as Belgium, Germany, France, Spain, Australia, Finland, US, the UK, etc. provide for the universal jurisdiction. The legislation of these states extends the principle of universal jurisdiction over such crimes as genocide, crimes against humanity, war crimes, aggression, human trafficking, extortive abduction, slave trade, slavery, sexual crimes against children, enforced disappearance of a person, prostitution, terrorism-related acts, crimes concerning radioactive materials, attacks against civil aviation and maritime traffic, domestic violence or violence against women, illicit trafficking in narcotics and dangerous drugs, financial crimes, torture, use of mines, transnational organized crime, etc.[112].

Article 8 of the Criminal Code of Ukraine 'The validity of the law on criminal responsibility for crimes committed by foreigners or stateless persons outside Ukraine', *inter alia*, proclaims that foreigners or stateless persons not permanently residing in Ukraine who committed crimes abroad shall be responsible in Ukraine under this Code in cases envisaged by international treaties. Thus, this part of Article 8 may be interpreted as stipulating the principle of universal jurisdiction.

There is a difference between the universal jurisdiction and the principle *aut dedere aut judicare*. Universal jurisdiction, which is prescriptive (law-making) by its nature, allows a state to establish by law its jurisdiction over a crime without any link to the citizenship of the criminal or victim, place of commission of the crime, i.e., to criminalize a given conduct and empower its courts to entertain judicial proceedings[113]. The rule relating to *aut dedere aut judicare* applies subsequently to the

[111] Ibid.

[112] The Scope and Application of the Principle of Universal Jurisdiction. Report of the UN Secretary-General. A/71/111. 28 June 2016. P. 8. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/199/09/PDF/N1619909.pdf?OpenElement.

[113] Pedretti R. The Principle of Universal Jurisdiction and the Obligation *aut dedere aut judicare* / R. Pedretti. *Immunity of Heads of State and State Officials for International Crimes*. Leiden: Koninklijke Brill NV. 2015. P. 341.

state's assertion of jurisdiction over a specific behavior[114]. Thus, the principle of universal jurisdiction serves as a ground for establishing the state's jurisdiction over a given crime based on which the obligation *aut dedere aut judicare* might ultimately lead to the prosecution or extradition of the offender[115]. We may conclude that establishing the universal jurisdiction is the first stage, and implementing the principle of *aut dedere aut judicare* is the second one. In addition, the latter principle may relate not only to the universal jurisdiction, but also be based on other jurisdictional grounds, for example, the principle of active or passive nationality, the principle of territoriality, etc.

Immunity of state officials from foreign criminal jurisdiction. Immunity of state officials from foreign criminal jurisdiction is grounded in international law, including customary international law and is often justified on the basis of the functional and representative theories[116]. The 'representative' theory gave as the rationale for diplomatic immunity the idea that the diplomatic mission personifies the sending state and the 'functional' theory gave as the rationale the fact that immunity is necessary to enable the diplomatic mission to perform its functions[117]. Moreover, principles of international law concerning the sovereign equality of states and non-interference in internal affairs, as well as the need to ensure the stability of international relations and the independent performance of their activities by states, all have a justificatory bearing on immunity[118].

The immunity of officials from foreign criminal jurisdiction as a rule of international law means that the juridical right of the person

[114] Ibid.
[115] Pedretti R. P. 342.
[116] Immunity of State Officials from Foreign Criminal Jurisdiction. Preliminary report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur. 2012. P. 42-43.
[117] Immunity of State Officials from Foreign Criminal Jurisdiction. Preliminary report on the immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin. 2008. P. 179.
[118] Immunity of State Officials from Foreign Criminal Jurisdiction. Preliminary report … 2012. P. 43.

enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign state not to exercise jurisdiction over the person concerned[119]. Immunity from the criminal process or from criminal procedure measures does not imply immunity from the substantive law of the foreign state, in other words, the person in question may be proceeded with substantively in another appropriate forum[120]. One should also remember Article 31 of the Vienna Convention on Diplomatic Relations (1961) which stipulates that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State, meanwhile, such immunity does not exempt him from the jurisdiction of the sending State[121]. The sending State can also waive the immunity of its diplomat. In the latter case, the receiving State will be entitled to exercise its criminal jurisdiction over the person in question. In this part of the textbook, we do not touch upon the question of the immunity of diplomatic and consular agents from criminal jurisdiction of the receiving State, because it is governed by the law of foreign relations. This part will concern only high-ranking officials of a state.

The scope of the immunity from foreign criminal jurisdiction of serving officials differs depending on the level of the office held[122]. The general rules are as follows: 1) all serving state officials enjoy immunity in respect of acts performed in an official capacity; 2) only certain serving high-ranking officials additionally enjoy immunity in respect of acts performed by them in a private capacity; 3) the scope of immunity of former officials is identical irrespective of the level of the office that they held: they enjoy immunity in respect of acts performed by them in an official capacity during their term in office[123]. This approach laid the foundation of the Draft Articles of the UN

[119] Ibid.
[120] Ibid.
[121] Vienna Convention on Diplomatic Relations (1961). URL: https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.
[122] Immunity of State Officials from Foreign Criminal Jurisdiction. Preliminary report … 2012. P. 43.
[123] Ibid.

International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction[124].

A distinction is usually drawn between the two types of immunity of state officials: immunity *ratione personae* and immunity *ratione materiae*[125]. Immunity *ratione personae* or personal immunity is derived from the official's status and the post occupied by him in government service and from the state functions which the official is required to perform in that post[126]. Immunity *ratione personae* extends to acts performed by a state official in both an official and a private capacity, both before and while occupying his post[127]. Since it is connected with the post occupied by the official in government service, it is temporary in character, becomes effective when the official takes up his post and ceases when he leaves his post[128]. Draft Articles stipulate that heads of state, heads of government and ministers for foreign affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, and they enjoy it only during their term of office; such immunity covers all acts performed, whether in a private or official capacity, by heads of state, heads of government and ministers for foreign affairs prior to or during their term of office; the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*[129].

State officials enjoy immunity *ratione materiae* regardless of the level of their post, by virtue of the fact that they are performing official state functions[130]. Immunity *ratione materiae* is sometimes also called functional immunity[131]. This type of immunity extends only

[124] UN International Law Commission. Immunity of State Officials from Foreign Criminal Jurisdiction. URL: https://legal.un.org/ilc/guide/4_2.shtml.
[125] Immunity of State Officials from Foreign Criminal Jurisdiction. Preliminary report … 2008. P. 177.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Eighth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. 2020. P. 21.
[130] Immunity of State Officials from Foreign Criminal Jurisdiction. Preliminary report … 2008. P. 177.
[131] Ibid.

to acts performed by state officials acting in an official capacity, i.e., performed in fulfilment of functions of the state[132]. Accordingly, it does not extend to acts performed in a private capacity[133]. When the official leaves government service, he continues to enjoy immunity *ratione materiae* with regard to acts performed while he was serving in an official capacity[134]. Draft Articles stipulate that state officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction, and they enjoy such immunity only with respect to acts performed in an official capacity; immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be state officials; individuals who enjoyed immunity *ratione personae*, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office[135].

Draft Article 7 provides for some exclusions to the general rules on immunity of officials from foreign jurisdiction: immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance[136]. Some scholars highlight that it is difficult to conclude that the Commission is expressing a view that Draft Article 7 reflects *lex lata*: the lack of state practice – let alone widespread, representative, and consistent state practice – in support of denying immunity for those crimes under customary international law[137].

The judgment of the ICJ in the *Arrest Warrant* case reiterated the principle of the immunity of officials from foreign criminal jurisdiction. In this case Belgium tried to exercise its universal jurisdiction provided

[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Eighth report on immunity of State officials from foreign criminal jurisdiction. P. 21.
[136] Ibid.
[137] Murphy S. Immunity *Ratione Materiae* of State Officials From Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions? *AJIL Unbound*. 2018. Vol. 112. P. 4.

for in its national legislation in relation to the Minister for Foreign Affairs of the Democratic Republic of the Congo, Mr. Abdoulaye Yerodia Ndombasi, who was accused of violating international humanitarian law. On 17 October 2000, the Democratic Republic of the Congo filed an Application instituting proceedings against Belgium concerning a dispute over an international arrest warrant issued on 11 April 2000 by a Belgian examining judge against the acting Congolese Minister for Foreign Affairs, Mr. Abdoulaye Yerodia Ndombasi, seeking his detention and subsequent extradition to Belgium for alleged crimes constituting 'grave violations of international humanitarian law'[138]. The arrest warrant was transmitted to all states, including the DRC[139]. In its submissions presented at the public hearings, the DRC requested the Court to adjudge and declare that Belgium had violated the rule of customary international law concerning the inviolability and immunity from criminal process of incumbent foreign ministers and that it should be required to recall and cancel that arrest warrant and provide reparation for the moral injury to the DRC[140].

The Court observed that, contrary to Belgium's arguments, it had been unable to deduce from its examination of state practice that there existed under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs when they were suspected of having committed war crimes or crimes against humanity[141]. The Court further observed that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: the immunities under customary international law, including those of ministers for foreign affairs, remained opposable before the courts of a foreign state, even where those courts exercised an extended criminal jurisdiction on the basis of various international conventions on the prevention and punishment of certain

[138] Arrest Warrant. Overview of the case. URL: https://www.icj-cij.org/en/case/121.
[139] Ibid.
[140] Ibid.
[141] Case concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium). Judgment of the International Court of Justice of 2002. P. 24. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf.

serious crimes[142]. However, the Court emphasized that the immunity from jurisdiction enjoyed by incumbent ministers for foreign affairs did not mean that they enjoyed impunity in respect of any crimes they might have committed, irrespective of their gravity[143]. It found that the issuance and international circulation of the disputed arrest warrant constituted a violation of an obligation of Belgium towards the DRC, in that it had failed to respect the immunity which Mr. Yerodia enjoyed as incumbent Minister for Foreign Affairs[144].

On 28 January 2021, Germany's Federal Court of Justice issued a landmark judgment under Germany's code of crimes under international law in relation to the case which involved an Afghan army officer accused of coercing, mistreating, and desecrating captured Taliban fighters[145]. After he was convicted by the Higher Regional Court in Munich, the case was appealed to the Federal Court of Justice which, despite agreeing that individuals may sometimes have functional immunity deriving from state immunity (immunity *ratione materiae* as opposed to personal immunity, or immunity *ratione personae*), nonetheless found that no such immunity existed for individuals accused of war crimes[146].

Tasks and questions for individual work:

1. Study the case of Mr. Hissène Habré, including before the UN Committee against Torture[147] and the International Court of Justice[148], and answer the following questions:

[142] Ibid.

[143] Case concerning the Arrest Warrant. P. 25.

[144] Case concerning the Arrest Warrant. P. 33.

[145] Sadat L. New Developments in State Practice on Immunity of State Officials for International Crimes. *ASIL Insights*. 2021. Vol. 25, Iss. 18. URL: https://www.asil.org/insights/volume/25/issue/18.

[146] Ibid.

[147] Decision of the Committee Against Torture under Article 22, Paragraph 7, of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Communication No. 181/2001 submitted by Suleymane Guengueng et al. CAT/C/36/D/181/2001. 19 May 2006. URL: https://digitallibrary.un.org/record /575800.

[148] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Judgment of the International Court of Justice of 2012. URL: https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf.

1) who was Mr. Hissène Habré and what were the historical facts which led to a number of litigations at the national and international level?

2) under what principles of criminal jurisdiction did the Senegalese and Belgian courts consider the cases and what were their judgments?

3) how did the UN Committee against Torture interpret the universal jurisdiction in the case?

4) what were the main arguments of both sides in the case in the ICJ?

5) how did the ICJ interpret the jurisdictional issues under the UN Convention Against Torture in the case and what was its final judgment?

6) what other international judicial and political institutions considered the case and what were their judgments (decisions)?

To answer the last question, please find the judgments related to the case of the African Court on Human and People's Rights, the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice), the Extraordinary African Chambers (EAC), as well as decisions of the Assembly of African Union Heads of State and Government.

2. Find out which principles of criminal jurisdiction and by which states have been applied in the following cases and explain your position: *Adolf Eichmann* case, *Ivan Demyanyuk* case, *Guatemalan Genocide* case, *Augusto Pinochet* case.

To accomplish this task, please explore information about court proceedings in the following countries:

Augusto Pinochet case: Spain, Germany, France, Switzerland, Sweden, United Kingdom, Chile

Adolf Eichmann case: Israel

Guatemalan Genocide case: Spain

Ivan Demjanjuk case: United States, Israel, Spain, Germany

TOPIC 3
JURISDICTION OF STATES IN ECONOMIC AND ENVIRONMENTAL MATTERS

Extraterritorial jurisdiction of states in antitrust (competition) law. Generally, the national law of a country is applicable only within that country's territory, nevertheless, the application of a country's law becomes more problematic when considering multinational corporations and cross-border transactions, which potentially affect multiple countries[149]. Markets in different states can be impacted upon by the activity of multinational corporations and other subjects of international economic relations. Trying to protect their internal markets from harmful external influences, states conclude bilateral or multilateral agreements. When international cooperation surrounding cross-border transactions is not available, countries respond by simply applying their own competition, or antitrust, law[150] and introduce legal standards for the application of this law extraterritorially. Thus, they assert jurisdiction over foreign defendants when their foreign conduct produces adverse effects upon domestic commerce[151]. Although the exercise of extraterritorial jurisdiction of competition law is criticized for seemingly undermining the territorial principle of international law, the exercise of this jurisdiction is necessary when countries are unable to reach an agreement regarding international transactions[152].

However, the extraterritorial application of the competition law may lead to complex jurisdictional conflicts. The problem of extraterritorial

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[149] Phan T. The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach. *Louisiana Law Review*. 2016. Vol. 77, No. 2. P. 426.
150 Ibid.
[151] Alford R. The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches. *Virginia Journal of International Law*. 1992-1993. Vol. 33, No. 1. P. 1.
[152] Phan T. P. 426.

jurisdiction refers to the general problem of conflicting claims by nation-states seeking to apply their laws and implement their policies to regulate extraterritorial conduct in a way which may undermine and conflict with the laws and policies of a foreign government[153]. Usually, enforcement jurisdiction is extraterritorially applied to cartels and mergers. A cartel is a group of formally independent producers, whose goal is to increase their collective profits by means of other restrictive trade practices, e.g., price fixing, limiting supply, etc.[154]. Each enterprise that entered the cartel retains its financial and production independence. A merger occurs when one or more undertakings acquire direct or indirect control of one or more other undertakings by the acquisition of shares, assets, by the lease of assets, by contract or joint ventures[155]. It is important to ensure that states apply their extraterritorial jurisdiction in such situations within the limits established by international law.

There is a difference between the extraterritorial application of competition law and conflict of laws. Conflict of laws is a country's set of rules which apply when a legal issue contains a foreign element and a domestic court must decide whether to apply foreign law or cede jurisdiction to a foreign court[156]. Private law governs relationships between private parties and conflict of laws relates to private relationships. In contrast, public law governs relationships between private parties and the state, and the extraterritorial application of competition law relates to public law. Competition law has the characteristics of public law because it imposes duties on subjects in a foreign territory, such as the duty not to abuse a dominant position, the duty not to enter into anticompetitive agreements, the duty to comply with merger notification requirements, and the duty not to engage in unfair trade practices[157]. In most jurisdictions, the public law

[153] Alford R. P. 5.
[154] Mehra P. Choice between Cartels and Horizontal Mergers. URL: file:///Users/marynamedvedieva/Downloads/SSRN-id1081844.pdf.
[155] Merger (Notion). URL: https://www.concurrences.com/en/dictionary/Concentration.
[156] Phan Th. P. 429.
[157] Phan Th. P. 431.

character of competition law is also evident in the use of criminal or administrative sanctions[158].

The basis for extranational jurisdiction in antitrust issues is either the principle of nationality (i.e., jurisdiction may be exercised by a state over the acts of its nationals, even where the act took place abroad) or the effects doctrine (i.e., jurisdiction of a state may be exercised over an act conducted abroad which has effects in that state)[159]. Effects doctrine is one of the exceptions to the principle of territoriality. Anyway, states try to achieve a balance between applying their domestic laws extraterritorially and allow the state with the closest nexus to the particular transaction to judge the case (positive comity)[160].

American antitrust law and extraterritorial jurisdiction. Before 1945, U.S. courts used the strict territoriality approach to limit U.S. antitrust law application to domestic jurisdiction, however, following World War II, they developed a more liberal approach – the 'intended effects test'[161]. This new test soon met much opposition, and the U.S. courts retreated from this standard by applying 'international comity' principles[162]. This restraint was short-lived, however; the courts quickly adopted the 'substantial effects test', which is still used today[163]. U.S. antitrust law includes the Sherman Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914). The Sherman Act prohibits conspiracy and monopolization and outlaws every contract, combination, or conspiracy in restraint of trade among several states, or with foreign nations, and any monopolization, attempted monopolization, or conspiracy or combination to monopolize any

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[158] Ibid.
[159] Report of the Task Force on Extraterritorial Jurisdiction. P. 45.
[160] Report of the Task Force on Extraterritorial Jurisdiction. P. 47.
[161] Lim D. State Interest as the Main Impetus for U.S. Antitrust Extraterritorial Jurisdiction: Restraint Through Prescriptive Comity. *Emory International Law Review*. 2017. Vol. 31, Iss. 3. P. 417.
[162] Ibid.
[163] Ibid.

part of the trade or commerce among several states, or with foreign nations[164]. The Federal Trade Commission Act bans 'unfair methods of competition' and 'unfair or deceptive acts or practices'[165]. The Clayton Act prohibits mergers and acquisitions where the effect 'may be substantially to lessen competition, or to tend to create a monopoly'[166].

The first case in which the US Supreme Court dealt with the extraterritorial application of the Sherman Act was *American Banana Co. v. United Fruit Co*. in 1909. In this case, both the plaintiff and the defendant were American corporations, but the alleged monopolization took place in Panama and Costa Rica[167]. Justice Holmes refused to apply the Sherman Act to conduct that occurred entirely outside of the United States[168] and noted that the 'general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done'[169]. Thus, the Court interpreted U.S. antitrust law 'as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power[170].

After World War II, when the United States became a world economic and political leader, American courts started to exercise extraterritorial jurisdiction in competition law by applying the 'intended effects test'. The classic case was *US v. Aluminum Co. of America (Alcoa)* in 1945, which concerned high levels of market concentration abroad (creation of aluminum cartels) in violation of the Sherman Act. Judge Hand held that U.S. laws could reach conduct outside the United States by foreign persons if the conduct had consequences within the United States that were forbidden by its laws[171]. The 'intended effects test' presumed the

[164] Federal Trade Commission. The Antitrust Laws. URL: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.
[165] Ibid.
[166] Ibid.
[167] Phan Th. P. 452.
[168] Lim D. P. 417.
[169] Alford R. P. 7.
[170] Ibid.
[171] Lim D. P. 419.

fulfilment of the two conditions: there must be the intent to effect U.S. imports and actual prohibited effect upon such import.

Since some countries, like the UK, expressed their opposition to the American extraterritorial antitrust jurisdiction, the U.S. courts started to set limitations on the 'intended effects test'. In cases *Timberlane Lumber Co. v. Bank of America* (1976) and *Mannington Mills v. Congoleum Corporation* (1979) the U.S. courts encouraged the application of 'interest balancing test', or the principles of international comity, under which courts have to take into account the interests of other nations. The second case listed a number of factors that should be taken into account when conducting such a test, in particular: if there was an intentional or actual effect on the United States' foreign trade; if this impact was large enough to cause significant harm to the plaintiff; were the interests of and link to the United States sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority[172].

In 1982, the U.S. Congress amended the Sherman Act by passing the Foreign Trade Antitrust Improvements Act (FTAIA). The Act established a single test to determine the extraterritorial application of the Sherman Act which was allowed to apply only if there was a 'direct, substantial and reasonably foreseeable effect' on trade or commerce in the U.S.[173]. In *the Laker Airways v. Sabena* (1984), the U.S. court has ruled that the interests of American consumers, creditors, and the judiciary are sufficient territorial grounds to justify the exercise of jurisdiction by a U.S. court. An important new conclusion was that the reconciliation of conflicting interests of states should be carried out through diplomatic channels[174]. The court noted that in the absence of a clear legislative act, the court has neither the power nor the institutional resources to weigh the political factors that need to be assessed in resolving competing claims for jurisdiction[175]. In contrast, diplomatic channels and resources of executive authorities are by

[172] Lim D. P. 423.
[173] Phan Th. P. 454-455.
[174] *Laker Airways v. Sabena* (1984). URL: https://casetext.com/case/laker-airways-v-sabena-belgian-wd-airlines.
[175] Ibid.

definition designed to share experiences, negotiate and reconcile on issues that accompany the realization of national interests in the field of international cooperation[176].

British and Canadian governments opposed the extraterritorial application of US antitrust law in their national legislations and courts. In *Hartford Fire Insurance v. California* (1992) the facts of the case concerned the conspiracy of the UK-based reinsurance companies acting in foreign countries, i.e., abroad the U.S. In this case, the Court of Appeals stated that the doctrine of international comity cannot prohibit the application of the Sherman Act extraterritorially. According to the judgment, if the domestic law of two different states applies to the same act, then both states may have jurisdiction. Rather than upholding or rejecting the comity concerns altogether, the Supreme Court held in this case that comity considerations applied only when there was a 'true conflict between domestic and foreign law'[177]. The Court decided that U.S. antitrust laws apply to the conduct by non-Americans that occurs outside the United States if the said conduct is intended to, and does, produce, a substantial effect in the United States[178]. It drew the conclusion that the notions of international comity 'would not counsel against exercising jurisdiction in the circumstances alleged here'[179]. Thus, the court applied 'substantial effects test' in the case.

In *U.S. v. Nippon Paper Industries Co.* (1997), the defendant Japanese corporation and co-conspirators held meetings in Japan where they agreed to fix the price of their thermal fax paper throughout North America[180]. In its opinion, the court used language from *Hartford Fire* to explain that it was clearly established law that conduct having a substantial effect in the United States fell within the purview of the Sherman Act[181]. Due to this case, the extraterritorial application of

[176] Ibid.
[177] Lim D. P. 425.
[178] Cotter J. Extraterritorial Jurisdiction: The Application of U.S. Antitrust Laws to Acts outside the United States – *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993). *William Mitchel Law Review*. 1994. Vol. 20, Iss. 4. P. 1111.
[179] Cotter J. P. 1112.
[180] Lim D. P. 428.
[181] Ibid.

antitrust law was extended to criminal prosecutions under the Sherman Act, 'opening a new era of criminal enforcement against foreign entities'[182].

In the case of *Hoffman-LaRoche Ltd v. Empagran* (2004), the U.S. government began to prosecute ten companies and their corporate executives for conspiring to fix the prices and allocate sales of bulk vitamins[183]. The US Supreme Court relied on the doctrine of international comity to limit the extraterritorial effect of the FTAIA. Key to the Court's decision was the distinction between dependent and independent effects; the Court held that when the foreign plaintiff's injury is independent of the effect of defendant's conduct on U.S. commerce, U.S. courts have no jurisdiction[184].

One of the recent cases testing the extraterritorial application of the Sherman Act is *Motorola Mobility LLC v. AU Optronics Corp* (2014), in which the court considered the language from the FTAIA[185]. The case was part of a series of cases alleging that Taiwanese and Korean manufacturers were involved in a large international conspiracy to fix the price of LCD panels in violation of §1 of the Sherman Act[186]. Motorola, a U.S. company, and ten of its foreign subsidiaries bought LCD panels from the defendant, AU Optronics, to incorporate into cellphones[187]. The following issues were discussed in the case: whether the conduct was classified as 'import commerce'; whether plaintiffs alleged an antitrust violation under the FTAIA; and whether Motorola, on behalf of its foreign subsidiaries, had antitrust standing to bring the claim[188]. The court held that price fixing abroad fails the FTAIA's 'direct effects' test, as well as the FTAIA requirement that the effect of

[182] Ibid.
[183] Diamond S. Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking. *Brooklyn Journal of International Law*. 2006. Vol. 31, Iss. 3. P. 806.
[184] Diamond S. P. 808.
[185] Phan Th. P. 456.
[186] Masingill M. Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in *RJR NABISCO* to Foreign Component Cartels. *American University Law Review*. 2018. Vol. 68. P. 639.
[187] Ibid.
[188] Ibid.

the defendant's conduct 'gives rise to' an antitrust claim in the United States[189]. The court stressed the globalized supply chains and use of foreign subsidiaries in today's economy, and that courts should not extend coverage of U.S. law to include foreign subsidiaries injured abroad by conduct that occurred in foreign commerce[190].

European Union antitrust law and extraterritorial jurisdiction. Initially, the EU opposed the extraterritorial jurisdiction applied by the U.S. courts but later it started to apply extraterritorial antitrust jurisdiction itself. The development of the EU antitrust extraterritorial jurisdiction may be divided into three phases: the first phase was characterized by the attempt of the Court of Justice of the European Union (CJEU) to reconcile the extraterritorial reach of EU competition rules with the territoriality principle by applying the 'single economic entity' doctrine to international groups of companies; in the second phase the CJEU developed for the same purpose a distinction between the 'formation' of a restrictive practice (such as a cartel) and its 'implementation' ('the doctrine of implementation'); during the third phase at least the General Court has accepted the 'effects doctrine', but this phase still has not come to an end[191].

The EU antitrust policy is developed from Articles 101 and 102[192] of the Treaty on the Functioning of the European Union (TFEU): Article 101 prohibits anti-competitive agreements between two or more independent market operators, and Article 102 prohibits abusive behavior by companies holding a dominant position on any given market[193].

In *Grosfillex* (1964), the first decision under the competition rules, the Commission reasoned that the 'territorial scope of [the competition laws] is determined neither by the domicile of the enterprises nor by...

[189] *Motorola Mobility LLC v. AU Optronics Corp* (2014). URL: https://www.antitrustalert.com/tag/motorola-mobility-llc-v-au-optronics-corp/.
[190] Masingill M. P. 642.
[191] Peter B. Extraterritorial reach of EU competition law revisited: The 'effects doctrine' before the ECJ. *Econstore*. 2016. Discussion Paper No. 3. P. 8. URL: https://www.econstor.eu/bitstream/10419/148068/1/87238506X.pdf.
[192] Former articles 85 and 86 of the EEC Treaty.
[193] European Commission. Antitrust. URL: https://ec.europa.eu/competition-policy/antitrust_en.

where the agreement is concluded or carried out. On the contrary, the sole and decisive criterion is whether an agreement ... affects competition within the Common Market or is designed to have this effect'[194]. In *Beguelin* (1971) the EU Court stated in dictum that '[the fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of [Article 85] since the agreement is operative on the territory of the common market'[195].

In the case of *ICI v. Commission* (1972), known as the *Dyestuffs* case, the Court of Justice of the European Union has established jurisdiction over a series of restrictive agreements setting fixed prices for food dyes, based on the concept of a 'single economic entity'. This doctrine considers a parent and a subsidiary company as a single entity for the purpose of competition law in order to determine the content of their market behavior. Under this model, if a subsidiary is located within the EU, while a parent company is located abroad, the former may be held liable for the activities of the latter, even if such activities were implemented outside the EU. In *Dyestuffs* case the EU Court declined to apply the 'effects doctrine' as was suggested by the Advocate General and exercised jurisdiction under the principle of territoriality[196] because of the links of a parent company with its subsidiaries situated in the EU territory. The Court held a non-EU parent company jointly liable for a breach of Article 101(1) TFEU that had been committed by its wholly-owned subsidiaries in the EU upon finding the parent company had issued instructions to the subsidiaries to increase their prices[197].

The Commission similarly evaluated evidence of the foreign parent's overall control in *Re Hoffman-LaRoche*[198] (1979). Hoffman-LaRoche, a Swiss-based pharmaceutical company, was found guilty of

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[194] Alford R. P. 28.
[195] Alford R. P. 30.
[196] Lopez-Balboa V. and Myers J. Jurisdictional Standards under EEU Competition Law: The Evolution of the Economic Entity Test. *Journal of Comparative Business and Capital Market Law*. 1984. Vol. 6. P. 392.
[197] Odudu O. and Baily D. The Single Economic Entity Doctrine in EU Competition Law. *Common Market Law Review*. 2014. Vol. 51. P. 1748.
[198] Lopez-Balboa V. and Myers J. P. 396.

violating Article 86 for executing exclusive or preferential agreements in supplying vitamins to the Common Market[199]. The Commission asserted jurisdiction over Hoffman-LaRoche, describing how the parent company directed its eight wholly owned subsidiaries to implement these illegal agreements: 'A number of circulars from the parent company of the Roche group to its subsidiaries and minutes of meetings of the officers of the company confirm the main features of the 'fidelity' system and clearly show the benefits accruing to Roche[200]'. Although it never explicitly stated so, the Commission was using the economic entity test and the Court upheld the Commission's findings[201].

A later model that introduced a new jurisdiction standard ('the doctrine of implementation') was formulated in *Re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. E.C. Commission,* known as *Wood Pulp* (1988). This model is based on the principle of objective territorial jurisdiction. According to it, the extraterritorial application of EU competition law is allowed when a certain action (infringement) has been at least partially implemented in the European Union. The case of *Wood Pulp* concerned a cartel consisting of non-EU producers of bleached sulphate wood pulp, a substance, used for the production of highquality papers[202]. The EU Commission imposed fines on these undertakings, on the ground that they violated Article 101(1) of the TFEU by engaging in concerted practices to fix the prices of wood pulp products sold in the EU[203]. The undertakings challenged the Commission's decision before the CJEU, and alleged that lacking jurisdiction to apply the EU competition rules to the contested practices, the Commission was in violation of public international law, since cartel members were not domiciled in the EU and contested price fixing agreements were concluded outside the EU[204]. The Commission asserted that Article 101 was applicable to the contested

[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Çorlu H. Extraterritorial Application of EU Competition Law: The New Standard-bearer of Legal Imperialism? *Ankara Review of European Studies*. 2021. Vol. 20, No. 2. P. 420.
[203] Ibid.
[204] Ibid.

practices since these agreements had direct, deliberate and significant consequences for the EU. In its 1988 judgment, the Court of Justice of the European Union adhered to the principle of territoriality and drew the conclusion that if producers of goods from third countries sell them directly to buyers from EU countries at prices controlled, even from abroad, they actually operate within the EU and violate its antitrust law. According to the Court, the decisive factor is not the place of conclusion of the agreement, but the place of its implementation. Thus, the Court made an expanded interpretation of the territorial principle and did not use the effect doctrine as proposed by the Advocate General.

The third doctrine was applied in *Gencor* (1999). This case involved a merger of South African and British companies to gain joint control of another South African company; all interested companies exported platinum and rhodium to the EU[205]. The Commission blocked the merger, as it would create a dominant duopoly position in the world market for platinum and rhodium, and as a result would create obstacles to effective competition in the EU[206]. The Court of Justice has for the first time analyzed the territorial scope of the Merger Regulation – Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings. It noted that the document does not require such a company to be established in the EU or to operate within the territorial jurisdiction of the Communities; it is enough that such anti-competitive activities have negative consequences for the effective competition in the EU[207]. As companies sold their products in the EU, the doctrine of implementation was also applied there.

The *Intel* case is another evidence of the application of the effect doctrine. American company Intel has gained a dominant position in the computer market for the production of certain types of processors. Its actions (dominant position) were prohibited under Article 102 of the TFEU. Another US company, AMD, has filed a complaint with the EU Commission in this regard, which has ruled in favor of AMD. By decision of 13 May 2009, the Commission fined Intel €1.06 billion for

[205] Peter B. P. 11.
[206] Ibid.
[207] Peter B. P. 12.

abusing its market dominance in central processing units. Intel appealed to the General Court, which upheld the Commission's decision. The plaintiff denied the jurisdiction of the Commission. In its judgement of 2014, the Court has analyzed the doctrines of implementation and effects articulated in previous cases, which in its view are not cumulative but alternative (only one of them can be invoked) to establish jurisdiction of the Commission and the Court to hear this case. The Court reiterated that consequences (effects) for the EU market must be substantial, immediate and foreseeable[208]. The action brought by Intel against that decision of the Commission was dismissed in its entirety by the General Court by this judgment[209]. Intel appealed to the EU Court of Justice, which in 2017 referred the case for reconsideration to the EU General Court. By its judgment of 2022, the General Court set aside in part the contested decision in so far as it characterises the rebates at issue as abusive within the meaning of Article 102 TFEU and imposes a fine on Intel in respect of all of its actions characterised as abusive.

Although sometimes the effects doctrine and the principle of objective territorial jurisdiction are used as synonyms, especially in criminal law, there is a difference between them. The effects doctrine presupposes the exercise of extraterritorial antitrust jurisdiction by a state when a certain action of a corporation makes influence on its territory. In turn, the principle of objective territorial jurisdiction requires that at least part of the action be carried out in the territory of the state, thus, it requires a closer link between the act and the state.

Extraterritorial jurisdiction of states in environmental law. The basis for the extraterritorial application of national environmental laws of states is that Public International Law lacks proper regulation of relevant matters. Since there are no international conventions governing the sustainable use and protection of some natural

[208] Peter B. P. 14.

[209] General Court of the European Union Press Release No. 16/22. The General Court annuls in part the Commission decision imposing a fine of € 1.06 billion on Intel. 26 January 2022. URL: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf.

resources, states try to exercise extraterritorial prescriptive, judicial and/or enforcing jurisdiction to preserve 'common good' which is our surrounding environment. But such unilateral national measures often raise important questions on their compatibility with other international treaties including the WTO agreements.

To understand the problem better, one must distinguish between the two cases: 1) extraterritoriality – the application of measures that impose obligations on persons who have no connection with the regulatory state (they are applied against persons who are not citizens or who do not reside in the state or do not act in the territory of the state); 2) territorial extension, or territorial expansion – the application of measures that impose obligations on persons who have a territorial connection with the regulatory state, but by applying the measures the regulating state takes into account the conduct or circumstances committed abroad[210]. There are a lot of examples of the extraterritorial jurisdiction and territorial extension of jurisdiction in environmental matters in the practice of the USA, the EU and the WTO, but we will analyze only the most popular cases.

American extraterritorial environmental jurisdiction. One of the earliest cases involving extraterritorial environmental jurisdiction of the USA was the *Bering Sea Seals* case of 1893. The question that was put in front of the tribunal was whether states had jurisdiction to enact conservation measures for the protection of marine mammals on the high seas[211]. The tribunal rejected claims that states had such jurisdiction and declared the freedom of the high seas[212]. The facts which gave rise to the arbitration were as follows. In 1886 and 1889 the US seized British Columbian and British vessels engaged in fur sealing in the Bering Sea beyond the three-mile limit of US territorial sea[213]. One of the questions put before the tribunal was whether the US had any right, and if so what

[210] Scott J. Exterritoriality and Territorial Extension in EU Law. *The American Journal of Comparative Law*. 2014. Vol. 62. P. 90.
[211] Louka P. International environmental law: Fairness, effectiveness and world order. Cambridge: Cambridge University Press. 2006. P. 42.
[212] Ibid.
[213] Sands P. Principles of international environmental law. Cambridge: Cambridge University Press. 2003. 2nd ed. P. 562.

right, 'of protection or property in the fur seals frequenting the islands of the United States in the Bering Sea when such seals are found outside the ordinary three-mile limit'[214]. Having rejected the United States' argument that the US could apply conservation measures in areas beyond national jurisdiction, the arbitrators adopted Regulations for the protection and preservation of fur seals outside jurisdictional limits[215].

Another example is the Truman Proclamation (1945) which stipulated: 'the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'[216]. This document which derived from existing customary rules on maritime jurisdiction 'triggered a worldwide jurisdictional revolution as well as decades of diplomatic and legal disputes over oceanic spaces, territorial rights, and resource exploitation and protection'[217]. Truman's assertion of jurisdiction over the subsoil and seabed resources of the continental shelf produced new 'state spaces' outside of the previous boundaries of sovereign territoriality[218]. The document led to the creation of new relevant international customary rule and then – UNCLOS treaty provision.

In 1968, the U.S. Congress enacted the Pelly Amendment which revised the Fishermen's Protective Act of 1967 in response to unsuccessful U.S. efforts to persuade Denmark, Norway, and West Germany to comply with the ban on high seas salmon fishing that was promulgated by the International Commission for the Northwest Atlantic Fisheries[219]. The Pelly Amendment provided for that: '[w]hen the Secretary of

[214] Ibid.
[215] Ibid.
[216] Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental. URL: https://iea.uoregon.edu/treaty-text/1945-presidentialproclamationnaturalresourcescontinentalshelfentxt.
[217] Margolies D. Jurisdiction in Offshore Submerged Lands and the Significance of the Truman Proclamation in Postwar U.S. Foreign Policy. *Diplomatic History*. 2020. Vol. 44, Iss. 3. P. 447-465.
[218] Ibid.
[219] Charnovitz S. Environmental trade sanctions and the GATT: An analysis of the Pelly Amendment on foreign environmental practices. *The American University Journal of International Law and Policy*. 1994. Vol. 9, Iss. 3. P. 758.

Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President. Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products of the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade'[220]. The Pelly Amendment process is linked to acts of foreign persons, not foreign governments[221]. In 1978, Congress added a new track to Pelly for 'engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species whether or not such conduct is legal under the laws of the offending country'[222]. There are several U.S. environmental laws linked to the Pelly Amendment. Now, the Pelly Amendment allows the President to impose trade embargo on states whose actions reduce the effectiveness of measures under international fisheries protection programs, the International Convention for the Regulation of Whaling (1946), or the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (1973).

Unlike *Bering Sea Seals* case and Truman Proclamation, which are classical examples of a state's extraterritorial prescriptive and enforcing jurisdiction, the Pelly Amendment is about unilateral prescriptive environmental measures having extraterritorial effect, i.e., about territorial extension. Territorial jurisdiction is expanded, or extended, because the regulating state, the USA, evaluates actions of private entities outside its jurisdiction, beyond its Exclusive Economic Zone. Thus, by means of prescriptive jurisdiction, the regulating state imposes some rules with extraterritorial effect, and then assesses the actions of private entities from foreign countries in relation to adherence to its national standards: whether they undermine the effectiveness of

[220] Charnovitz S. P. 759.
[221] Ibid.
[222] Ibid.

international fisheries and wild conservation instruments by conducting their activities on the high seas or within the territory or jurisdiction of their own states. Meanwhile, executive, or enforcing jurisdiction is exercised when there is a link to the territory of the regulating state, i.e., when private entities from foreign countries bring their products to its territory. At the same time, this situation should be distinguished from the situation when a state tries to implement its national environmental legislation in the absence of any international environmental treaty or program. In this case it will have extraterritorial effect, but its legitimacy is questionable under modern international law given the 'unilateralism v. multilateralism' debate.

The factors influencing the certification under the Pelly Amendment can be various: non-ratification of the treaty by the flag state of the entity, non-performance of such treaty, and in some cases – even lawful actions of states, allowed by exceptions or reservations to the treaty. For example, if a state has exercised its right to reservation to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora or the International Convention for the Regulation of Whaling, it may still be subject to the Pelly Amendment. For example, in 1974, Japan and the USSR were certified on the basis that they exceeded the catch quota set by the International Whaling Commission for 1973-1974, despite the fact that they acted lawfully on the basis of their reservations[223]. As a result, both countries agreed to the Commission's quotas for the following years, and trade sanctions were not applied. Chile, Peru, and South Korea were certified in 1978 for violating whaling quotas, although none of them was a party to the 1946 Convention[224]. The President did not impose sanctions because all three states agreed to sign the Convention. In 1986, the United States unilaterally banned the import of all species and products of wildlife from Singapore, citing non-compliance with the provisions of Article 10 of the Convention on the International Trade in Endangered Species of

[223] Martin G. Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments. *Denver Journal of International Law and Policy*. 1989. Vol. 17, No. 2. P. 298.
[224] Martin G. P. 299.

Wild Fauna and Flora, which regulates trade with non-member states. As a result of these measures, Singapore became a party to the Convention in 1986[225]. Such trade restrictions were applied by the United States to China and Taiwan in 1994, as a result of which they made the necessary changes in their national legislation[226]. Japan's withdrawal of its CITES reservations concerning marine turtles in August 1994 has also been credited to the threat of American trade sanctions[227].

Experts assess the Pelly Amendment and the practice of its application as quite ambiguous, because, on the one hand, it has promoted new environmental initiatives and the cessation of environmentally harmful practices, and on the other hand, some problems appear in relation to their legitimacy. First question arises as to whether such unilateral trade restrictions comply with GATT/WTO rules. Secondly, the establishment of legal standards of conduct for private entities, judgments on whether they adhere to it, and the determination of penalties for non-compliance with these standards are unilateral by nature; such standards are rather vague and questionable, as they include cases where private actors of a state act lawfully. Such unilateral trade sanctions imposed by a state in compliance with multilateral environmental agreements, such as the International Convention for the Regulation of Whaling, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora or regional fishery convention, may also raise questions about their legitimacy as countermeasures, because very often the state that applies them, such as the USA, is not directly affected (is not an injured state) within the meaning of Article 49 of the Articles on Responsibility of Sates for Internationally Wrongful Acts (2001), and the state against which they are applied is a third party that has not agreed to be bound by a particular international treaty. Nevertheless, the application of such measures having extraterritorial effect may be justified by reference to *erga omnes* obligations envisaged in Articles 48 and 54 of the document.

[225] Sand P. Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment. *European Journal of International Law*. 1997. Vol. 1. P. 39.
[226] Ibid.
[227] Ibid.

In order to overcome potential and existing problems surrounding the application of environmental legislation by territorial extension of states' jurisdiction, international community has committed to negotiate a legally binding instrument concerning management and protection of marine biodiversity in areas beyond national jurisdiction under the umbrella of the UNCLOS[228].

European Union extraterritorial environmental jurisdiction. Another example of prescriptive unilateral acts that may have an extraterritorial effect (territorial expansion, or extension) was the planned introduction by the EU of the tax on greenhouse gas emissions from aircraft for all states that fly, depart or land in the Member States of the Union. As emissions from aircraft have been excluded from the scope of the Kyoto Protocol (1997), any measures to combat climate change due to civil aviation activities were to be developed within the framework of ICAO. Given the fact that this international organization was not ready with multilateral regulation of the issue, the EU resorted to environmental unilateralism having adopted Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities into the scheme for greenhouse gas emission allowance trading within the Community (Aviation Directive). On 21 February 2012, representatives of 29 countries signed the Moscow Declaration, in which they expressed their readiness to take countermeasures against the EU in the event of the introduction of a tax on emissions from aircraft. Airlines have challenged the legality of the Aviation Directive before the British High Court (*Air Transport Association and others v. Secretary of State for Energy and Climate Change*). Later the British court initiated the preliminary ruling proceedings before the Court of Justice of the European Union. The Court was asked to determine whether the EU Aviation Directive which expanded the EU Emissions Trading Scheme to include aviation emissions was extraterritorial and

[228] Friedman A. Beyond "not undermining": Possibilities for global cooperation to improve environmental protection in areas beyond national jurisdiction. *ICES Journal of Marine Science*. 2019. Vol. 76, Iss. 2. P. 452-456.

thus in violation of international law[229]. The Court had to access the compliance of the EU actions with the principles of customary law, the Chicago Convention on Civil Aviation (1944), the Kyoto Protocol and the US-EU Open Skies Agreement (2007). In its judgment of 2011, the Court noted that the application of EU law to aircraft operators departing from or arriving at an airport located in one of the Member States does not infringe the principle of the territoriality or sovereignty of third countries, since these aircraft are physically located in the territory of one of the Member States of the European Union and are therefore subject to the unlimited jurisdiction of the European Union[230]. The EU has never introduced its environmental tax, since ICAO approved a multilateral market-based instrument in this area (Carbon Offsetting and Reduction Scheme for International Aviation, CORSIA).

Although these measures were called extraterritorial in the doctrine, they were in fact territorial extensions, as they were applied within the EU jurisdiction in its airports, but taking into account behavior and circumstances committed outside the EU territorial jurisdiction: the tax scheme took into account the entire greenhouse gas emissions from the aircraft during the entire flight period including beyond EU territorial jurisdiction. Besides, the EU could have decided to exempt flights departing from third countries from being included in its tax scheme when the third country in question had adopted its own measures to reduce the climate change impact of these flights[231]. Thus, the EU was required to take into account the content of third country law[232].

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[229] Dobson N. and Ryngaert C. Provocative Climate Protection: EU 'Extraterritorial' Regulation of Maritime Emissions. *International and Comparative Law Quarterly*. 2017. Vol. 66, No. 2. P. 307.

[230] Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change. Judgment of the Court (Grand Chamber) of 201 in Case C-366/10. Para. 125. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0366.

[231] Scott J. P. 97.

[232] Ibid.

In 2015, the Union went ahead and adopted Regulation 2015/757 setting out a monitoring, reporting, and verification scheme for maritime emissions as the first step towards a market-based measure incorporating these emissions into the EU's independent reduction commitment[233]. Regulation includes the complete duration of voyages to and from EU ports, meaning that operators will be required to monitor and report CO_2 emitted outside EU territory[234] including on the high seas and the maritime zones of other states. Thus, here we also have territorial extension of jurisdiction. Another example is the adoption of EU Regulation 995/2010 on tropical timber. This document prohibits import of tropical timber and wood products from third countries in violation of the legislation of these third countries. Territorial expansion is manifested in the fact that EU bodies must assess foreign legislation and cases of its violation.

On 14 July 2021, the European Commission adopted the proposal for a new Carbon Border Adjustment Mechanism (CBAM), which will require importers to report the embedded emissions in certain carbon-intensive products (initially aluminum, cement, iron and steel, electricity and fertilizers) and buy certificates to account for these emissions[235]. In March 2022, the Council reached an agreement on the CBAM regulation. The CBAM is intended to complement the EU Emissions Trading System and level the playing field between EU and non-EU businesses, ensuring that production of carbon-intensive goods does not shift from within the EU to third countries in order to take advantage of less stringent climate policies[236]. It takes effect in a transitional form on 1 January 2023 and be fully operational from 1 January 2026[237]. But it raises the question of territorial extension anyway.

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[233] Dobson N. and Ryngaert C. P. 296.

[234] Ibid.

[235] EU: European Commission adopts proposal for new Carbon Border Adjustment Mechanism. URL: https://www.globalcompliancenews.com/2021/08/23/eu-european-commission-adopts-proposal-for-new-carbon-border-adjustment-mechanism10082021/.

[236] Ibid.

[237] Ibid.

WTO case law on territorial extension in environmental matters. WTO jurisprudence on territorial extension in environmental matters is linked to the concept of 'processes and production methods' (PPMs) which relate to the manner in which products are made and natural resources are extracted, grown or harvested[238]. Territorial extension in environmental matters means prescriptive jurisdiction of states to adopt legal standards concerning the methods of production of certain goods within the territory of that state as well as beyond its national jurisdiction. The above-mentioned U.S. and EU unilateral environmental measures which have extraterritorial effect were also based on the PPMs. Since some PPMs may impact the environment as well as human health (for example, production methods can pollute the air or water, and certain methods of harvesting can lead to resource depletion or harm to endangered species), countries have adopted policies and rules aimed at avoiding or mitigating the harmful effects caused by PPMs[239]. These policies can affect international trade, because the measures may include, among other things, import and export restrictions on products produced in a certain way, labelling requirements regarding the production method used to produce a product, tax schemes based on production methods, and border tax adjustments levied on imported products to counterbalance PPM-based domestic taxation[240]. That is why other countries challenge PPMs before the WTO. Trade-affecting PPM-based measures often aim to protect natural resources, the environment, humans, animals, plants, etc. that are located (at least in part) outside the territorial boundaries of the country taking the measure[241].

The first relevant cases in the GATT/WTO jurisprudence were *United States – Restrictions on Imports of Tuna* ('*US– Tuna/Dolphin I*', Mexico v. United States, 1991), and *United States – Restrictions on Imports of Tuna* ('*US – Tuna/Dolphin II*', EEC v. United States, 1994). The United States has banned imports of tuna from countries that have not taken

[238] Bernasconi-Osterwalder N., Magraw D., Oliva M. J. et al. Environment and trade: a guide to WTO jurisprudence. London and Sterling: Earthscan. 2006. P. 203.
[239] Ibid.
[240] Ibid.
[241] Bernasconi-Osterwalder N. et al. P. 205.

dolphin protection measures in line with U.S. domestic standards, in breach of its GATT obligations as applicants claimed. In the first case, the United States imposed two types of bans: a primary embargo (on products from countries that caught tuna by prohibited methods in the United States) and a secondary embargo (on tuna products purchased in a country subject to the primary embargo). The GATT expert panel has decided that both types of the embargo violate US obligations under GATT and do not fall under the exceptions of Article XX.

In the second case, the same decision was adopted in relation to the US embargo applied to the Netherlands, on whose behalf the EEC got involved in the case. Both decisions were never approved by the GATT Council. In the Tuna-I report, the GATT panel concluded that 'if the extrajurisdictional interpretation of Article XX (g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement'[242].

The next set of cases were *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*US – Shrimp/Turtle I*', 1998 and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*US – Shrimp/Turtle 21.5*', 2001). In 1998, four countries – India, Malaysia, Pakistan and Thailand – filed a complaint with the WTO alleging that the US ban on imports of certain shrimp and shrimp products derived by means of technology that posed risk to sea turtles contradicted Article XI of GATT. The United States justified its ban by the provisions of Article XX (d). Under the United States Endangered Species Act of 1973, all U.S. vessels are required to use special 'turtle excluding devices' (TEDs) to avoid catching turtles when fishing for other marine living resources. The ban did not apply to the so-called 'certified nations' that have adopted similar conservation programs and achieved the same level of accidental death of turtles as American

[242] Murase S. Extraterritorial Application of Domestic Environmental Law. Transnational Environmental Issues. P. 354. URL: https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/11-Vinuales-Background6-Extraterritorial-Application-of-Domestic-Environmental-Law.pdf.

vessels. The Appellate Body ruled that sea turtles were an 'exhaustible natural resource' within the meaning of Article XX (g) of GATT, however, held that the unilateral measures taken by the United States constituted unjustified and arbitrary discrimination.

The second stage of the dispute was related to the review of the above decision. In 1998, the WTO Dispute Settlement Body requested the United States to bring its ban into line with GATT rules, but in 2000 Malaysia stated that the United States was not properly implementing the WTO recommendations and announced the initiation of a review procedure under Article 21.5 of the WTO Dispute Settlement Understanding. This time, a group of experts concluded that the United States had demonstrated a long and serious effort of good will to reach a multilateral agreement as it began intensive negotiations to adopt an international legal regime for the protection of sea turtles in the Indian Ocean and Southeast Asia. Thus, the actions of the United States were fully justified in the sense of Article XX of GATT. Malaysia has filed an appeal on the grounds that the United States has not actually reached such an agreement. However, the Appellate Body supported the findings of the Panel.

One of the latest cases was *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* ('*EU-Seals*', Canada v. EU, 2014). The claim of Canada concerned EU Regulation 1007/2009 on trade in seal products, which, according to Canada, prohibited the importation and the placing on the EC market of all seal products[243]. The Regulation prohibited the importation of fur of the animals caught by the cruel leghold-trap methods[244]. The Appellate Body upheld the Panel's finding that the EU Seal Regime was 'necessary to protect public morals' within the meaning of Article XX(a) of GATT 1994 but concluded that the European Union had not justified this regime under the chapeau of this Article[245]. In

[243] European Communities – Measures Prohibiting the Importation and Marketing of Seal Products. Summary of the dispute today. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm

[244] Murase S. P. 354.

[245] European Communities – Measures Prohibiting the Importation and Marketing of Seal Products.

other words, such measures (PPMs) posed an arbitrary or unjustifiable discrimination between countries where the same conditions prevailed, or a disguised restriction on international trade.

Considering the *Shrimp-Turtle* case, for example, one may argue that, on the one hand, the US did not apply its laws 'beyond the geographic limits of [its] jurisdiction', which is the definition of extraterritorial jurisdiction, as it did not directly prohibit anyone outside its territory from fishing without TEDs[246], although the measures were aimed at conservation of exhaustible natural resources outside the jurisdiction of the US. The decisions to impose and how to administer the ban were made in the US, and the actual refusal of import occurred at the US ports, which are located within the territorial jurisdiction of the US[247]. On the other hand, the US measures restricted fishermen abroad from exporting their product into the US and is therefore extraterritorial[248]. Thus, while the application of the US law was not extraterritorial, the effects of the measure nevertheless were extraterritorial[249]. Thus, the most appropriate qualification of these cases related to PPMs will be the following: there is territorial extension of the prescriptive jurisdiction of a state; enforcement jurisdiction is not an issue in the present cases, because the trade restrictions on the tuna, shrimps or seals were enforced at the border, that is, within the territory, of the United States or the EU.

Tasks and questions for individual work:

1. Consider the topic 'Jurisdictional immunities of states and their property' which is linked to the issue of the jurisdiction of states in economic matters. Answer the following questions and accomplish the following tasks:

1) what is the jurisdictional immunity of a state?

2) what types of jurisdictional immunity of a state are distinguished in legal doctrine and law?

[246] Bernasconi-Osterwalder N. et al. P. 237.
[247] Bernasconi-Osterwalder N. et al. P. 237-238.
[248] Bernasconi-Osterwalder N. et al. P. 238.
[249] Ibid.

3) what international treaties are devoted to the jurisdictional immunities of states?

4) in what cases a state cannot invoke its jurisdictional immunity under these treaties?

5) what types of state property are regarded to always have immunity?

6) consider *Jurisdictional Immunities of the State* case (Germany v. Italy, ICJ, 2012).

7) consider the case-law of the ECtHR in relation to state immunity.

2. Watch the Ukrainian Association of International Law Briefing (April 2021) 'Jurisdictional Immunities of States: Public and Private Law Challenges'[250] and answer the following questions:

1) why did professor M. Gnatovskyy call the issue of the jurisdictional immunities of states a 'fascinating theoretical topic'?

2) what is the history of the adoption of the American Foreign Sovereign Immunity Act, what is 'the presumption of immunity' and what are the exceptions from this presumption according to R. Shaw?

3) tell about Ukrainian cases on the issue as well as the link between the production sharing agreements and jurisdictional immunities of states according to O. Girenko.

[250] https://www.youtube.com/watch?v=lgVdJ7-w9Xc.

TOPIC 4
JURISDICTION OF STATES IN HUMAN RIGHTS ISSUES

Extraterritorial application of human rights treaties. Jurisdiction plays a particular role in human rights law, which distinguishes it from its function in other branches of Public International Law where jurisdiction determines the legality of action. In human rights law jurisdiction is about the question of whether an obligation to observe human rights applies towards certain individuals[251]. In other words, jurisdiction provides 'tests for when the [extraterritorial] obligations would be triggered' and hence defines the scope of application *ratione personae*: towards which rights-holders does a State Party hold obligations?[252]

Underlying the development of a specific human rights approach to extraterritoriality is the tension between the ideal of universal realization of human rights and the territorial nature of the state parties to human rights treaties, which may come to the fore, for example, when states carry out activities on foreign territory, as in the context of military operations[253]. The human rights notion of extraterritoriality is linked to the classical paradigms of human rights law, namely the universality, indivisibility of human rights and non-discrimination[254]. A human rights treaty is applied extraterritorially where, at the moment

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[251] Vandenhole W. The 'J' Word: Driver or Spoiler of Change in Human Rights Law? / Allen S., Costelloe D., Fitzmaurice M., Gragl P. and Guntrip E. (eds.). *The Oxford Handbook of Jurisdiction in International Law*. 2019. Oxford: Oxford University Press. P. 415.

[252] Ibid.

[253] Vordermayer M. The Extraterritorial Application of Multilateral Environmental Agreements. *Harvard International Law Journal*. 2018. Vol. 59, No. 1. P. 72.

[254] Ibid.

of a violation by State A of a right protected under the treaty, the right-holder is located outside State A's territory[255].

When considering the extraterritorial application of treaties like the European Convention on Human Rights and Fundamental Freedoms (1950), the International Covenant on Civil and Political Rights (1966) or the American Convention on Human Rights (1969), human rights bodies can rely on express provisions[256]. For example, Article 2(1) of the ICCPR provides that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[257]. Article 1 of the ECHR stipulates that the High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention[258]. Article 1 of the American Convention on Human Rights proclaims that the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition[259]. Thus, the basis for jurisdiction in human rights law may become not only the territoriality principle but also the principles of active personality because a state will exercise its jurisdiction over a person due to an effective connection (nationality) between the state and the individual affected even if such an individual is outside the state's territory. Other jurisdictional principles, like the passive personality or universality principles, also may be applied in human rights law.

[255] Chauhan A. A Casual Model for the Extraterritorial Application of Human Rights Treaties. *The Oxford University Undergraduate Law Journal*. 2019. Iss. VIII. P. 110.
[256] Vordermayer M. P. 74.
[257] International Covenant on Civil and Political Rights (1966). URL: https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf.
[258] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL: https://www.echr.coe.int/documents/convention_eng.pdf.
[259] American Convention on Human Rights (1969). URL: https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf.

Jurisprudence of the UN Human Rights Committee. The UN Human Rights Committee has confirmed that the reference to 'jurisdiction' extends the state's obligations under the ICCPR beyond its territory. For example, the Committee reaffirmed that Israel had commitments on human rights in the occupied territories in the West Bank and in Gaza, and the United States – on its military base at Guantanamo Bay in Cuba. Thus, in its Concluding Observations on Israel (2003), the Committee has noted with regret 'the State party's position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza, especially as long as there is a situation of armed conflict in these areas'[260]. The Committee reiterated its view, that the applicability of the regime of international humanitarian law does not 'preclude accountability of States parties under Article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law. The State party should reconsider its position and to include in its third periodic report all relevant information regarding the application of the Covenant in the Occupied Territories resulting from its activities therein'[261].

In its Concluding Observations on the USA (2006), the Committee regreted that the State Party had not integrated into its report information on the implementation of the Covenant with respect to individuals under its jurisdiction and outside its territory[262]. The Committee noted with concern the restrictive interpretation made by the State Party of its

[260] Concluding Observations of the Human Rights Committee on Israel. CCPR/CO/78/ISR. 21 August 2003. URL: https://www.refworld.org/docid/3fdc6bd57.html.
[261] Ibid.
[262] Concluding Observations of the Human Rights Committee on the United States of America. CCPR/C/USA/CO/3/Rev.1. 18 December 2006. URL: https://digitallibrary.un.org/record/589849.

obligations under the Covenant, as a result in particular of its position that the Covenant did not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice[263]. The Committee drew the conclusion that State Party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose and, thus, should in particular acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory[264].

In its General Comment No. 31 'The nature of the general legal obligation imposed on States Parties to the Covenant' the Committee described the extraterritorial application of the ICCPR as follows: 'States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. … This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, …'[265].

In its jurisprudence the Committee also relied on such interpretation of the jurisdiction. One of the most famous was the case of *Montero v. Uruguay*[266]. In this case the State Party rejected the competence of the Committee to consider the communication on the grounds that the requirements for submission of a communication to the Committee

[263] Ibid.

[264] Ibid.

[265] General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. CCPR/C/21/Rev.1/Add. 13 26 May 2004. URL: https://www.refworld.org/docid/478b26ae2.html.

[266] Montero v. Uruguay. Human Rights Committee, Communication No. 106/1981. 31 March 1983. URL: https://ccprcentre.org/files/decisions/106_1981_Montero_v__Uruguay.pdf.

under Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights which recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction were not met[267]. The State Party argued that 'at the time of the submission of her request (to have her passport renewed) Miss Mabel Pereira Montero was not subject to the jurisdiction of the Uruguayan State' and that '… it is consequently inappropriate for the Committee to deal with communications of this kind which are outside its terms of reference and violate international provisions'[268].

The Committee did not accept such contention of the State Party. It started to examine whether the fact that Pereira Montero resided abroad affected the competence of the Committee to receive and consider the communication under Article 1 of the Optional Protocol, taking into account the provisions of Article 2 (1) of the Covenant[269]. In that context, the Committee made the following observations: 'Article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities'[270]. The Committee found that 'it followed from the very nature of that right that, in the case of a citizen resident abroad, it imposed obligations both on the State of residence and on the State of nationality and that, therefore, Article 2 (1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under Article 12 (2) to citizens within its own territory'[271].

Another case is *Lopez Burgos v. Uruguay*[272]. The author of the communication was Delia Saldias de Lopez, a political refugee of Uruguayan nationality residing in Austria, who submitted the communication on behalf of her husband, Sergio Ruben Lopez Burgos,

[267] Montero v. Uruguay. Para 7.1.
[268] Ibid.
[269] Montero v. Uruguay. Para 5.
[270] Ibid.
[271] Ibid.
[272] Sergio Euben Lopez Burgos v. Uruguay. Human Rights Committee, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40). 1981. URL: http://hrlibrary.umn.edu/undocs/session36/12-52.htm.

a worker and trade-union leader in Uruguay[273]. The author stated that mainly because of the alleged victim's active participation in the trade union movement, he was subjected to various forms of harassment by the authorities from the beginning of his trade union involvement[274]. He was arrested in 1974 and after his release in 1975 moved to Argentina where obtained a status of a political refugee. The author of the communication claimed that on 13 July 1976 her husband was kidnapped in Buenos Aires by members of the 'Uruguayan security and intelligence forces' who were aided by Argentine para-military groups, and on 26 July 1976 was illegally and clandestinely transported to Uruguay, where he was detained and continuously subjected to physical and mental torture and other cruel, inhuman or degrading treatment[275].

The State party, in response, stated 'that the communication concerned is completely devoid of any grounds which would make it admissible by the Committee since in the course of the proceedings taken against Mr. Lopez Burgos he enjoyed all the guarantees afforded by the Uruguayan legal order'[276]. The Human Rights Committee observed that the reference in Article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' was not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred[277]. The Committee reiterated that Article 2 (1) of the Covenant imposed an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but observed that it did not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it[278].

[273] Sergio Euben Lopez Burgos v. Uruguay. Para. 1.
[274] Sergio Euben Lopez Burgos v. Uruguay. Para 2.1.
[275] Sergio Euben Lopez Burgos v. Uruguay. Para. 2.3.
[276] Sergio Euben Lopez Burgos v. Uruguay. Para. 4.
[277] Sergio Euben Lopez Burgos v. Uruguay. Para. 12.2.
[278] Sergio Euben Lopez Burgos v. Uruguay. Para. 12.3.

Jurisprudence of the UN Committee on Economic, Social and Cultural Rights and extraterritorial corporate liability approach. Although the ICESCR does not contain any provision on jurisdiction, the Committee had several occasions to interpret the Covenant in light of this concept. Thus, in its General Comment No. 12 on the Right to Adequate Food the Committee stipulated that every state is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger[279]. Another General Comment No. 14 on the Right to the Highest Attainable Standard of Health repeated the general understanding of the Committee of the jurisdiction of a state: 'Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. … Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties'[280]. In its General Comment No. 19 on the Right to Social Security the Committee noted that the Covenant contains no express jurisdictional limitation[281]. In general, the Committee upholds the idea of extraterritorial jurisdiction of states in relation to economic, social and cultural rights.

Nevertheless, there are some general comments where the Committee interprets the concept of extraterritorial jurisdiction in a

[279] CESCR General Comment No. 12: The Right to Adequate Food (Art. 11). Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 (Contained in Document E/C.12/1999/5). URL: https://www.refworld.org/pdfid/4538838c11.pdf.

[280] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). URL: https://www.refworld.org/pdfid/4538838d0.pdf.

[281] CESCR General Comment No. 191: The Right to Social Security (Art. 9). Adopted at the Thirty-ninth session of the Committee on Economic, Social and Cultural Rights, on 5-23 November 2007. E/C.12/GC/19. 4 February 2008. URL: https://www.globalhealthrights.org/wp-content/uploads/2013/10/CESCR-General-Comment-No.-19-The-Right-to-Social-Security.pdf.

different way. Thus, in its General Comment No. 15 on the Right to Water the Committee observed: 'To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction'[282]. Unlike the 'classical' understanding of the extraterritorial jurisdiction in human rights law, according to which a state is entitled to exercise its jurisdiction over persons under the principle of active personality (when its national is abroad) or the principle of effective/overall control (in times of the occupation of a foreign territory), this interpretation of the Committee resembles the 'effects doctrine'.

In another General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities the Committee observed that States parties' obligations under the Covenant did not stop at their territorial borders[283]. States parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant[284]. The Committee stipulated that extraterritorial obligations arise when a State Party

[282] CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant). Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11). URL: https://www.refworld.org/docid/4538838d11.html.

[283] CESCR General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. E/C.12/GC/24. 10 August 2017. URL: https://www.refworld.org/docid/5beaecba4.html.

[284] Ibid.

may *influence* situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory[285]. This wording, with an explicit reference to the influence of an activity, may be interpreted within the context of the effects doctrine. The shift is made from jurisdiction over persons or territory to jurisdiction over harmful activities which includes state activities performed within a state's territory that impact individuals neither present in the state's territory nor subject to state jurisdiction in the sense of 'authority and control'[286].

This trend is supported by other international initiatives. For example, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) adopted by a non-governmental expert consortium[287], stipulates that 'A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; b) situations over which State's acts or omissions bring about foreseeable *effects* on the enjoyment of economic, social and cultural rights, whether within or outside its territory; c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive *influence* or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law'[288]. In international environmental law there is a principle of inalienable sovereignty over natural resources and the responsibility of states to ensure that activities

[285] Ibid.
[286] Vordermayer M. P. 78.
[287] Vordermayer M. P. 76.
[288] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011). URL: https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf.

under their jurisdiction or control do not harm the environment of other states or areas outside their national jurisdiction. By analogy, the modern doctrine states that states are responsible to ensure that any activities under their jurisdiction or control do not harm other states in socio-economic aspect.

The doctrine and case law of some states are in line with the interpretation of the extraterritorial jurisdiction made by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 24. The main question here is under what conditions a state can and should exercise extraterritorial jurisdiction in order to prosecute a transnational corporation domiciled in that state for human rights violations committed by its subsidiaries or by the corporation itself abroad. Some authors distinguish the following legal instruments: 1) the indirect liability of the parent corporation for the acts of the subsidiary, or the 'piercing the veil' approach, which requires establishing, as a matter of fact, that the parent company exercises such a control on the subsidiary company that it may be held liable for its acts (e.g., case of *Bowoto v. Chevron Texaco*)[289]; 2) the 'integrated enterprise' or 'single business enterprise' approach, under which a multinational appears as a coordinator of the activities of its subsidiaries, which function as a network of organizations working along functional lines rather than according to geographical specialization (e.g., case of *Amoco Cadiz Oil Spill*)[290]; 3) direct liability of the parent company for certain actions which it has itself – not via its subsidiary alone – taken, in violation of its legal obligations (e.g., case of *Connelly v. RTZ Corporation plc and Others*)[291].

Advisory Opinion of the ICJ on Legal Consequences on the Construction of the Wall in the Occupied Palestinian Territory (2004). The Court had an opportunity to analyse the issue of extraterritorial jurisdiction of states in human rights issues in its

[289] De Schutter O. Extraterritorial jurisdiction as a tool for improving Human Rights Accountability of Transnational Corporations. P. 37. URL: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf.
[290] De Schutter O. P. 39.
[291] De Schutter O. P. 41.

Advisory Opinion on Legal Consequences on the Construction of the Wall in the Occupied Palestinian Territory in 2004. The Court addressed the question submitted to it by the General Assembly, namely: '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 of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?'[292]. Doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments[293]. For example, Israel denied that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child, which it had signed and ratified, were applicable to the occupied Palestinian territory[294]. It asserted that humanitarian law was the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own government in times of peace[295]. By interpreting Article 2(1) of the International Covenant on Civil and Political Rights, the Court determined that this international human rights instrument is applicable to individuals who are both present within State's territory and subject to that State's jurisdiction and it can also be construed as covering individuals outside that territory but subject to that State's jurisdiction[296]. The Court reminded that the *travaux préparatoires* of the Covenant show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they

[292] Legal Consequences on the Construction of the Wall in the Occupied Palestinian Territory (2004). Advisory Opinion of the International Court of Justice. Para 66. URL: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.
[293] Legal Consequences on the Construction of the Wall … Para. 86.
[294] Legal Consequences on the Construction of the Wall … Para. 102.
[295] Legal Consequences on the Construction of the Wall … Para. 102.
[296] Legal Consequences on the Construction of the Wall … Para. 108.

exercise jurisdiction outside their national territory: they only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence[297]. Thus, the Court has considered that the Covenant is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory[298].

Concerning the International Covenant on Economic, Social and Cultural Rights the Court reminded that it contains no provision on its scope of application which may be explicable by the fact that this Covenant guarantees rights which are essentially territorial[299]. However, it is not to be excluded that it applies both to territories over which a State Party has sovereignty and to those over which that State exercises territorial jurisdiction[300]. Israel repeated its position that the Covenant and the jurisdiction of the UN Committee on Economic, Social and Cultural Rights cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they were part and parcel of the context of armed conflict as distinct from a relationship of human rights[301]. The Court drew the conclusion that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power that is why it was bound by the provisions of the Covenant[302]. As regards the Convention on the Rights of the Child, that instrument contains Article 2 according to which States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction, and the Court concluded that Convention is also applicable within the Occupied Palestinian Territory[303].

Case-law of the European Court of Human Rights. The case-law of the ECtHR on jurisdiction in human rights issues is different and each decision of the Court is based on the specific circumstances of the

[297] Legal Consequences on the Construction of the Wall … Para. 109.
[298] Legal Consequences on the Construction of the Wall … Para. 111.
[299] Legal Consequences on the Construction of the Wall … Para. 112.
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Ibid.

case. Some important conclusions, principles and cases on this topic may be found in the Guide on Article 1 of the European Convention on Human Rights prepared by the Registry of the Court in 2021[304].

As provided by Article 1, the engagement undertaken by a Contracting State is confined to securing the listed rights and freedoms to persons within its own jurisdiction; meanwhile 'jurisdiction' within the meaning of Article 1 is a *sine qua non* in this framework: the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention[305]. The question of whether the actions which give rise to the applicant's complaints fall within the jurisdiction of the respondent State and whether such a State is in fact responsible for those acts under the Convention are quite different matters, the latter having to be decided by the Court at a later stage (consideration of the application on the merits)[306].

The Court has established a number of clear principles in its case-law on Article 1: 1) Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the Member States' jurisdiction from scrutiny under the Convention; 2) for the purposes of establishing jurisdiction under the Convention, the Court takes account of the particular factual context and relevant rules of international law; 3) the Court must concentrate on the issues raised in present case before it, without, however, losing sight of the general context; 4) a State's jurisdiction does not depend on the seriousness or intensity of the alleged breach, and such factors do not alter the Court's reasoning on this point; 5) the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention; 6) the general duty imposed on the State by Article 1 of the Convention entails and requires the implementation of a national

[304] Guide on Article 1 of the European Convention on Human Rights prepared by the Registry of the Court. URL: https://www.echr.coe.int/documents/guide_art_1_eng.pdf.
[305] Guide on Article 1. P. 5.
[306] Guide on Article 1. P. 5-6.

system capable of securing compliance with the Convention throughout the territory of the State for everyone which is confirmed by the fact that, firstly, Article 1 does not exclude any part of the Member States' jurisdiction from the scope of the Convention and, secondly, it is with respect to their jurisdiction as a whole that Member States are called on to show compliance with the Convention[307].

A State's jurisdiction within the meaning of Article 1 is primarily territorial, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case[308]. To date, the Court has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries[309]. A State's jurisdiction outside its own borders can primarily be established in one of the following two ways: 1) on the basis of the power (or control) actually exercised over the person of the applicant (personal concept of jurisdiction or *ratione personae*); 2) on the basis of control actually exercised over the foreign territory in question (spatial concept of jurisdiction or *ratione loci*)[310].

1) Personal concept of jurisdiction comprises:

a). Acts of diplomatic or consular agents: a State's jurisdiction may arise from the activities of its diplomatic or consular agents abroad in accordance with the rules of international law where those agents exercise authority and control over other persons or their property which may incur their country's responsibility under the Convention[311]. The Commission found that the applicants were within the jurisdiction of the respondent State in the following cases:

▪ a series of acts allegedly committed by German consular agents in Morocco against the applicant (a German national) and his wife, damaging their reputation and finally, according to the applicant, triggering his expulsion from Moroccan territory (*X. v. Germany*);

[307] Guide on Article 1. P. 6-7.
[308] Guide on Article 1. P. 7.
[309] Guide on Article 1. P. 15.
[310] Ibid.
[311] Guide on Article 1. P. 17.

▪ the alleged inaction of the British consul in Amman (Jordan) to whom the applicant, a British national, had asked for assistance in restoring custody of her child, who had been taken to Jordan by the father (*X. v. the United Kingdom*);

▪ the fact that the Danish Ambassador to the German Democratic Republic had called the police of that State to remove a group of Germans who had taken refuge in the Danish Embassy (*M. v. Denmark*)[312].

Other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State[313]. In these specific situations, customary international law and treaty provisions have clearly recognised and defined the extraterritorial exercise of jurisdiction by the relevant State.

b). Exercise of another State's sovereign authority with its agreement: where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State[314]. As regards extradition, when a State issues a European arrest warrant or an international arrest warrant issued by Interpol for the purposes of enforcing the detention of a person located in another State and the latter executes the warrant pursuant to its international obligations, the requesting State is responsible under the Convention for such detention, even if it was executed by the other State[315].

c). Use of force by a State's agents operating outside its territory: in some cases, the use of force by a State's agents operating outside its territory – whether lawfully or unlawfully – may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction[316]. The Court thus acknowledged that the

[312] Ibid.
[313] Guide on Article 1. P. 18.
[314] Ibid.
[315] Ibid.
[316] Guide on Article 1. P. 20.

applicants were under the jurisdiction of the relevant respondent States in the following situations:

▪ in case where the applicant, the leader of the Kurdistan Workers' Party, who had been arrested by Turkish security agents in the international zone of Nairobi airport (Kenya) and flown back to Turkey, the Court noted that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the jurisdiction of that State, even though in this instance Turkey exercised its authority outside its territory (*Öcalan v. Turkey*)[317];

▪ in case where the applicant, known as Carlos, born in Venezuela, was detained by the Sudanese police in Sudan and handed over to the French police, that in turn put him on a French military plane and took him to a French military base, the Commission noted that from the moment he was handed over to the French police, the applicant fell under the powers of authority and, therefore, under the jurisdiction of France, despite the fact that the powers in this case were exercised abroad (*Illich Sanchez Ramirez v. France*).

2) Spatial concept of jurisdiction.

Where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention'[318]. In situations of an armed conflict and the control of the territory of a Contracting State by another Contracting State, the issue of jurisdiction arises where a State loses effective control of all or part of its internationally recognised territory[319]. Thus, the complaints brought before the Court may be directed against 'active' or 'passive' Contracting Parties.

a). The 'active' Contracting Party is the one which exercises its authority outside its own territory that may take three different forms:

[317] Ibid. P. 20.
[318] Guide on Article 1. P. 22.
[319] Ibid.

complete or partial military occupation of another State; support for an insurrection or a civil war in another State; installation (or assistance with installation), on the territory of another State, of a separatist regime in the form of an entity which is not recognised as a sovereign State by the international community[320].

The question whether a Contracting State is genuinely exercising effective control over a territory outside its borders is the one of fact and in seeking to answer that question the Court primarily has regard to the following two criteria: the number of soldiers deployed by the State in the territory in question; the extent to which the State's military, economic and political support for the local subordinate administration provides it with influence and control over the region[321]. Where the Court establishes that the facts of the case are within the respondent State's jurisdiction, the latter ('active state') has two main obligations: a negative obligation to refrain from actions incompatible with the Convention; a positive obligation to guarantee respect for the rights and freedoms secured under the Convention[322].

The question of the occupying power's responsibility in the framework of 'traditional' military occupation arose in a number of cases concerning Iraq. For example, the case of *Al-Skeini and Others v. the United Kingdom* concerned the deaths of six of the applicants' relatives in Basra in 2003, when the United Kingdom had held occupying power status there[323]. Three of them had been killed or fatally wounded by gunfire from British soldiers; another victim had been fatally injured during an exchange of fire between a British patrol and unidentified gunmen; another had been shot by British soldiers and then forced to jump into a river, where he had drowned; and 93 wounds had been found on the body of the last victim, who had died in a British military base[324]. The Court noted that following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government,

[320] Ibid.
[321] Guide on Article 1. P. 23.
[322] Ibid.
[323] Guide on Article 1. P. 24.
[324] Ibid.

the United Kingdom (together with the United States of America) had assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government, in particular, the United Kingdom had assumed power and responsibility for maintaining security in the south-west of the country[325]. Thus, there was a jurisdictional link, for the purposes of Article 1 of the Convention, between the United Kingdom and the persons killed during security operations conducted by British troops between May 2003 and June 2004[326].

The Court has considered the creation of a separatist entity unrecognised by the international community in different historical and political contexts: Turkey's responsibility for breaches of the Convention in Northern Cyprus, Russia's responsibility for violations committed in Transdniestria, South Ossetia and Abkhazia, as well as in Ukraine, and Armenia's responsibility for violations in Nagorno-Karabakh. The first series of cases concern the situation which has prevailed in Northern Cyprus since Turkey conducted military operations there in 1974, and the continuing division of the territory of Cyprus[327]. Despite the proclamation of the 'Turkish Republic of Northern Cyprus' in 1983, the Court reaffirmed that having regard to international practice and the condemnations set out in the Resolutions of the UN Security Council and of the Committee of Ministers of the Council of Europe, it was clear that the international community did not recognise the 'Turkish Republic of Northern Cyprus' as a State under international law, that is why only the Republic of Cyprus, a High Contracting Party to the Convention, constituted the legitimate government of Cyprus[328]. The Court acknowledged that the alleged violations in the North of Cyprus fell within Turkey's jurisdiction in the following cases: *Cyprus v. Turkey, Loizidou v. Turkey, Güzelyurtlu and Others v. Cyprus and Turkey*[329].

Russia's jurisdiction with regard to violations committed in Transdniestria was acknowledged by the Court, e.g., in *Ilaşcu and*

[325] Ibid.
[326] Ibid.
[327] Guide on Article 1. P. 27.
[328] Ibid.
[329] Guide on Article 1. P. 27-28.

Others v. Moldova and Russia, meanwhile Armenia's jurisdiction in Nagorno-Karabakh – in *Chiragov and Others v. Armenia*.

b). The complaints brought before the Court may be directed also against the 'passive' Contracting Party, which is undergoing any of the above actions (occupation, civil war or separatist regime). The Court always starts from the presumption that the facts of the case fall within the jurisdiction of the 'passive' State, nevertheless, in exceptional circumstances, where the State is unable to exercise its authority in a part of its territory, that presumption may be limited[330]. Generally speaking, the following six positive obligations incumbent on the 'passive' State can be identified in the Court's existing case-law: three general obligations – to affirm and reaffirm its sovereignty over the territory in issue; to refrain from providing any kind of support to the separatist regime; to actively attempt to re-establish control over the disputed territory; and three special obligations relating to individual applicants to attempt to resolve the applicants' situation by political and diplomatic means; to attempt to resolve the applicants' situation by appropriate practical and technical means; to take the appropriate judicial action to protect the applicants' rights[331].

On 16 March 2022, when Russia was expelled from the Council of Europe due to the active phase of the war against Ukraine, the ECtHR suspended all cases against it. There are several interstate cases (Ukraine v. Russia) linked to the aggression of Russia since 2014 pending before the Court, inter alia, *Ukraine v. Russia (re Crimea)*, concerning events in the Crimean peninsula, and *Ukraine and the Netherlands v. Russia*, concerning events in eastern Ukraine (Donbas), including the downing of flight MH17. In the decision on admissibility of 2020 in *Ukraine v. Russia (re Crimea)* the Court recognized that Russia occupied the peninsula before its illegal annexation, and determined the date when the Russian Federation fully took control over the Crimea – 27 February 2014. This date will probably be used in other litigations lodged on behalf of Ukraine against the aggressor state in international institutions dealing with different aspects of this interstate dispute. It will be also

[330] Guide on Article 1. P. 31.
[331] Guide on Article 1. P. 33.

used by the ECtHR in deciding individual claims related to this issue. In this case the applicant Government maintained that from 27 February 2014 the Russian Federation had exercised extraterritorial jurisdiction over Crimea and had been responsible for an administrative practice entailing numerous violations of the Convention[332], whereas the respondent Government argued that events in Crimea were not within its jurisdiction at that time[333]. For the purposes of the admissibility decision, the Court decided to proceed on the basis of the assumption that the jurisdiction of Russia over Crimea was in the form or nature of 'effective control over an area' – rather than of territorial jurisdiction[334].

On 28 February 2022, the European Court of Human Rights received a request from the Ukrainian Government to indicate urgent interim measures to the Government of the Russian Federation, under Rule 39 of the Rules of Court, in relation to 'massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine'[335]. The Court has decided to indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops[336].

Case-law of the Inter-American Court of Human Rights. Most of the extraterritorial jurisdiction cases in human rights issues were against the United States, which did not ratify the American Convention

[332] Ukraine v. Russia (re Crimea). Grand Chamber Decision of 2020. Para. 7. URL: https://www.refworld.org/cases,ECHR,60016bb84.html.
[333] Ukraine v. Russia (re Crimea). Para 305.
[334] Ukraine v. Russia (re Crimea). Para. 349.
[335] The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory. Press Release of the Court. ECHR 068 (2022). 1 March 2022. URL: file:///Users/marynamedvedieva/Downloads/The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf.
[336] Ibid.

on Human Rights and therefore did not fall under the jurisdiction of the Inter-American Court of Human Rights, but only to that of the Inter-American Commission under the American Declaration of the Rights and Duties of Man. The Declaration does not contain any provisions on jurisdiction, while the Convention has Article 1, which proclaims that the States Parties undertake to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms. Paragraph 2 of the same Article restricts the notion of 'person' to natural persons, thus excluding, unlike the ECHR, legal persons from its scope.

The case of *Victor Saldaño v. Argentina* was decided by the Inter-American Commission on Human Rights in 1999. In 1998, Lidia Guerrero filed a petition with the Inter-American Commission on Human Rights against the Argentine Republic because of alleged violation of the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights to the detriment of Victor Saldaño, son of the petitioner[337]. The alleged victim, an Argentine citizen, was sentenced to death by the courts of the United States of America and the petitioner contended that during the trial the rights enshrined in Articles I, II, XVIII, XXIV, and XXVI of the American Declaration had been violated, besides she alleged that the failure of the Argentine State to present an interstate complaint under Articles 44 and 45 of the American Convention against the United States rendered it responsible for violation of the said articles of the Declaration, as well as rights similarly protected in Articles 4, 8, 25, and 1(1) of the American Convention[338].

The Commission expressed its opinion concerning the jurisdiction of states. It did not believe that the term 'jurisdiction' in the sense of Article 1(1) is limited to or merely coextensive with national territory[339]. Rather, the Commission was of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are

[337] Victor Saldaño v. Argentina. Report N° 38/99. Petition of March 11, 1999. Decision of the Inter-American Commission on Human Rights. URL: http://www.cidh.org/annualrep/98eng/inadmissible/argentina%20salda%C3%B1o.htm

[338] Ibid.

[339] Victor Saldaño v. Argentina. Para. 17.

undertaken outside that state's own territory[340]. The Commission recognized that the nationals of a state party to the American Convention are subject to that state's jurisdiction in certain respects when domiciled abroad or otherwise temporarily outside their country or state and that a state party must accord them, when abroad, the exercise of certain convention-based rights[341]. The Commission drew the conclusion that the relevant events – the arrest, trial, and sentencing of the alleged victim – took place entirely within the territory of another State and were carried out by the local authorities and organs of that foreign State[342]. The Commission pointed out that the petitioner had not adduced any proof whatsoever that tends to establish that the Argentine State had in any way exercised its authority or control either over the person of Mr. Saldaño, prior or subsequent to his arrest in the United States, or over the local officials in the United States involved in the criminal proceeding taken against him[343]. The mere fact that the alleged victim was a national of Argentina cannot, in and of itself, engage that state's responsibility for the allegedly wrongful acts of agents of another state performed wholly within their own national territory[344]. The petitioner had failed to show any act or omission by Argentine authorities that implicated that state in the alleged violations arising out of Mr. Saldaño's prosecution in the United States so as to subject him to Argentina's jurisdiction within the meaning of Article 1(1) of the American Convention[345]. The Commission concluded that, according to the provisions of Article 47(c) of the American Convention, it lacked jurisdiction to process the petition submitted against the Argentine State and thus rejected the petition *in limine litis*[346]. It found that the claim presented referred to an individual who was not subject to the jurisdiction of the Argentine State under the terms of Article 1(1) of the American Convention and that under the circumstances presented, the

[340] Ibid.
[341] Victor Saldaño v. Argentina. Para. 20.
[342] Victor Saldaño v. Argentina. Para. 21.
[343] Ibid.
[344] Victor Saldaño v. Argentina. Para. 22.
[345] Ibid.
[346] Victor Saldaño v. Argentina. Para. 35.

Argentine State had no obligation whatsoever under the Convention to lodge an interstate complaint against the United States[347].

On 15 November 2017, the Inter-American Court of Human Rights issued an Advisory Opinion on the Environment and Human Rights at the request of Colombia, which concerned the negative impact of major infrastructure projects on the Caribbean marine environment carried out by Nicaragua. The Opinion is important for the topic of jurisdiction of states in human rights issues. The Court suggested the extraterritorial application of the Convention in case of transboundary harm to an individual. Having analyzed the concept of jurisdiction under Article 1 (1) of the American Convention, and referring to the EctHR's case-law on effective control and the possibility of exercising extraterritorial jurisdiction in the event of military occupation, the Court found that due to the state's obligation to prevent transboundary environmental damage which may impact the rights of individuals enshrined in the American Convention in other states, these individuals are entitled to invoke the responsibility of a state which breaches such an obligation. The Court drew the conclusion that a state may not only be found internationally responsible for acts and omissions attributed to it within its own territory but also for those acts and omissions outside its territory, but under its jurisdiction (or control)[348]. The Inter-American Court found that a person is subject to the jurisdiction of a state in relation to an act committed outside the territory of that state (extraterritorial action) or with effects beyond this territory, when the said state is exercising authority over that person or when that person is under its effective control, either within or outside its territory[349]. The Court considered that states have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory[350]. For the purposes of the American Convention,

[347] Victor Saldaño v. Argentina. Paras. 22-23.
[348] Environment and Human Rights (2017). Advisory Opinion of the Inter-American Court of Human Rights. Para. 77. URL: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.
[349] Environment and Human Rights. Para. 81.
[350] Environment and Human Rights. Para. 101.

when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory[351]. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage[352]. Thus, the Court concluded that individuals would be considered within the jurisdiction of the state of origin of the pollution and would have the right to apply to the court of this state to protect their rights along with the nationals of that state. This resembles the principle of non-discrimination in the exercise of the right to judicial protection on the grounds of citizenship, permanent residence or place of harm. The Court has recognized that this may occur in exceptional circumstances and stated that a causal link must be established between harmful activities in one state and human rights violations in another state.

Tasks and questions for individual work:

Study the *Banković* case[353] (ECtHR, decision on admissibility, 1999) and answer the following questions:

1) what were the facts of the case?

2) are the applicants and their deceased relatives under the jurisdiction of the respondent States in the context of Article 1 of the Convention? Analyze the applicants' arguments;

3) are the applicants and their deceased relatives under the jurisdiction of the respondent States in the context of Article 1 of the Convention? Analyze the respondents' arguments;

[351] Ibid.

[352] Environment and Human Rights. Para 102.

[353] Decision of the European Court of Human Rights as to the Admissibility of Application No. 52207/99 by Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Joksimović and Dragan Suković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. URL: http://www.rulac.org/assets/downloads/ECtHR_Bankovic_Admissibility.pdf.

4) are the applicants and their deceased relatives under the jurisdiction of the respondent States in the context of Article 1 of the Convention? Analyze the ECHR arguments and final decision;

5) why is this decision criticized in academic literature and expert community?

2. Consider the moot case and answer the questions.

Region X is an integral part of the territory of State A. Region X has economic and cultural ties with the neighboring State B, furthermore, it is inhabited by national minorities who are citizens of State A but came from Sate B. According to the Agreement between the two states on military cooperation (1998) a military base of State B is located in Region X. In accordance with the terms of the Agreement the number of military personnel of State B cannot exceed 10,000 people; and each military operation or any movement of its troops shall be agreed in advance with the authorities of State A. On 5 June 2021, the number of military personnel was increased to 20,000 and the troops were dislocated near main administrative buildings of the Region – without prior notification of State's A authorities. On 10 July 2021, a referendum was organized by local authorities of Region X concerning its separation from State A. The majority (70%) voted for independence of a newly created 'State X'. On 20 July 2021, the Treaty on Accession of 'State X' to State B was signed proclaiming 'State X' an autonomous part of State B. State A did not have military capacities enough to be engaged in an armed conflict to give relevant response to the actions of State B. There were not any active hostilities but State A recognized such a situation to be the occupation of the part of its territory by State B.

State A brought a case against State B before the European Court of Human Rights alleging the violations of rights of its citizens in Region X under Articles 2-11 of the European Convention on Human Rights. Furthermore, about 20 individual applications were lodged in the ECHR claiming that the governments of both States A and B were responsible for those violations. State A claims that State B has exercised its jurisdiction over Region X since 5 June 2021, thus, must

be held responsible for human rights breaches from this date. State B claims that it has exercised its jurisdiction over Region X only since 20 July 2021, when 'State X' became a part of State B, thus, no responsibility could be attributed to it before that date. How would the ECtHR decide this inter-state dispute and what judgments would it render concerning individual applications in relation to jurisdictional issues?

TOPIC 5
JURISDICTION OF INTERNATIONAL UNIVERSAL COURTS

The notion of 'competence' and 'jurisdiction' of an international court. In the *Mavrommatis Palestine Concessions* case (1924) the Permanent Court of International Justice concluded that it need not consider whether 'competence' and 'jurisdiction' of a court should be regarded as synonymous expressions[354]. There are many different approaches to the definition of the terms 'jurisdiction' and 'competence' of an international court in international treaties and academic literature but they lack any uniform definition or interpretation. For example, the text of the Statute of the International Court of Justice refers to both words: 'jurisdiction' (Articles 36 and 53) and 'competence' (Chapter II which comprises Article 36 on jurisdiction) without giving any definitions of these terms.

There are different doctrinal approaches to the problem of the correlation between competence and jurisdiction of an international court. The majority of scholars consider that competence, which is a broader concept, includes jurisdiction, which is a narrower concept. Jurisdiction refers to powers of an international court to resolve the dispute and issue an order or a judgment on it. The competence comprises the right and obligation of an international court to decide the case, and also it comprises its right to request and receive information relevant to cases from different sources as well as the right to give an advisory opinion on some legal issues at the request of competent bodies, etc.

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[354] The Mavrommatis Palestine Concessions (Greece v. UK). Judgment of the Permanent Court of International Justice of 1924. P. 10. URL: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf.

The following two procedures in the jurisprudence of international courts should be distinguished: decision on the jurisdiction and on the admissibility of the case. Usually, a respondent state objects to the jurisdiction of a court and admissibility of the claims submitted by an applicant state. Such preliminary objections aim at preventing the consideration of a dispute by the court on merits. Even if the court establishes that it has jurisdiction in the case, it must determine whether the claims of the applicant are admissible. The principles for determining jurisdiction and admissibility differ depending on the statutes and rules of procedure of an international court.

The jurisdiction of international courts has several parameters, according to which the following its types are distinguished: a) jurisdiction *ratione materiae* (subject-matter jurisdiction), b) jurisdiction *ratione personae* (personal jurisdiction), c) jurisdiction *ratione loci* (territorial jurisdiction), d) jurisdiction *ratione temporis* (temporary jurisdiction). A fundamental principle governing the settlement of international disputes is that the jurisdiction of an international tribunal depends in the last resort on the consent of the States concerned to accept that jurisdiction[355].

Jurisdiction of the International Court of Justice. Jurisdiction *ratione personae* of the ICJ is established in Articles 34, 35 of its Statute and Article 93 of the UN Charter. Thus, only states may be parties to the disputes decided by the Court (Article 34(1) of the ICJ Statute), the Court shall be open to the State Parties to the present Statute (Article 35(1) of the ICJ Statute) and all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice (Article 93(1) of the UN Charter)[356]. Furthermore, Article 35(2) of the ICJ Statute envisages that the conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court[357].

[355] The International Court of Justice. Handbook. P. 34. URL: https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf.
[356] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.
[357] Ibid.

This procedure was applied to Switzerland (1946), Liechtenstein (1949), San Marino (1953) and Nauru (1987). Under Article 14 of the Rules of the Court (1978), the institution of proceedings by a State which is not a party to the Statute but which, under Article 35, paragraph 2 thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by the Security Council under that Article, shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar[358].

No sovereign state can be made a party to proceedings before the Court unless it has in some manner or other consented thereto[359]. It must have agreed that the dispute or the class of disputes in question should be dealt with by the Court[360]. It is this agreement that determines the jurisdiction of the Court in respect of the particular dispute – the Court's jurisdiction *ratione materiae*[361]. In some cases, state parties to the dispute agreed on the fact that the ICJ has jurisdiction in the case but they disagree on the scope of that jurisdiction. For example, in the *Pulp Mills* case (Argentina v. Uruguay, 2010) the Court decided that its substantive jurisdiction was limited only by the provisions of bilateral treaty (the Statute of the River Uruguay of 1975) and did not encompass other multilateral environmental treaties Argentina had referred to in its submissions. In the case on the *Maritime Delimitation in the Black Sea* (Romania v. Ukraine, 2009) the Court decided that its subject-matter jurisdiction was limited to the delimitation of continental shelves and exclusive economic zones of the states and did not encompass the delimitation of their territorial seas.

As a general rule, the ICJ has an optional (facultative), not mandatory (obligatory), jurisdiction, because only upon the consent of state parties to the dispute the latter can be settled by the Court. State A cannot bring a case against State B before the Court if State B does not consent to

[358] Rules of the International Court of Justice (1948). URL: https://www.icj-cij.org/en/rules.
[359] The International Court of Justice. Handbook. P. 34. URL: https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf.
[360] Ibid.
[361] Ibid.

the jurisdiction of the Court. That consent may be expressed by several means: 1) in a special agreement; 2) in unilateral statement, 3) in treaties.

(1) Special agreement, or compromise. Under Article 36(1) of the ICJ Statute, the jurisdiction of the Court comprises all cases which the parties refer to it[362]. The possibility envisaged in this Article is where the parties bilaterally and on *ad hoc* basis agree to submit an already existing dispute to the ICJ and thus to recognize its jurisdiction for purposes of that particular case[363]. Since its establishment in 1945, some 17 cases (about 15% of the cases) have been submitted to the Court by means of a special agreement[364]. One of the advantages of this means is that since the parties have expressed in an agreement a genuine interest in the Court settling their dispute, no preliminary objections concerning its jurisdiction are raised, nor are problems related to the judgment's execution to be expected[365].

It can also happen that the consent of a respondent State may be deduced from its conduct in relation to the Court or in relation to the applicant; this is a fairly rare situation, known as *forum prorogatum:* for the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a state[366]. This method differs in that the state may unilaterally file a complaint before the Court without the consent of the respondent state. At this stage, the Court has no jurisdiction to consider the application. According to paragraph 5 of Article 38 of the Rules of Court, it sends a statement to the potential respondent: 'When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action

[362] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.
[363] The International Court of Justice. Handbook. P. 35.
[364] Handbook on accepting the jurisdiction of the International Court of Justice. Model clauses and templates. P. 19. URL: https://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf.
[365] Ibid.
[366] The International Court of Justice. Handbook. P. 35.

be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case'[367]. This other state (potential respondent) may recognize the jurisdiction of the Court by a direct statement or further conduct, for example by submitting any official papers, such as memorandum where it does not object to the jurisdiction of the Court. Since the founding of the Court in 1945, the doctrine of *forum prorogatum* has been used in about 10 per cent of cases. Meanwhile, the potential respondent state has recognized the Court's jurisdiction only twice: in '*Certain Questions of Mutual Assistance in Criminal Matters*' (Djibouti v. France, 2008) and '*Certain Criminal Proceedings in France*' (Republic of the Congo v. France, 2010). Although some authors claim that this procedure was used in the *Corfu Channel* case (the UK v. Albania, 1948).

(2) Unilateral statement, or optional clause. Under Article 36(2) of the ICJ Statute, the states parties to the Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation[368]. These statements are called 'declarations recognizing the jurisdiction of the Court as compulsory'. The statements of the parties to the dispute do not necessarily have to be identical, but must relate to the recognition of the Court's jurisdiction over the same dispute. Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other states, which have accepted the same obligation, before the Court, by filing an application instituting proceedings with the Court[369]. Conversely, it undertakes to appear before the Court should proceedings be instituted

[367] Rules of the International Court of Justice (1948). URL: https://www.icj-cij.org/en/rules.
[368] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.
[369] Declarations recognizing the jurisdiction of the Court as compulsory. URL: https://www.icj-cij.org/en/declarations.

against it by one or more other such States[370]. The declarations shall be deposited with the Secretary-General of the United Nations. There is the list of the states that have made declarations of recognition of the Court's jurisdiction on its official web-site. As of December 2022, there were 73 deposited declarations[371].

Under Article 36(3) of the ICJ Statute, the declarations may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time[372]. Statements may be limited in time, contain reservations in relation to certain states or exclude certain categories of disputes. Thus, they provide the basis for the restriction of the ICJ jurisdiction *ratione temporis*, *ratione personae, ratione loci* and *ratione materiae*. The majority of declarations contain such reservations, excluding the Court's jurisdiction in respect of various issues: a) some states have limited their optional clause declarations by stipulating that any other mechanisms of dispute settlement as agreed between the parties will prevail over the general jurisdiction of the Court; b) some states have limited their consent to the Court's jurisdiction *ratione temporis*, specifying that the declaration covers only disputes arising after the date that consent was given or concerning situations arising after that date; c) some states have limited the scope of their optional clause declarations by excluding matters falling within their domestic jurisdiction; d) several states have included a condition in their declaration stating that the Court does not have jurisdiction unless all parties to a given treaty who may be affected by the Court's decision are also parties to the case before the Court; e) certain states exclude some specific issues or categories of issues from the jurisdiction of the Court, such as territorial and maritime disputes, disputes concerning their armed forces or 'disputes between members of the British Commonwealth of Nations'[373].

Sometimes conditional statements can diminish the effectiveness of future dispute settlement by the ICJ. A state declaring a lot of

[370] Ibid.
[371] Ibid.
[372] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.
[373] The International Court of Justice. Handbook. P. 41-43.

conditions and thus restricting the ICJ jurisdiction may avoid possible proceedings in the Court, but at the same time such a state also deprives itself of the opportunity to apply to the Court against other states that have recognized the jurisdiction of the Court in accordance with Article 36(1) of the Statute. One of the examples of such conditional statements is India's declaration of recognition of the Court's jurisdiction. In its declaration of 27 September 2019 India accepted, in conformity with paragraph 2 of Article 36 of the Statute of the Court, as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice over all disputes *other than*: 1) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement; 2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations; 3) disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of India; 4) disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved, including the measures taken for protection of national security and ensuring national defence; 5) disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; 6) disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specially agree to jurisdiction in each case; 7) disputes concerning the interpretation or application of a multilateral treaty to which India is not a party; and disputes concerning the interpretation or application of a multilateral treaty to which India is a party, unless all the parties to the treaty are also parties

to the case before the Court or the Government of India specially agree to jurisdiction; 8) disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognized by the Government of India; 9) disputes with non-sovereign States or territories; 10) disputes with India concerning or relating to: *(a)* the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries; *(b)* the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels; *(c)* the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it; *(d)* the airspace superjacent to its land and maritime territory; and *(e)* the determination and delimitation of its maritime boundaries; (11) disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter[374].

(3) Treaties, or compromissory clauses. Under Article 36(1) of the ICJ Statute, the jurisdiction of the Court comprises all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force[375]. It has indeed become a general international practice to include in international agreements – both bilateral and multilateral – provisions, known as compromissory clauses, which stipulate that disputes of a given class shall or may be submitted to one or more methods for the pacific settlement of disputes[376]. Numerous clauses of this kind provide for recourse to conciliation, mediation or arbitration; others provide for recourse to the Court, either immediately

[374] Declarations recognizing the jurisdiction of the Court as compulsory. India. URL: https://www.icj-cij.org/en/declarations/in.

[375] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

[376] The International Court of Justice. Handbook. P. 37.

or after the failure of other means of pacific settlement[377]. Thus, a state party undertakes to recognize in advance the jurisdiction of the Court in the event of a dispute with another state party over the interpretation or application of the treaty or any other legal dispute in the future. The prior consent of the states to the jurisdiction of the Court is expressed in the form of the consent to a particular treaty (upon signature, ratification, accession, etc.). Such a consent provides a ground for the mandatory jurisdiction of the ICJ, because in case of the refusal of the respondent state to appear before the Court and participate in the proceedings initiated by the applicant state, notwithstanding this refusal, the Court will consider the case. In such instances, the jurisdiction of the Court is treaty-based and the Court may be seized by means of a written (unilateral) application[378].

A large group of multilateral universal and regional, as well as bilateral agreements contain the compromissory clauses on the jurisdiction of the ICJ, e.g. the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Law of Treaties, the Convention on Biological Diversity, the UN Convention against Corruption, etc. Currently over 300 multilateral and bilateral treaties are in force providing for the jurisdiction of the Court either in disputes relating to the interpretation or application of the treaty in question or in all disputes between the Parties[379]. Since its establishment in June 1945, about 40% of the cases dealt with by the Court have been submitted on the basis of a treaty[380].

Sometimes it is rather difficult for an applicant state to find a treaty with a compromissory clause in order to substantiate its claims against a respondent state in the ICJ. These were the cases Georgia v. Russia and Ukraine v. Russia. The two disputes arose out of the acts of aggression of the Russian Federation against the two states but there were just a few relevant agreements with a compromissory clause

[377] Ibid.
[378] Handbook on accepting the jurisdiction of the International Court of Justice. P. 13.
[379] Ibid.
[380] Ibid.

concerning the jurisdiction of the ICJ in which both the respondent and the applicant were parties thereto. In the dispute on the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation, 2008) as a basis for the jurisdiction of the Court, Georgia relied on Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, CERD (1965) and claimed that 'the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of, and under the direction and control of the Russian Federation, is responsible for serious violations of its fundamental obligations under CERD, including Articles 2, 3, 4, 5 and 6'[381]. Nevertheless, the Court concluded that it had no jurisdiction in the case having upheld the Russian preliminary objection that the procedural requirements of Article 22 of the Convention for recourse to the Court had not been fulfilled[382]. In the dispute on the *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, 2019) the Court found that it had jurisdiction to entertain the claims made by Ukraine on the basis of Article 24(1) of the International Convention for the Suppression of the Financing of Terrorism (1999), and on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination[383] because all the procedural requirements had been been fulfilled.

The fact that the same political situation and related legal dispute may be considered by different UN bodies raises the issue

[381] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation). Overview of the case. URL: https://www.icj-cij.org/en/case/140.

[382] Ibid.

[383] 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 the International Court of Justice on Preliminary Objections of 2019. URL: https://www.icj-cij.org/public/files/case-related/166/166-20191108-JUD-01-00-EN.pdf.

of competing jurisdiction. The Court, however, has repeatedly stated that the fact that the matter before the Court is also the subject of active negotiations between the parties, or the good offices of the UN Secretary-General, the Security Council or regional organizations, does not preclude the exercise of its judicial functions and found its jurisdiction in such cases. The Court noted that the Security Council has political functions, while the Court itself has legal functions, and that both bodies can therefore perform their separate but complementary functions in the same disputable situation. Thus, the Court came to such a conclusion in the case on *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom, 1998).

Jurisdiction of the International Tribunal for the Law of the Sea. Article 286 of the United Nations Convention on the Law of the Sea defines the ITLOS jurisdiction *ratione materiae*: any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section[384]. Article 288 of UNCLOS clarifies that the Tribunal has jurisdiction over any dispute concerning the interpretation or application of this Convention and jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention[385]. Furthermore, this article defines the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea which has jurisdiction in any matter which is submitted to it in accordance with Part XI of UNCLOS. The ITLOS Statute in Section 2 entitled 'Competence', Article 21 'Jurisdiction' clarifies the following: the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided

[384] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[385] Ibid.

for in any other agreement which confers jurisdiction on the Tribunal[386]. Thus, the ITLOS subject-matter jurisdiction comprises: jurisdiction over any dispute concerning the interpretation or application of the Convention; jurisdiction over any dispute concerning the interpretation or application of other agreements; jurisdiction of the Seabed Disputes Chamber over disputes with respect to activities in the Area[387].

The ITLOS Statute in Section 2 entitled 'Competence', Article 20 'Access to the Tribunal' defines its jurisdiction *ratione personae*: the Tribunal shall be open to States Parties; the Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case[388]. Part XI of UNCLOS deals with the jurisdiction of the Seabed Disputes Chamber of ITLOS, in particular, Article 187 envisages that the Chamber shall have jurisdiction in disputes with respect to activities in the Area falling within the following categories: (a) disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto; (b) disputes between a State Party and the Authority; (c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons; (d) disputes between the Authority and a prospective contractor who has been sponsored by a State; (e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party; (f) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention[389]. Thus, not only states but also the International Seabed Authority as an intergovernmental organization and its Enterprise as a legal entity, natural or legal persons

[386] Statute of the International Tribunal for the Law of the Sea. URL: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf.
[387] International Tribunal for the Law of the Sea. Jurisdiction: Competence. URL: https://www.itlos.org/en/main/jurisdiction/competence/.
[388] Statute of the International Tribunal for the Law of the Sea. URL: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf.
[389] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

may be parties to the disputes which are considered by the ITLOS Seabed Disputes Chamber.

Like the ICJ, ITLOS also has an optional (facultative), not mandatory (obligatory), jurisdiction, because only upon the consent of state parties to the dispute it can be considered by the Tribunal. That consent may be expressed by several means: 1) in a special agreement; 2) in unilateral statement; 3) in treaties.

(1) Special agreement. The Tribunal may have jurisdiction over a dispute submitted on the basis of a special agreement concluded between the parties[390]. The parties may also decide, by agreement, to transfer to the Tribunal a dispute that has been instituted before an arbitral tribunal established under Article 287[391].

(2) Unilateral declaration. Under Article 287(1) of UNCLOS, when signing, ratifying or acceding to the Convention or at any time thereafter, a State is free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein[392]. Thus, according to Article 287 of the Convention, a State is free to accept the jurisdiction of the Tribunal for the settlement of disputes concerning the interpretation or application of the Convention by means of a written declaration to be deposited with the Secretary-General of the United Nations[393]. The Tribunal has compulsory jurisdiction to deal with all disputes concerning the interpretation or application of the Convention when the parties to

[390] A Guide to Proceedings Before the International Tribunal for the Law of the Sea. Hamburg. 2016. P. 5. URL: https://www.itlos.org/fileadmin/itlos/documents/guide/1605-22024_Itlos_Guide_En.pdf.
[391] Ibid.
[392] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[393] International Tribunal for the Law of the Sea. Jurisdiction: How to Submit a Case. URL: https://www.itlos.org/en/main/jurisdiction/how-to-submit-a-case/.

the dispute have accepted the Tribunal as the same procedure for the settlement of the dispute by means of a declaration made under Article 287 of the Convention[394]. The dispute may be submitted to the Tribunal at the request of either party by way of unilateral application[395].

Each state can restrict the jurisdiction *ratione materiae* of ITLOS or arbitral tribunals established under Annexes VI and VII in its declaration on the recognition of jurisdiction. Thus, Ukraine made such a declaration: 'Ukraine declares, in accordance with Article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities'[396].

(3). Treaties. The ITLOS Statute in Section 2, Article 22 'Reference of disputes subject to other agreements' provides for that: if all the parties to a treaty or convention already in force and concerning the subject-matter covered by the Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal[397]. The list of international agreements containing provisions relating to the jurisdiction of the International Tribunal for the Law of the Sea is on its web-site. The list is not necessarily exhaustive. It contains references to (a) multilateral agreements such as the UN Fish Stocks Agreement, the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (1972), and many regional fisheries agreements; as well as (b) bilateral agreements.

Even in the absence of declarations made under Article 287 of the Convention, the Tribunal has compulsory jurisdiction in two instances where the parties to a dispute have failed to agree, within a given

[394] Ibid.
[395] Ibid.
[396] International Tribunal for the Law of the Sea. Jurisdiction: Declarations made by States Parties under article 298. URL: https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/.
[397] Statute of the International Tribunal for the Law of the Sea. URL: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf.

period of time, to submit their dispute to another court or tribunal[398]. These instances are requests for the prescription of provisional measures pending the constitution of an arbitral tribunal (Article 290, paragraph 5 of the Convention) and requests for the prompt release of vessels and crews (Article 292 of the Convention)[399]. These cases may be instituted by unilateral application from any State Party to the Convention[400]. For such proceedings, the Tribunal renders its decision without delay, within a period of approximately one month[401]. The Seabed Disputes Chamber has compulsory and generally exclusive jurisdiction pursuant to Article 187 of the Convention over disputes concerning activities in the Area[402].

In the *Case concerning the detention of three Ukrainian naval vessels* (Ukraine v. Russian Federation) considered by ITLOS in order to prescribe provisional measures, the Russian Federation was of the view that the arbitral tribunal to be constituted under Annex VII of UNCLOS, which would hear the case on merits, would not have jurisdiction in this case in light of the reservations made by both the Russian Federation and Ukraine under Article 298 of UNCLOS stating, *inter alia*, that they do not accept the compulsory procedures provided for in section 2 of Part XV thereof entailing binding decisions for the consideration of disputes concerning military activities[403]. However, ITLOS regarded the detention by the Russian military authorities of three Ukrainian naval vessels in the Black Sea near the Kerch Strait in November 2018 as not military but law-enforcement activity and drew the conclusion that those reservations made by both states under Article 298 of UNCLOS did not apply to the case. The Tribunal prescribed provisional measures requiring the Russian Federation to release the three Ukrainian naval

[398] A Guide to Proceedings Before the International Tribunal for the Law of the Sea. P. 6.
[399] Ibid.
[400] Ibid.
[401] Ibid.
[402] Ibid.
[403] Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation). Order of the International Tribunal for the Law of the Sea on the Prescription of Provisional Measures of 2019. Para. 8. URL: https://www.itlos.org/fileadmin/itlos/documents/cases/26/published/C26_Order_20190525.pdf.

vessels and the 24 detained Ukrainian servicemen and to allow them to return to Ukraine in order to preserve the rights claimed by Ukraine[404].

There have been cases in the Tribunal's jurisprudence where the parties to the dispute have tried to challenge its jurisdiction for various reasons. Most often, they referred to Articles 281, 282 and 283 of the Convention. Article 281 entitled 'Procedure where no settlement has been reached by the parties' stipulates: if the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure[405]. Article 282 'Obligations under general, regional or bilateral agreements' envisages that: if the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree[406]. Article 283 'Obligation to exchange views' provides that: when a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means[407].

Pursuant to the provisions of its Statute, the Tribunal has formed the several chambers, such as the Chamber of Summary Procedure, the Chamber for Fisheries Disputes, the Chamber for Marine Environment Disputes and the Chamber for Maritime Delimitation Disputes. At the request of the parties, the Tribunal has also formed special chambers to deal with the *Case concerning the Conservation and Sustainable*

[404] Case Concerning the Detention of Three Ukrainian Naval Vessels. Para. 118.
[405] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[406] Ibid.
[407] Ibid.

Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community), the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)* and the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*[408].

Jurisdiction of the International Criminal Court. The ICC jurisdiction *ratione materiae* is defined in Article 5 of the Rome Statute: the Court has jurisdiction with respect to the following crimes: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression[409]. Concerning the ICC jurisdiction over the crime of aggression, it is known that the Assembly of States Parties adopted the definition of this crime during the Review Conference of the Rome Statute, held in Kampala (Uganda) in 2010. In 2017, the states parties to the Rome Statute took the historic step of 'activating' the jurisdiction of the Court over the crime of aggression[410]. It was decided by the resolution of the ICC Assembly of States Parties, adopted by consensus, that the crime of aggression would be subject to the Court's jurisdiction from 17 July 2018[411].

The ICC jurisdiction *ratione temporis* is defined in Article 11 of the Rome Statute: the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute; if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12(3)[412]. The illustrative example of the application of the rules relating to the ICC temporal jurisdiction may be the *Texaco/Chevron* case.

[408] The International Tribunal for the Law of the Sea. Chambers. URL: https://www.itlos.org/en/main/the-tribunal/chambers/.
[409] Rome Statute of the International Criminal Court (1998). URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.
[410] Akande D. and Tzanakopoulos A. Treaty Law and ICC Jurisdiction over the Crime of Aggression Jurisdiction. *The European Journal of International Law*. 2018. Vol. 29, No. 3. P. 940.
[411] Ibid.
[412] Rome Statute of the International Criminal Court (1998). URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

In 2014, groups representing rainforest communities in the Ecuadorian Amazon asked the ICC to investigate Chevron for contamination associated with oil extraction by Texaco, which Chevron acquired in 2000, and Petroecuador, the country's state-owned oil company[413]. The complaint was lodged against Chevron CEO John Watson and alleged that decisions by Chevron and its high-ranking officers to pollute the rainforest, and subsequently to evade remediation, constituted a crime against humanity. The ICC Prosecutor drew the conclusion that these actions did not appear to amount to the international crimes under the Court's jurisdiction, besides, the Court may only hear cases occurred after 1 July 2002, whereas the alleged abuse happened in the 1990s (before Ecuador ratified the Statute in 2002)[414]. Thus, some of the allegations did not appear to fall within the Court's temporal jurisdiction, and other allegations did not appear to fall within the Court's subject-matter jurisdiction.

The ICC jurisdiction *ratione personae* and jurisdiction *ratione loci* are defined in Article 12(2) of the Rome Statute: a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5[415]. The Court may exercise its jurisdiction if one or more of the following States are Parties to the Rome Statute or have accepted the jurisdiction of the Court: (a) the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) the State of which the person accused of the crime is a national[416].

Different authors often consider this article as encompassing both territorial and personal jurisdiction. ICC has jurisdiction only over

[413] ICC Won't Prosecute Chevron. *The Washington Free Beacon*. 2015. URL: https://freebeacon.com/issues/icc-wont-prosecute-chevron/.
[414] Texaco/Chevron lawsuits (re Ecuador). Centre de Ressources sur les Enterprises et les Droits de l'Homme. URL: https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/texacochevron-lawsuits-re-ecuador-1/.
[415] Rome Statute of the International Criminal Court (1998). URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.
[416] Ibid.

natural persons (individuals) and not over legal entities. Furthermore, the Rome Statute does not prejudice the responsibility of states under international law. Article 12(2)(a) refers to the territoriality principle and Article 12(2)(b) – to the active personality principle. Thus, the Court may only exercise its jurisdiction if the alleged perpetrator of a crime is a national of a State Party or a national of a state which has accepted the jurisdiction of the Court[417] by declaration.

For example, Ukraine did not ratify the Rome Statute but accepted the ICC jurisdiction by two declarations under Article 12(3) of the Statute. On 17 April 2014, Ukraine lodged the first declaration, accepting the jurisdiction of the Court over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014 (the 'Maidan events')[418]. On 8 September 2015, the Government of Ukraine lodged its second declaration accepting the exercise of jurisdiction of the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date[419]. On 25 April 2014, the Office of the Prosecutor of the ICC opened a preliminary examination into the *Situation in Ukraine*, which is currently ongoing and focuses on the Maidan events, as well as on the alleged crimes occurring after 20 February 2014 in Crimea and eastern Ukraine[420]. Besides, after the beginning of the full-scale aggression of Russia against Ukraine, in March 2022 the Office received a referral from 43 States Parties, and the Prosecutor announced he had proceeded to open an investigation into the *Situation in Ukraine* the scope of which encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards[421].

On 20 December 2019, the ICC Prosecutor announced the conclusion of the preliminary examination of the *Situation in Palestine*

[417] Wagner M. The ICC and its Jurisdiction – Myths, Misconceptions and Realities. *Max Planck Yearbook of United Nations Law*. 2003. Vol. 7, No. 1. P. 481.
[418] International Criminal Court. Situation in Ukraine. ICC-01/22. URL: https://www.icc-cpi.int/ukraine.
[419] Ibid.
[420] Ibid.
[421] Ibid.

with regard to alleged war crimes[422]. Israel is not a state party to the Statute. Concerning Palestine, the Chamber found that, regardless of its status under general international law, Palestine's accession to the Statute followed the correct and ordinary procedure and that the Chamber has no authority to challenge and review the outcome of the accession procedure conducted by the Assembly of States Parties[423]. Palestine, in the opinion of the Chamber, is therefore a State Party to the Rome Statute, as a result, a 'State' for the purposes of Article 12(2)(a) of the Statute and has thus agreed to subject itself to the terms of the ICC Rome Statute[424]. Pre-Trial Chamber I noted that, among similarly worded resolutions, the General Assembly of the United Nations in Resolution 67/19 '[reaffirmed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967'[425]. On this basis, the Chamber found that the Court's territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967. This means that the territorial jurisdiction of the ICC includes West Bank, Gaza and East Jerusalem.

The preconditions for the exercise of jurisdiction by the Court are envisaged in Article 13: the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated an investigation in respect of sucha crime in accordance with Article 15[426].

[422] Questions and Answers on the Decision on the International Criminal Court's territorial jurisdiction in the Situation in Palestine. URL: https://www.icc-cpi.int/sites/default/files/itemsDocuments/palestine/210215-palestine-q-a-eng.pdf.
[423] Ibid.
[424] Ibid.
[425] Ibid.
[426] Rome Statute of the International Criminal Court (1998). URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

The principle of complementarity enshrined into many articles of the Rome Statute is the basis for deciding the conflict of international and national criminal jurisdictions. In this case, international jurisdiction of the ICC does not replace national criminal jurisdiction of states, but simply complements it. National jurisdiction generally takes precedence, except in cases where the State is unwilling or unable to investigate or prosecute alleged crimes. Under Article 17(1) of the Statute, the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) the case is not of sufficient gravity to justify further action by the Court[427].

Paragraphs 2 and 3 of Article 17 determine the conditions of 'unwilling' and 'unable'. In order to determine unwillingness in a particular case, the Court shall consider, whether one or more of the following exist, as applicable: (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice[428]. In order to decide on inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

[427] Ibid.
[428] Ibid.

Jurisdiction of the Permanent Court of Arbitration. Jurisdiction *ratione personae* of the PCA is defined by the parties which may agree to bring a case before the Court: any two or more States; a State and an international organization (i.e., an intergovernmental organization); two or more international organizations; a State and a private party; and an international organization and a private party[429]. The PCA Arbitration Rules (2012) are a consolidation of four prior sets of PCA procedural rules: the Optional Rules for Arbitrating Disputes between Two States (1992); the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993); the Optional Rules for Arbitration Between International Organizations and States (1996); and the Optional Rules for Arbitration Between International Organizations and Private Parties (1996)[430].

The cornerstone of the PCA jurisdiction is the agreement of the parties which can be made by way of a separate agreement covering an existing dispute (often referred to as a 'submission agreement') or through a clause in a treaty, contract, or other legal instrument, which is usually more general, covering any future disputes 'arising under' or 'in connection with' the instrument concerned[431]. Some international treaties contain such clause, e.g., the Convention on the Conservation of Migratory Species of Wild Animals (1979), the Energy Charter Treaty (1994), the Protocol on Environmental Protection to the Antarctic Treaty (1991), etc. The potential subject-matter jurisdiction of the PCA arbitral tribunals is unlimited: in each case however, the scope of jurisdiction is governed by the wording of the applicable arbitration agreement[432].

There is a link between the ITLOS jurisdiction to prescribe provisional measures in a dispute and the jurisdiction of the UNCLOS Annex VII arbitral tribunal constituted to decide the dispute on merits within the PCA. Generally, *prima facie* jurisdiction is determined by

[429] United Nations Conference on Trade and Development. Dispute Settlement: General Topics. 1.3 Permanent Court of Arbitration. 2003. P.15. URL: https://unctad.org/es/system/files/official-document/edmmisc232add26_en.pdf.

[430] PCA Arbitration Rules. URL: https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/.

[431] United Nations Conference on Trade and Development. Dispute Settlement… P. 15.

[432] United Nations Conference on Trade and Development. Dispute Settlement… P. 16.

an international court in order to adopt provisional measures until it recognizes the jurisdiction to decide the case on its merits. Assertion of any court's *prima facie* jurisdiction over the provisional measures does not resolve the question of its jurisdiction over the merits of the claims. Under Article 290(1) of UNCLOS, if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction, 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, pending the final decision[433]. Thus, a party to the dispute may refer to ITLOS with a request to prescribe provisional measures pending the establishment of an arbitral tribunal under UNCLOS to hear the dispute on merits. ITLOS is entitled to prescribe such measures only if the provisions invoked by the applicant *prima facie* appear to afford a basis on which the jurisdiction of the arbitral tribunal could be founded[434].

There is the list of cases arbitrated under the auspices of the PCA in the capacity of UNCLOS Annex VII arbitral tribunal[435]. Among them there are two cases concerning Ukraine and Russia. On 1 April 2019, Ukraine served on the Russian Federation a Notification and Statement of Claim under Annex VII to the 1982 United Nations Convention on the Law of the Sea referring to a *Dispute concerning the detention of Ukrainian naval vessels and servicemen* and the Permanent Court of Arbitration acts as Registry in this arbitration[436]. In its Preliminary Objections, the Russian Federation contended that the arbitral tribunal did not have jurisdiction because, *inter alia*, Ukraine's claims related to a 'dispute concerning military activities' and are therefore excluded from the Tribunal's jurisdiction by the operation of declarations made

[433] United Nations Convention on the Law of the Sea (1982). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[434] 'ARA Libertad' Case (Argentina v. Ghana). Order of the International Tribunal for the Law of the Sea of 2012. Para. 60. URL: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf.
[435] UNCLOS Annex VII cases arbitrated under the auspices of the PCA. URL: https://pca-cpa.org/en/services/arbitration-services/unclos/.
[436] Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation). URL: https://pca-cpa.org/en/cases/229/.

by both Ukraine and the Russian Federation to exclude such disputes pursuant to Article 298(1)(b) of UNCLOS[437]. Unlike ITLOS, the arbitral tribunal in its award of 27 June 2022 drew the conclusion that the detention by the Russian military authorities of three Ukrainian naval vessels in the Black Sea near the Kerch Strait in November 2018 constituted 'military activities' excluded from its jurisdiction, meanwhile it concluded that the events following the arrest of the Ukrainian naval vessels did not constitute 'military activities' excluded from its jurisdiction in accordance with Article 298(1)(b) of the Convention[438].

On 16 September 2016, Ukraine served on the Russian Federation a Notification and Statement of Claim under Annex VII to the 1982 UNCLOS referring to a *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* and the Permanent Court of Arbitration acts as Registry in this arbitration[439]. The Russian Federation raised preliminary objections to the jurisdiction of the arbitral tribunal on the grounds that, *inter alia*, the arbitral tribunal lacked jurisdiction because the Parties' dispute in reality concerned Ukraine's 'claim to sovereignty over Crimea' and was therefore not a 'dispute concerning the interpretation or application of the Convention' as required by Article 288(1) of the Convention[440]. In its award of 21 February 2020, the arbitral tribunal upheld that it had no jurisdiction over Ukraine's claims, to the extent that a ruling on the merits of Ukraine's claims necessarily required it to decide, directly or implicitly, on the sovereignty of either Party over Crimea; and rejected the other objections of the Russian Federation to its jurisdiction[441].

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[437] Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation). Award of an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea on the Preliminary Objections of 2022. URL: https://pcacases.com/web/sendAttach/38096.

[438] Ibid.

[439] Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation). Award of an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea on the Preliminary Objections of 2020. URL: https://pcacases.com/web/sendAttach/9272.

[440] Ibid.

[441] Ibid.

Tasks and questions for individual work:

1. Consider the issues of the jurisdiction of international universal courts in interstate disputes related to Russia's aggression against Ukraine (study their summaries, where available):

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). Request for the Indication of Provisional Measures. Order of the International Court of Justice of 19 April 2017[442].

2) 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 of the International Court of Justice of 8 November 2019[443].

3) Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). Request for the Indication of Provisional Measures. Order of the International Court of Justice of 16 March 2022[444].

4) Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation). Request for the Prescription of Provisional Measures. Order of the International Tribunal for the Law of the Sea of 25 May 2019[445].

5) Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation). Award of an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea on the Preliminary Objections of 27 June 2022.

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[442] https://www.icj-cij.org/public/files/case-related/166/19410.pdf.
[443] https://www.icj-cij.org/public/files/case-related/166/166-20191108-SUM-01-00-EN.pdf.
[444] https://www.icj-cij.org/public/files/case-related/182/182-20220316-SUM-01-00-EN.pdf.
[445] https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_284_En.pdf.

6) Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation). Preliminary Objections of the Russian Federation. Award of an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea on the Preliminary Objections of 21 February 2020.

Answer the following questions:

1) what was the treaty basis for ICJ jurisdiction *ratione materiae* in cases relating to terrorism, racial discrimination and genocide?

2) what were the grounds for the recognition by the ICJ of its *prima facie* jurisdiction in the case relating to terrorism and racial discrimination?

3) what is the link between the jurisdiction *ratione materiae* of the ICJ and procedural preconditions under conventions on terrorism and racial discrimination?

4) what were the grounds for the recognition by the ICJ of its *prima facie* jurisdiction in the case relating to genocide?

5) what was the treaty basis for ITLOS and Annex VII arbitral tribunal jurisdictions *ratione materiae* in cases relating to detention of vessels and coastal state rights?

6) what were the grounds for the recognition by ITLOS of its *prima facie* jurisdiction in the case relating to detention of vessels?

7) analyze the 'military activity' and 'law-enforcement activity' exceptions to ITLOS and Annex VII arbitral tribunal jurisdictions in cases relating to detention of vessels and coastal state rights.

2. Consider the moot case and answer the questions.

State A committed an act of aggression against State B having occupied part of its territory in December 2015. Both States signed the Rome Statute in 2000 but have never ratified it. In January 2016, State B lodged the declaration accepting the exercise of jurisdiction of the ICC in relation to alleged crimes (aggression, war crimes and crimes against humanity) committed on its occupied territory from December 2015 by the commanders, soldiers of the armed forces as well as the

official representatives of State A which all are citizens of this State. In March 2016, the Parliament of State A approved the law to withdraw the signature of this State from the Statute.

Will the International Criminal Court have jurisdiction in this case and why? What is the practical difference between 'the act of aggression' and 'the crime of aggression' and which one belongs to the ICC jurisdiction *ratione materiae*?

TOPIC 6
JURISDICTION OF INTERNATIONAL REGIONAL COURTS

Jurisdiction of the European Court of Human Rights. The main legal sources of jurisdiction for the ECtHR are the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), its Protocols and Rules of the Court (2020).

Jurisdiction ratione materiae. Article 32 of the ECHR entitled 'Jurisdiction of the Court' provides for that the jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47[446]. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide. Thus, jurisdiction of the Court in accordance with the provisions of this Article applies to all matters concerning the interpretation and application of the Convention and the Protocols, and is considered by the Court in accordance with Article 33 (inter-state cases), Article 34 (individual applications), Article 46 (binding force and execution of judgments) and Article 47 (advisory jurisdiction) of the Convention. Applications concerning a provision of the Convention in respect of which the respondent State has made a reservation are declared incompatible *ratione materiae* with the Convention, provided that the issue falls within the scope of the reservation[447].

For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto that have come into force[448].

[446] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL: https://www.echr.coe.int/documents/convention_eng.pdf.
[447] European Court of Human Rights. Practical Guide on Admissibility Criteria. 2022. P. 70-71. URL: https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.
[448] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 70.

In other words, the Court considers only those cases which refer to the rights enshrined in the Convention and its Protocols. For example, the Court will not consider any application concerning the right to a safe environment or the right to a decent work which are not explicitly covered by these instruments. Nevertheless, given the fact that the Convention is, by the definition of the Court, a 'living organism' which is subject to the evolutionary interpretation with regard to new modern relations in the society, the subject-matter jurisdiction of the Court is rather dynamic and also evolves. Such approach paves the way for the protection of the rights which are not explicitly enshrined in the Convention and the Protocols with the help of other articles. For example, environmental damage which caused the violation of the right to private and family life or the right to life of the applicants (Articles 8 and 2 of the Convention) will be considered by the Court, as was demonstrated in many cases such as *Lopez Ostra v. Spain* (1994), *Guerra and others v. Italy* (1998), *Öneryildiz v. Turkey* (2004), *Fadeyeva v. Russia* (2005), *Dubetska and others v. Ukraine* (2011), etc.

The ECHR defines the competence of a single judge, committees, chambers and Grand Chamber, including the issue of relinquishing the jurisdiction. Thus, Article 30 of the ECHR envisages that where a case pending before a chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the chamber might have a result inconsistent with a judgment previously delivered by the Court, the chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber.

Jurisdiction ratione personae. Personal jurisdiction of the ECtHR is determined by Articles 33 and 34 of the Convention. Article 33 relating to inter-state cases provides that any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party[449]. Article 34 on individual applications envisages that the Court may receive applications from any person, non-governmental organisation or group of individuals

[449] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL: https://www.echr.coe.int/documents/convention_eng.pdf.

claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto[450].

Any person may bring a case against a State Party where the alleged violation has taken place under the jurisdiction of the State concerned in accordance with Article 1 of the Convention, regardless of his or her nationality, place of residence, civil status, or legal capacity[451]. Applications may be submitted only by living persons or on their behalf; the deceased cannot lodge an application even through a representative[452]. Governmental bodies performing legislative, executive or judicial functions, as well as local self-government authorities, do not have the right to apply to the Court. As it was proclaimed by the Court in *Lambert and Others v. France* (2015), in order to be able to lodge an application in accordance with Article 34, an applicant must be able to show that he or she was 'directly affected' by the measure complained of[453]. Meanwhile, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end[454]. In some cases, the Court has recognized that family members, such as the parents of a person who died or is missing, may themselves claim to be indirect victims of the alleged violation, e.g. of Article 2.

Jurisdiction ratione loci. Compatibility *ratione loci* requires the alleged violation of the Convention to have taken place within the jurisdiction of the respondent State or in territory effectively controlled by it[455]. Where applications are based on events in a territory outside the Contracting State and there is no link between those events and any authority within the jurisdiction of the Contracting State, they will be dismissed as incompatible *ratione loci* with the Convention[456]. Where

[450] Ibid.
[451] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 9.
[452] Ibid.
[453] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 11.
[454] Ibid.
[455] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 63.
[456] Ibid.

complaints concern actions that have taken place outside the territory of a Contracting State, the Government may raise a preliminary objection that the application is incompatible *ratione loci* with the provisions of the Convention[457].

In *Romeo Castaño v. Belgium* (2019) the Court dealt with the scope of a State's procedural obligation to cooperate with another State investigating a murder committed within the latter's jurisdiction[458]. The applicants' father was killed in a terrorist attack carried out by ETA in Spain in 1981; three persons were later convicted and sentenced and a fourth, N.J.E., escaped justice and was living in Belgium[459]. The Belgian courts on two occasions refused to execute European arrest warrants issued by the Spanish authorities in respect of N.J.E. expressing doubts as to whether the requesting state's regime of incommunicado detention applied to persons suspected of terrorism-related offences was compatible with the protection of N.J.E.'s human rights[460]. The applicants alleged in the Convention proceedings that Belgium was in breach of its obligations under Article 2 by preventing Spain from prosecuting N.J.E[461]. The ECtHR decided whether the applicants came within the jurisdiction of Belgium *ratione loci* and drew the conclusion that although the Article 2 procedural obligation attached in principle to the state within whose jurisdiction the death occurred, the existence of 'special features' could create a procedural obligation for a third Contracting State, even if that State had not itself initiated an investigation into the death. For the Court, those 'special features' meant that Belgium assumed a procedural obligation under Article 2 to cooperate with the Spanish authorities in the investigation of N.J.E.'s involvement in the murder of the applicants' father on their territory[462].

[457] Ibid.
[458] Joint Law Report 2019: African Court on Human and Peoples' Rights, European Court of Human Rights, Inter-American Court of Human Rights. Developments in the case-law of the European Court of Human Rights. *Український часопис міжнародного права*. 2021. №3. P. 107.
[459] Ibid.
[460] Ibid.
[461] Ibid.
[462] Ibid.

Jurisdiction ratione temporis. In accordance with the general rules of international law (principle of non-retroactivity of treaties), the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party[463]. From the ratification date onwards, all the State's alleged acts and omissions must conform to the Convention or its Protocols, and subsequent facts fall within the Court's jurisdiction even where they are merely extensions of an already existing situation[464]. The Court may, however, have regard to facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date[465]. The Convention institutions have accepted the extension of their jurisdiction *ratione temporis* to situations involving a continuing violation which originated before the entry into force of the Convention but persists after that date[466]. For example, Denmark, Norway, Sweden and the Netherlands filed a complaint against Greece in April 1970. Although Greece denounced the Convention on 12 December 1969, the Commission accepted the complaint, deciding that Greece still had obligations under the provisions of the Convention.

Jurisdiction and admissibility are closely linked in the practice of the ECtHR. Article 35 of the Convention lists admissibility criteria: (1) the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken; (2) the Court shall not deal with any application submitted under Article 34 that is anonymous; or is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information; (3) the Court shall declare inadmissible any individual

[463] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 64-65.
[464] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 65.
[465] Ibid.
[466] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 67.

application submitted under Article 34 if it considers that: the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal[467]. The Court may reject any application which it considers inadmissible under this Article at any stage of the proceedings.

There are some grounds for inadmissibility relating to the ECHR's jurisdiction *ratione personae*. Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it[468]. Applications will be declared incompatible *ratione personae* with the Convention on the following grounds: if the applicant lacks standing as regards Article 34 of the Convention; if the applicant is unable to show that he or she is a victim of the alleged violation; if the application is brought against an individual; if the application is brought directly against an international organization which has not acceded to the Convention; if the complaint involves a Protocol to the Convention which the respondent State has not ratified[469]. Even where an application is compatible with the Convention and all the formal admissibility conditions have been met, the Court may nevertheless declare it inadmissible for reasons relating to the examination on the merits[470].

Protocol No. 15 (2013) amending the Convention introduces a reference to ***the principle of subsidiarity and the doctrine of the margin of appreciation***. It entered into force on 1 August 2021. The Protocol adds a new recital to the Convention's preamble which reads as follows: 'Affirming that the High Contracting Parties, in accordance with the

[467] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL: https://www.echr.coe.int/documents/convention_eng.pdf.
[468] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 57.
[469] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 57-58.
[470] European Court of Human Rights. Practical Guide on Admissibility Criteria. P. 73.

principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'[471].

The Court has traditionally referred to the principle of subsidiarity in its formal dimension, which is closely linked to Article 35 of the Convention on the rule of the exhaustion of local remedies. Thus, subsidiarity is understood as the supremacy of national courts over the ECtHR. The principle of subsidiarity within the Convention system can be divided into procedural subsidiarity and substantive subsidiarity[472]. Procedural subsidiarity governs the responsibilities for safeguarding the Convention guarantees between the ECtHR and national authorities[473]. Substantive subsidiarity on the other hand, regulates the competency of assessment and review of the ECtHR[474]. The 'fourth instance doctrine' posits that the ECtHR 'is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them'[475]. According to this doctrine, developed in ECtHR case law, it is therefore not the function of the ECtHR to reconsider questions of fact or national law: so-called fourth-instance applications are declared inadmissible by the ECtHR, on the ground of being manifestly ill-founded according to Article 35[476]. The principle was first mentioned in *Belgian Linguistic* case*,* 1968. Thus, the principle draws a line between the jurisdiction of national courts which must be primary and the jurisdiction of the ECtHR which must be subsidiary.

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[471] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (2013). URL: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c.

[472] Füglistaler G. The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence. 2016. P. 11. URL: https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[473] Ibid.

[474] Füglistaler G. P. 12.

[475] Ibid.

[476] Ibid.

'Margin of appreciation' refers to the discretion of States parties to the Convention in decision-making at the national level. States are free to choose the solution they deem optimal to establish a balance between individual and public interests. The doctrine of the margin of appreciation is a natural product of the principle of subsidiarity insofar as it allocates to national authorities the discretion to implement Convention guarantees through domestic regulations in different areas according to the needs and resources of the community and individuals within their territory[477]. The ECtHR judgment in *Handyside v. UK* case (1976) paved the way to the development of the margin of appreciation doctrine. The ECtHR observed in this case: 'By reason of their direct and continuous contact with the vital forces of their countries State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. … Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of necessity in this context. … a margin of appreciation … is given both to the domestic legislator ('prescribed by law') and to the bodies … that are called upon to interpret and apply the laws in force'[478]. Thus, it can be argued that the 'margin of appreciation' doctrine is a kind of safeguard for the Court against extending its jurisdiction to issues that naturally fall within the jurisdiction of national courts and other public authorities. Thus, in applying this concept, the ECtHR limits its jurisdiction only to the consideration of the conformity of the interpretation of the Convention given by national authorities with Court's case-law, as well as the object and purpose of the Convention.

Jurisdiction of the Court of Justice of the European Union. The Court of Justice of the European Union is divided into **two courts**: Court of Justice – deals with requests for preliminary rulings from national courts, certain actions for annulment and appeals; General Court – rules on actions for annulment brought by individuals, companies and,

[477] Füglistaler G. P. 14.
[478] Füglistaler G. P. 16.

in some cases, EU governments[479]. The most common types of cases the CJEU exercises its jurisdiction *ratione materiae* are: interpreting the law (preliminary rulings); ensuring the EU takes action (actions for failure to act); annulling EU legal acts (actions for annulment); enforcing the law (infringement proceedings); sanctioning EU institutions (actions for damages)[480]. The General Court hears actions involving member states, institutions, and natural or legal persons[481], thus, it has a rather broad jurisdiction *ratione personae*.

Scholars distinguish optional and binding jurisdiction of the EU Court of Justice, depending on whether the subject has an obligation or a right to apply to the Court[482]. Optional jurisdiction means those powers of the Court which depend on the will of the parties to refer the case to it[483]. For the most part, the jurisdiction of the Court is binding, and only a few procedures are optional, e.g. recourse to the Court concerning the compatibility of international agreements of the EU with the Lisbon Treaties depends on the will of the Parliament, Council, Commission or Member State[484].

The Court of Justice has jurisdiction to hear and decide on:

(1) Preliminary rulings: to ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice to clarify the interpretation of European Union law, so that they may ascertain, for example, whether their national legislation complies with that law; a reference for a preliminary ruling may also concern the review of the validity of an act adopted by the European Union's institutions; the court which made the reference to

[479] Court of Justice of the European Union (CJEU). URL: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en.
[480] Ibid.
[481] Britannica. Court of Justice of the European Union. URL: https://www.britannica.com/topic/European-Court-of-Justice.
[482] Комарова Т.В. Суд Європейського Союзу: Розвиток судової системи та практики тлумачення права ЄС. Харків: «Право». 2018. С. 83.
[483] Ibid.
[484] Ibid.

the Court of Justice is, in deciding the dispute before it, bound by the interpretation given; the Court of Justice's judgment likewise binds other national courts before which the same problem is raised[485].

(2) Actions for failure to fulfil obligations: these actions enable the Court of Justice to determine whether Member States have fulfilled their obligations under European Union law; before bringing the case before the Court of Justice, the Commission conducts an administrative stage in which the Member State concerned is given the opportunity to reply to the complaints against it; if, at the conclusion of that stage, the Member State has not put an end to the infringement, an action may be brought before the Court of Justice either by the Commission – as is usually the case – or by a Member State[486].

(3) Actions for annulment: by an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union; the Court of Justice has exclusive jurisdiction over actions between the institutions and those brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers)[487].

(4) Actions for failure to act: these actions enable review of the lawfulness of failure to act by a European Union institution, body, office or agency; where the failure to act is held to be unlawful, it is for the institution, body, office or agency concerned to put an end to the failure by the adoption of appropriate measures[488].

(5) Appeals: appeals limited to points of law may be brought before the Court of Justice against judgments and orders of the General Court; where the state of the proceedings so permits, the Court of Justice may itself decide the case, otherwise, it must refer the case back to the General Court, which is bound by the decision given on the appeal[489].

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[485] The Court of Justice: Composition, jurisdiction and procedures. URL: https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_2_kurumlar/Court_of_Justice.pdf.
[486] Ibid.
[487] Ibid.
[488] Ibid.
[489] Ibid.

(6) Reviews: decisions of the General Court on appeals against decisions of the European Union Civil Service Tribunal may, in exceptional circumstances, be reviewed by the Court of Justice where there is a serious risk of the unity or consistency of European Union law being affected[490].

The General Court has jurisdiction to hear and decide on the following: actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union and against regulatory acts or against a failure to act on the part of those institutions, bodies, offices or agencies; actions brought by the Member States against the Commission; actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers; actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the European Union or their staff; actions based on contracts made by the European Union which expressly give jurisdiction to the General Court; actions relating to intellectual property brought against the European Union Intellectual Property Office and against the Community Plant Variety Office; disputes between the institutions of the European Union and their staff concerning employment relations and the social security system[491].

The *MOX Plant* case, which concerned the obligations of the United Kingdom and Ireland under UNCLOS, is an example where the subject-matter jurisdiction of the EU Court of Justice competes with the subject-matter jurisdiction of other international courts. The *MOX Plant* case refers to three linked sets of litigation arising out of a decision of the United Kingdom to authorize the construction and operation of a plant to make mixed oxide fuel ('MOX')[492]. These cases comprise proceedings instituted by Ireland against the UK under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention arbitration); proceedings

[490] Ibid.

[491] Court of Justice of the European Union: General Court. URL: https://curia.europa.eu/jcms/jcms/Jo2_7033/en/#compet.

[492] Churchill R. MOX Plant Arbitration and Cases. URL: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e176?prd=EPIL.

instituted by Ireland against the UK under UNCLOS (ITLOS and arbitral tribunal under Annex VII of UNCLOS); proceedings instituted by the European Commission against Ireland before the Court of Justice of the European Union which rendered the final judgment in this case. The CJEU has an exclusive jurisdiction over the mixed agreements to which UNCLOS belongs. In the case before the CJEU Ireland contended that the issue was not a matter of the EU law over which the CJEU enjoys jurisdiction[493]. The Court repeated its exclusive jurisdiction to adjudicate on all aspects of the EU law, including international law aspects that are part of the Community legal order[494].

Jurisdiction of the Inter-American Commission and Court of Human Rights. The inter-American judicial system of human rights protection has its own peculiarities. The American Convention on Human Rights in Article 33 stipulates that the following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: Inter-American Commission on Human Rights and Inter-American Court of Human Rights[495].

The Inter-American Commission is a principal and autonomous organ of the Organization of American States (OAS) established in 1959 whose mandate stems from the Charter of the Organization[496]. The Commission performs this functions on promotion of the observance and protection of human rights in Americas by making visits to the countries, carrying out thematic activities and initiatives, preparing reports on the human rights situation in a certain country or on a particular thematic issue, adopting precautionary measures or requesting provisional measures before the Inter-American Court, and processing and analyzing individual petitions with a view to determining

[493] Cardwell P. Who Decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute. *Journal of Environmental Law*. 2007. Vol. 19. P. 123.
[494] Lavranos L. The *MOX Plant* Judgment of the ECJ: How exclusive is the jurisdiction of the ECJ? *European Environmental Law Review*. 2006. Vol. 15, Iss. 10. P. 291.
[495] American Convention on Human Rights (1969). URL: https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf.
[496] Inter-American Commission on Human Rights. Petition and Case System. 2010. URL: http://www.oas.org/petitions.

the international responsibility of the States for human rights violations, and issuing the recommendations it deems necessary[497].

Today, the American Convention and its protocols, other OAS human rights treaties, the Statute of the Inter-American Commission on Human Rights, and the Rules of Procedure, give the Commission numerous functions to promote and protect human rights[498]. Among these mandates, the Commission has broad subject matter and personal jurisdiction to receive petitions from any person or group of persons or nongovernmental entity legally recognized in one or more OAS member states[499]. Complaints of individuals and organizations about violations of their rights guaranteed by the American Declaration of the Rights and Duties of Men, the American Convention on Human Rights, and other inter-American human rights treaties are submitted to the Commission. They do not have direct access to the Court: the Commission acts on their behalf and may refer to the Court cases relating to the interpretation and application of the American Convention on Human Rights and other inter-American human rights treaties.

If the Commission determines that a State is responsible for having violated the human rights of a person or group of persons, it will issue a report that may include the following recommendations to the State: suspend the acts in violation of human rights; investigate and punish the persons responsible; make reparation for the damages caused; make changes to legislation; and/or require that the State adopt other measures or actions[500]. Individuals or groups, in addition to submitting a petition, or as a separate filing without a petition, may ask the Commission to issue a request to a state for precautionary measures to prevent imminent and irreparable harm, or to request provisional measures from the Court in situations of extreme gravity and urgency[501].

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[497] Ibid.

[498] Shelton D. The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System. *Notre Dame Journal of International and Comparative Law*. 2015. Vol. 5, No. 1. P. 2-3.

[499] Shelton D. P. 3.

[500] Inter-American Commission on Human Rights. Petition and Case System. 2010. URL: http://www.oas.org/petitions.

[501] Shelton D. P. 3.

The Inter-American Court, established in 1979, has jurisdiction in relation to application and interpretation of the American Convention. Under Article 61 of the American Convention on Human Rights only the States Parties and the Commission shall have the right to submit a case to the Court. According to Article 62, a State Party may, upon depositing its instrument of ratification or adherence to the Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention[502]. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. The jurisdiction of the Court comprises all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration, or by a special agreement[503]. In other words, the Court considers the cases, provided that the State concerned has agreed to its jurisdiction by a special agreement or a declaration. States which ratified the Convention but did not recognize the jurisdiction of the Court are Dominica, Grenada, Jamaica. Due to the fact that some states of the American continent neither have signed nor ratified the American Convention on Human Rights (e.g., Canada or USA), cases related to the responsibility of these states for the violations of human rights may be considered only by the Commission.

Temporal jurisdiction of the Court means that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party. In *Martín del Campo v. Mexico* the applicant claimed to have been tortured by police agents in 1992, though under its optional declaration, Mexico recognized the jurisdiction of the IACtHR from December 1998 onwards[504].

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[502] American Convention on Human Rights (1969). URL: https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf.
[503] Ibid.
[504] Jardón L. The Interpretation of Jurisdictional Clauses in Human Rights Treaties. *Anuario Mexicano de Derecho Internacional.* 2013. Vol. 13. P. 99-143.

In relation to the alleged torture, the Court had to assess if the acts were instantaneous or continuous and concluded that they were instantaneous, that is why in accordance with the principle of non-retroactivity of treaties and Mexico's declaration, it had to decline jurisdiction[505].

The Court may also rule that the state has violated the provisions of other inter-American human rights treaties, namely: Inter-American Convention to Prevent and Punish Torture (1985), Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights (1988), Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), Inter-American Convention on Forced Disappearance of Persons (1994), Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999). Thus, the Inter-American system has further expanded its human rights guarantees and the jurisdiction of the IACtHR through the adoption of additional human rights instruments[506]. Some of these human rights treaties envisage explicit compromissory clauses recognizing the jurisdiction of the Court, e.g., Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights (Article 19(6)).

On 16 November 2009, the Inter-American Court of Human Rights delivered its judgment in the case *Gonzalez et al. ('Cotton Field') v. Mexico.* Before entering into the substantive matters of the judgment, the Court was confronted with a preliminary objection of the state[507]. Mexico contended the jurisdiction *ratione materiae* of the Court to apply the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), because it believed that the Court may exercise its jurisdiction only under the American Convention on Human Rights[508].

[505] Ibid.
[506] Shelton D. P. 2.
[507] Tiroch K. Violence against Women by Private Actors: The Inter-American Court's Judgment in the Case of Gonzalez et al. ('Cotton Field') v. Mexico. *Max Planck Yearbook of United Nations Law*. 2010. Vol. 14. P. 386.
[508] Ibid.

The dispute centred on the ambivalent formulation of Article 12 of the Convention Belém do Pará[509]. The provision stipulates that any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions. As can be seen, the text solely mentions the Inter-American Commission on Human Rights as competent to accept petitions[510]. Therefore, the principal question pertained to the requirement of an express reference to the Court in order to establish its jurisdiction[511]. In order to solve the issue, the Court referred to the Vienna Convention on the Law of Treaties and its provisions on the interpretation of treaties[512]. The Court concluded that the Convention of Belém do Pará was applicable to the case and it had subject-matter jurisdiction to hear the case.

Jurisdiction of the African Commission and Court of Human and People's Rights. The mandate of the African Commission of Human and People's Rights is as follows: 1) promotion of human and peoples' rights: the Commission carries out sensitisation, public mobilisation and information dissemination through seminars, symposia, conferences and missions; 2) protection of human and peoples' rights: the Commission ensures protection of human and peoples' rights through its communication procedure, friendly settlement of disputes, state reporting, urgent appeals and other activities of special rapporteurs and working groups and missions; 3) interpretation of the African Charter on Human and People's Rights: the Commission is

[509] Ibid.
[510] Tiroch K. P. 387.
[511] Ibid.
[512] Ibid.

mandated to interpret the provisions of the Charter upon a request by a state party, organs of the African Union or individuals; 4) performance of any other tasks which may be entrusted to it by the Assembly of Heads of State and Government[513]. Commission may receive inter-state communications as well as individual complaints concerning the violations of human rights. The individual application must be first submitted to the Commission, who may decide, after preliminary examination, to refer the case to the Court.

The African Court of Human and People's Rights was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998)[514]. But it became operational only in 2009. According to the Protocol, the Court complements the protective mandate of the African Commission. Only 33 Member States of the African Union have currently ratified the Protocol establishing the African Court and only eight States have accepted the jurisdiction of the Court to hear cases with the direct participation of individuals and NGOs[515].

Jurisdiction *ratione materiae* of the Court is defined in Article 3 of the Protocol, which provides for that jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and People's Rights, this Protocol and any other relevant human rights instrument ratified by the states concerned[516]. Thus, the subject-matter jurisdiction of the African Court is broader than that of the Inter-American Court, because the former encompasses the interpretation and application of *other* relevant human rights instrument, whereas the latter encompasses the

[513] African Commission of Human and People's Rights. Mandate of the Commission. URL: https://www.achpr.org/mandateofthecommission.

[514] The African Court in Brief. Basic Information. URL: https://www.african-court.org/wpafc/basic-information/.

[515] Ibid.

[516] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998). URL: https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf.

interpretation and application of *other inter-American* human rights treaties. The Court therefore has jurisdiction to consider human rights violations under treaties other than its foundational treaty, the African Charter, that is a unique feature compared to other regional human rights courts, which in their contentious jurisdiction – as opposed to the courts' advisory competence – are limited to the human rights treaties whose implementation they were established to oversee[517].

Article 5 of the Protocol determines the Court's jurisdiction *ratione personae*: the Commission; State Party which had lodged a complaint to the Commission; State Party against which the complaint has been lodged at the Commission; the State Party whose citizen is a victim of human rights violation; African intergovernmental organizations are entitled to submit cases to the Court[518]. Article 34(6) further clarifies that upon ratification, a State Party may make a declaration accepting the Court's jurisdiction in relation to the right of individuals to institute cases directly before it[519]. Thus, there are two roads leading an individual to the African Court: 1) the main road runs through the African Commission, and in that regard, the African human rights system basically applies a similar approach to the Inter-American human rights system: individual petitions can only go to the Court after the admissibility phase and the merits phase conducted by the Commission; 2) the second road leads directly to the African Court: it may be used by individuals and NGOs, however, subject to an 'opting in' declaration by the State Party concerned[520]. According to Article 5(3) the Court may entitle relevant NGOs with observer status before the Commission, and individuals to

[517] Reventlow Y. and Curling R. The Unique Jurisdiction of the African Court on Human and People's Rights: Protection of Human Rights Beyond the African Charter. *Emory International Law Review*. 2019. Vol. 33, Iss. 2. P. 204.

[518] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998). URL: https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf.

[519] Ibid.

[520] The Subject Matter Jurisdiction of the African Court of Human and Peoples' Rights. URL: https://www.icj.org/wp-content/uploads/2015/04/MENA-Arab-Court-Memo-Monageng-Advocacy-2015-ENG.pdf.

institute cases directly before it, in accordance with article 34 (6) of this Protocol. Thus, again the subject-matter jurisdiction of the African Court is broader than that of the Inter-American Court.

Although the Court has broad adjudication powers to protect rights contained in other international human rights treaties, its case law to date reveals a somewhat inconsistent approach to finding violations under legal instruments other than the Charter[521]. For example, in 2014, the Court handed down two judgments that concerned the rights of journalists, both in cases brought against Burkina Faso[522]. In the first case *Zongo v. Burkina Faso* the applicants claimed violations under the African Charter on Human and People's Rights, the International Covenant on Civil and Political Rights, the revised ECOWAS treaty and the Universal Declaration of Human Rights[523]. Having found the Respondent State in violation of Article 7 of the Charter for failing to uphold the right to have one's case heard before a competent national court, the Court held that it was unnecessary to consider the fair trial 'allegations made in the same vein' under the Covenant and the Universal Declaration[524]. In the second judgment in *Konaté v. Burkina Faso* the Court found that the Respondent State violated its obligations concerning the right to freedom of expression under not only the Charter, but also the Covenant, and revised ECOWAS treaty, but, the Court did not explicitly explain why, as opposed to its previous judgments, it found a violation of multiple instruments protecting the same right[525].

Applicants have brought complaints regarding alleged violations of the Universal Declaration on Human Rights, even though it is not a treaty[526]. The Court has also treated such complaints inconsistently[527]. Although the Court in *Tanganyika Law Society v. Tanzania* did not

[521] Reventlow Y. and Curling R. P. 209.
[522] Reventlow Y. and Curling R. P. 210.
[523] Ibid.
[524] Reventlow Y. and Curling R. P. 211.
[525] Ibid.
[526] Rachovitsa A. On New 'Judicial Animals': The Curious Case of an African Court with Material Jurisdiction of a Global Scope. *Human Rights Law Review*. 2019. Vol. 19. P. 260.
[527] Ibid.

rule out the possibility of examining such complaints, it subsequently maintained that it lacked jurisdiction to entertain a claim concerning an alleged breach of the Declaration, although the document can be used as a source of inspiration for interpreting the Charter[528]. However, in 2018 in *Anudo Ochieng Anudo v. United Republic of Tanzania* the Court found that the deprivation of the applicant's nationality was contrary to Article 15(2) of the Declaration, and it declared a violation in the operative provisions of its judgment[529].

For the adjudication of inter-African disputes, the Court of Justice as the principal judicial organ of the African Unity was established by virtue of Article 18 of the Constitutive Act[530]. The Constitutive Act itself provides no details on the crucial issues of the AU Court's composition and functions but leaves these matters to be determined by a future Protocol[531]. The only indication given as to the AU Court's competences is Article 26 stipulating that it shall be seized of matters of interpretation arising from the Constitutive Act's application or implementation[532]. The Protocol of the Court of Justice of the African Union was adopted in 2003 and entered into force in 2009. The Court has, however, never come into existence because the African Union has decided in 2008 that it should be merged with the African Court on Human and Peoples' Rights to form a new court – the African Court of Justice and Human Rights. The latter was founded by the Protocol on the Statute of African Court of Justice and Human Rights which should have replaced the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court (1998) and the Protocol on the Court of Justice of the African Union (2003)[533]. But this Protocol, which presumes the subject-matter jurisdiction of a new single Court in human rights issues as well as in inter-state

[528] Ibid.
[529] Ibid.
[530] Magliveras K. and Naldi G. The African Court of Justice. *Heidelberg Journal of International Law*. 2006. Vol. 66. P. 188.
[531] Ibid.
[532] Ibid.
[533] Elias O. Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights. *International Legal Materials*. 2009. Vol. 48, No. 2. P. 334-336.

disputes, has not yet entered into force. In June 2014, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) was adopted by the African Union[534]. The Malabo Protocol provides for the inclusion of criminal jurisdiction within the remit of the proposed African Court of Justice and Human Rights[535]. But this project is also put on hold so far.

Tasks and questions for individual work:

1. Consider the jurisdictional issues in the consolidated case of *Tanganyika Law Society and the Legal and Human Rights Centre v. the United Republic of Tanzania* and *Reverend Christopher R. Mtikila v. the United Republic of Tanzania*[536] (ACtHR, 2013) and answer the following questions:

1) what were the facts of the case?

2) what international treaties did the applicants refer to in their claims?

3) what were the arguments of the applicants and the respondent concerning the lack of jurisdiction of the African Court on Human and People's Rights to hear the case?

4) what were the rulings of the Court in relation to its temporal, material and personal jurisdiction?

2. Analyze the relations between (1) the European Court of Human Rights and the EU Court of Justice; (2) the European Court of Human Rights, Inter-American Court of Human Rights and African Court of Human and People's Rights.

(1) To accomplish the first part of this task, please study Opinion 2/94 of the EU Court of Justice concerning the accession by the

[534] Amnesty International. Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court. Snapshots. URL: https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0161372017ENGLISH.pdf.

[535] Ibid.

[536] Tanganyika Law Society and the Legal and Human Rights Centre v. the United Republic of Tanzania and Reverend Christopher R. Mtikila v. the United Republic of Tanzania. The Judgment of the African Court on Human and People's Rights of 2013. URL: https://afchpr-commentary.uwazi.io/api/files/1474462877796xxqob2vl-r1he61or.pdf.

Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms[537]; Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms[538]; Article 17 of Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention[539] and Opinion 2/13 of the EU Court of Justice concerning the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms[540]. Also visit the Council of Europe official web-page on the resumption of the negotiations on the issue, read the relevant information and watch the video[541].

(2) To accomplish the second part of this task, please look for material published in the Ukrainian Journal of International Law (2021, No. 3) and read the Declaration of San Jose, Kampala Declaration and Foreword to the Joint Law Report[542].

[537] https://curia.europa.eu/juris/showPdf.jsf;jsessionid=10E4837075A74731F2A6B-24043B205AB?text=&docid=99549&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1423305.
[538] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F08
[539] https://www.echr.coe.int/documents/library_collection_p14_ets194e_eng.pdf.
[540] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002.
[541] https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.
[542] https://jusintergentes.com.ua/images/2021/3/09.pdf; https://jusintergentes.com.ua/images/2021/3/10.pdf.

TOPIC 7
'ADVISORY JURISDICTION' OF INTERNATIONAL COURTS

Some scholars define the competence of an international court to issue advisory opinions as 'advisory jurisdiction'. Even at the official web-site of the ICJ the term 'advisory jurisdiction' is used; Article 48 of the ECHR refers to 'advisory jurisdiction' of the ECtHR. We consider that jurisdiction refers only to the powers of an international court to resolve the dispute and issue an order or a judgment on it, while the powers to issue advisory opinions comprise the competence of the court. Nevertheless, in order to describe this important part of the competence of international universal and regional courts we will call it conditionally the 'advisory jurisdiction'.

The authority to exercise 'advisory jurisdiction', i.e. to issue advisory opinions on legal issues related to the clarification and interpretation of the rules of international law, are vested in the International Court of Justice, the International Tribunal for the Law of the Sea (with some reservations), the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and People's Rights, the EU Court of Justice (with some reservations), etc. An advisory opinion which is usually of non-binding nature, is issued by a competent international court on current legal issues upon request from authorized subjects (states, international organizations and their bodies).

The court's interpretation of the norms of international law contributes to their unified understanding, which is a prerequisite and guarantee of their effective implementation. As a rule, when issuing advisory opinions, courts are guided by the provisions of their statutes and rules of procedure. 'Advisory jurisdiction' is discretionary, in other words, the court itself decides whether or not to issue an advisory opinion. The request for an advisory opinion must be made by a duly

authorized entity (*ratione personae*) and the question brought before the court for the opinion must be a question of law (*ratione materiae*). The question asked must relate to the field of activity of the entity requesting the opinion. Unlike a court's judgment in a case, an advisory opinion is not *res judicata*.

A request for an advisory opinion may be submitted to the ICJ by the UN bodies, namely the UN General Assembly and the UN Security Council, as well as other UN bodies and specialized agencies in the case of obtaining permission from the UN General Assembly (Article 96 of the UN Charter); to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea – by the Assembly and Council of the International Seabed Authority (Article 191 of the UN Convention on the Law of the Sea); to the ECtHR – by the Committee of Ministers of the Council of Europe (Articles 47-49 of the ECHR), governments of states and the Steering Committee on Bioethics of the Council of Europe (Article 29 of the European Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997)), as well as national courts of the ECHR states parties (Protocol 16 to the ECHR); to the CJEU – by national courts of the EU member states (Article 267 of the Treaty on the Functioning of the EU); to the IACtHR – by bodies and member states of the Organization of American States (Article 64 of the American Convention on Human Rights); to the ACtHPR – by bodies and member states of the African Union (formerly the Organization of African Unity), as well as any African organization recognized by the AU (Article 4 of the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights).

'Advisory jurisdiction' of the ICJ. Under Article 96 of the UN Charter the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question[543]. Other organs of the United Nations and specialized agencies,

[543] Charter of the United Nations and Statute of the International Court of Justice (1945). URL: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities[544]. Article 65 of the ICJ Statute envisages that 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[545]. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question[546]. Article 68 stipulates that in the exercise of its advisory functions the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable[547].

The advisory procedure is open to five United Nations organs and 15 UN specialized agencies. Before acceding to a request, the ICJ has to decide that it has jurisdiction and, if it has jurisdiction, whether it should exercise its discretion to give an advisory opinion. The ICJ has only once declined to accept a request on the ground that it did not have jurisdiction. In the Advisory Opinion requested by the WHO on the Legality of the Use by a State of Nuclear Weapons in an Armed Conflict, the ICJ found that it was not able accede to the request. The ICJ stipulated that three conditions have to be satisfied in order to found the jurisdiction of the ICJ when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the court; the opinion requested must be on a legal question, and this question must be the one arising within the scope of the activities of the requesting agency[548]. About 60% of the advisory opinions issued by the Court were requested by the UN General Assembly.

[544] Ibid.
[545] Ibid.
[546] Ibid.
[547] Ibid.
[548] Legality of the Use by a State of Nuclear Weapons in an Armed Conflict (1996). Advisory Opinion of the International Court of Justice. Para. 10. URL: https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf.

Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding[549]. The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions[550].

Sometimes states try to challenge the advisory jurisdiction of the ICJ on various grounds. Thus, in a number of advisory proceedings, the grounds were the following: the ineligibility of the subject of the request, for example, in view of the correlation of the functions of the UN General Assembly and the UN Security Council regarding giving any recommendations on the dispute or situation[551]; not a legal, but a political nature of the issue[552]; abstractness and inaccuracy of the formulated question[553], etc.

'Advisory jurisdiction' of the ITLOS. An ambiguous situation has developed around the ITLOS 'advisory jurisdiction'. UNCLOS and the Statute of the Tribunal do not provide advisory function for ITLOS as a full court[554]. In the two instances where UNCLOS mentions the advisory opinions, the competent organ to give an advisory opinion is the ITLOS Seabed Disputes Chamber (Article 191 of UNCLOS and Article 40 of the ITLOS Statute), and the

[549] International Court of Justice. Advisory Jurisdiction. URL: https://www.icj-cij.org/en/advisory-jurisdiction.
[550] Ibid.
[551] See, e.g., Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010), paragraphs 18-25.
[552] See, e.g., Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), paragraph 13.
[553] See, e.g., Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (2004), paragraphs 36-40.
[554] Gao J. The Legal Basis of the Advisory Function of the International Tribunal for the Law of the Sea as A Full Court: An Unresolved Issue. *International Journal of Maritime Affairs and Fisheries*. 2012. Vol. 4, Iss. 1. P. 84.

entitled entities to request an advisory opinion from the Chamber are the Assembly and/or the Council of the Authority of the 'Area'[555]. On the other hand, Article 138(1) of the ITLOS Rules provides that the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of UNCLOS specifically provides for the submission to the Tribunal of a request for such an opinion[556]. However, it is clear that the ITLOS Rules per se can not constitute the legal basis for the advisory function of ITLOS[557], because the provisions of the Rules of an international court cannot prevail over the provisions of the treaty which established this court and which did not clearly provide for the exercise of 'advisory jurisdiction' for it.

Nevertheless, on 2 April 2015, the full International Tribunal for the Law of the Sea rendered its first advisory opinion in reply to a request of the Sub-Regional Fisheries Commission regarding illegal, unreported and unregulated fishing[558]. In such a way ITLOS affirmed a broad advisory jurisdiction *ratione materiae* and *personae*, and found that there were no compelling reasons to exercise its discretionary power to dismiss the request[559]. The request was submitted under Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC), thus triggering – for the first time – the advisory procedure before the full Tribunal[560].

The main arguments in the case against the advisory jurisdiction of the Tribunal were that the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal and that if the Tribunal were to exercise advisory jurisdiction, it would be acting *ultra*

[555] Ibid.
[556] Ibid.
[557] Ibid.
[558] Ruys T., Soete A. 'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea. *Leiden Journal of International Law*. 2016. Vol. 29. P. 155-176.
[559] Ibid.
[560] Ruys T., Soete A. P. 157.

vires under the Convention[561]. The Tribunal analyzed Article 21 of its Statute, which deals with the jurisdiction of the Tribunal. The Article provides for that the jurisdiction of the Tribunal comprises three elements: (i) all 'disputes' submitted to the Tribunal in accordance with the Convention; (ii) all 'applications' submitted to the Tribunal in accordance with the Convention; and (iii) all 'matters' specifically provided for in any other agreement which confers jurisdiction on the Tribunal[562]. ITLOS observed that it is the third element which has risen diverse interpretations and that the words all 'matters' should not be interpreted as covering only 'disputes', for, if that were to be the case, Article 21 of the Statute would simply have used the word 'disputes'[563]. The Tribunal drew the conclusion that consequently, it must mean something more than only 'disputes' and that something more must include advisory opinions, if specifically provided for in 'any other agreement which confers jurisdiction on the Tribunal'[564]. When the 'other agreement' confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to 'all matters' specifically provided for in the 'other agreement'[565]. Article 21 and the 'other agreement' conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal[566]. ITLOS stipulated that the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance

[561] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (2015). Para. 40. URL: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf.
[562] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission. Para. 54.
[563] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission. Para. 56.
[564] Ibid.
[565] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission. Para. 58.
[566] Ibid.

with the agreement mentioned above; and such an opinion may be given on 'a legal question'[567].

'Advisory jurisdiction' of the ECtHR. The 'advisory jurisdiction' of the ECtHR is governed by Articles 47-49 of the ECHR, Rules 82-95 of the Rules of Court, Protocols No. 11 and 16 to the Convention and Article 29 of the Convention on Human Rights and Biomedicine. The drafters of the European Convention on Human Rights had a negative attitude towards giving advisory functions to the Court, but in 1963 Protocol No. 2 conferring upon the Court the competence to give advisory opinions appeared. Later it was replaced by Protocol No. 11 restructuring the control machinery of the Court (1994).

Article 47(1) of the European Convention on Human Rights stipulates that the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto[568]. Paragraph 2 of this Article establishes a restriction: such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention[569]. During the whole period of the ECtHR's functioning, it received relevant requests and issued advisory opinions on two questions. In 2004, the Court adopted Decision on its competence to give an advisory opinion. By a letter of 9 January 2002 addressed to the President of the Court, the Chairman of the Committee of Ministers of the Council of Europe requested the Court, by virtue of Article 47 of the Convention, to give an advisory opinion on the matter raised in Recommendation 1519 (2001) of the Parliamentary Assembly of the Council of Europe, concerning 'the

[567] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission. Para. 60.
[568] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL: https://www.echr.coe.int/documents/convention_eng.pdf.
[569] Ibid.

coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights'[570]. The request was made with regard to concerns over the potential incompatibility between ratification of the CIS Convention and ratification of the European Convention on Human Rights which were expressed by the Council of Europe in the context of discussions leading up to Moldova's accession to the Council of Europe in 1995[571]. The Court decided that the request for an advisory opinion was not within its competence as defined in Article 47 of the Convention.

In 2008, the Court adopted Advisory opinion No. 1 on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights. The questions asked in the request for an advisory opinion were worded as follows: (a) can a list of candidates for the post of judge at the European Court of Human Rights, which satisfies the criteria listed in Article 21 of the Convention, be refused solely on the basis of gender-related issues? (b) are Resolution 1366 (2004) and Resolution 1426 (2005) in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such list, on the basis of the criteria listed in Article 21 of the Convention?[572] This request was submitted by the Committee of Ministers and was influenced by the failure of Malta to comply with the Assembly's rule to include a female candidate into the list of candidates for the position of judge. In 2010, the Court issued its Advisory opinion No. 2 on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2).

In 2013, ***Protocol No. 16 to the ECHR*** which extends the 'advisory jurisdiction' of the ECtHR was adopted. The reason for the extension

[570] Decision of the European Court of Human Rights on Its Competence to Give an Advisory Opinion (2004). Para. 1. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-1339293-1397515%22]}.

[571] Decision of the European Court of Human Rights on Its Competence to Give an Advisory Opinion. Para. 12.

[572] Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (2008). URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-2268009-2419060%22]}.

of the Court's competence to give advisory opinions was to enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity. The other reasons for the adoption of the Protocol were the need to reconcile the principle of subsidiarity with the objectives to fuel the interaction between the ECtHR and Member States domestic courts, to enhance the coherence of the Convention's and the common European human rights jurisprudence, as well as the Convention's implementation at the domestic level and its viability by decreasing the Court's workload[573].

Article 1 of the Protocol envisages that highest courts and tribunals of a High Contracting Party may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto[574]. It is important to stress that the advisory-opinion procedure is not available to all courts or tribunals within the High Contracting Parties to the Protocol: the Court's jurisdiction only extends to requests for advisory opinions submitted by a domestic instance which has been designated as a highest court or tribunal for the purposes of the Protocol by the High Contracting Party[575]. 'Highest courts' usually refers to courts from which no appeal is possible[576]. Some States have listed different types of courts in their declarations: these include supreme courts and constitutional courts but sometimes also specialized highest courts[577].

[573] Jahn J. Normative Guidance from Strasbourg Through Advisory Opinions: Deprivation or Relocation of the Convention's Core? *Heidelberg Journal of International Law*. 2014. Vol. 74. P. 824.

[574] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2013). URL: https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf.

[575] Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (2017). URL: https://echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

[576] Gerards J. Advisory Opinion: European Court of Human Rights (ECtHR). Max Planck Encyclopedias of International Law. URL: https://www.researchgate.net/publication/335714531_Advisory_Opinion_European_Court_of_Human_Rights_ECtHR.

[577] Ibid.

Under Article 1, the requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it[578]. Thus, it is up to each court to decide whether to apply for an advisory opinion or not. The Court has no jurisdiction either to assess, where relevant, the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law or to rule on the outcome of the proceedings[579]. It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case[580]. The decision to request an advisory opinion is optional: a designated court or tribunal may avail itself of the advisory opinion procedure whenever it considers that a case before it raises a question or questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto, and, in its view, it is necessary to request an advisory opinion in order to resolve the dispute brought before it[581]. It will be for the requesting court or tribunal to decide whether the domestic proceedings are to be suspended pending the delivery of the Court's advisory opinion[582].

Article 5 of the Protocol explicitly provides that advisory opinions shall not be binding. In this respect, it is relevant that the Court's judgments are generally considered to have 'force of interpretation' or *res interpretata* which means, that a well-established interpretation of the terms and notions of the Convention given by the Court forms part and parcel of the Convention[583]. The fact that the Court has

[578] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2013). URL: https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf.
[579] Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (2017). URL: https://echr.coe.int/Documents/Guidelines_P16_ENG.pdf.
[580] Ibid.
[581] Ibid.
[582] Ibid.
[583] Gerards J. Advisory Opinion: European Court of Human Rights (ECtHR).

delivered an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party would not prevent a party to that case subsequently exercising their right of individual application under Article 34 of the Convention, i.e., they could still bring the case before the Court[584]. However, where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out[585].

Today, the Court issued six advisory opinions under the procedure of Protocol No. 16: two opinions requested by the highest courts of France (on registration of the birth certificates of children born through gestational surrogacy abroad and on the entitlement of landowners' associations to withdraw their land from the territory of an officially approved hunting association); two opinions requested by the highest courts of Armenia (on the interpretation of the Armenian Penal Code in the context of proceedings against the former President Robert Kocharyan and on the compatibility of the non-application of limitation periods for imposing criminal responsibility in respect of torture with Article 7 of the Convention) and one opinion requested by the Supreme Administrative Court of Lithuania (on the legislation on impeachment)[586]. One request from the Slovak Supreme Court concerning the independence of the current mechanism for assessing complaints against the police was rejected[587].

In accordance with Article 29 of the Convention on Human Rights and Biomedicine, the European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of this Convention at the request of the Government of a Party, or the

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[584] Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. URL: https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

[585] Ibid.

[586] Advisory opinions under Protocol No. 16. URL: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/advisoryopinions&c#n1593073280771782739956 2_pointer.

[587] Ibid.

Steering Committee on Bioethics[588]. In December 2019, the ECtHR has received, for the first time, a request for an advisory opinion from the Committee under Article 29. The questions posed by the Bioethics Committee concerned the interpretation of Article 7 of the Convention regarding the protection of the human rights and dignity of persons with mental disorders in the face of involuntary placement and/or treatment[589]. The Court rejected the request because, although it confirmed, generally, its jurisdiction to give advisory opinions under Article 29 of the Human Rights and Biomedicine Convention, the questions raised did not fall within the Court's competence[590].

'Advisory jurisdiction' of the CJEU. As regards the EU legal order, there is a long lasting institutionalized non-contentious procedure, the preliminary ruling procedure, which is certainly a well-known cornerstone of EU law[591]. This procedure is governed by Article 19(3)(b) of the Treaty on the European Union and Article 267 of the Treaty on the Functioning of the European Union.

According to Article 267, the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the

[588] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997). URL: https://rm.coe.int/168007cf98.
[589] European Court rejects request for an advisory opinion on biomedicine treaty. Press Release of 15 September 2021. URL: file:///Users/marynamedvedieva/Downloads/Decision%20Oviedo%20Convention%20request%20-%20European%20Court%20rejects%20request%20for%20an%20advisory%20opinion%20on%20biomedicine%20treaty.pdf.
[590] Ibid.
[591] Daka M. Advisory Opinion and Preliminary Ruling Procedure – A Comparative and Contextual Note. *Pravni Vjesnik*. 2020. Vol. 36, No. 3-4. P. 290.

Court[592]. Status as a court or tribunal is interpreted by the Court taking into account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent[593]. A request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings[594]. The Court can give a preliminary ruling only if EU law applies to the case in the main proceedings[595].

Under Article 267 where a question is raised before any court or tribunal of a Member State, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court. Thus, submitting a request to the CJEU in certain cases is the right of a national court of the Member State (it *may* refer the question for preliminary ruling): when the national court is not the last instance in the case, it has discretion and autonomy in deciding whether to refer to the EU Court of Justice or not; and in certain cases – its duty (it *shall* refer the question for preliminary ruling): when the national court is not the last instance in the case. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum delay. The judgments delivered in the preliminary ruling procedure are binding.

'Advisory jurisdiction' of the IACtHR. Under Article 64 of the American Convention on Human Rights, member states of the Organization may consult the Court regarding the interpretation of this Convention or of

[592] Court of Justice of the European Union. Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (2019). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001.
[593] Ibid.
[594] Ibid.
[595] Ibid.

other treaties concerning the protection of human rights in the American states[596]. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may consult the Court. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

The Court's first advisory opinion related to a request of the government of Peru concerning the interpretation of Article 64 of the American Convention granting advisory jurisdiction to the Court[597]. The question which seized the Court concerned the interpretation of the phrase 'or of other treaties concerning the protection of human rights in the American states'. The Government of Peru requested that the opinion cover the following specific questions: does this aforementioned phrase refer to and include: a) only treaties adopted within the framework or under the auspices of the inter-American system? or b) the treaties concluded solely between the American states, that is, is the reference limited to treaties to which only American states are parties? or c) all treaties to which one or more American states are parties?[598] The Court drew the conclusion that the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto[599]. Also the Court highlighted that, for specific reasons explained in a duly motivated decision, the Court may decline

[596] American Convention on Human Rights (1969). URL: https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf.
[597] Lockwood B. Advisory Opinions of the Inter-American Court of Human Rights. *Denver Journal of International Law and Policy*. Vol. 13, No. 2. P. 247.
[598] Advisory Opinion OC-1/82 on 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention On Human Rights) (1982). URL: https://opil.ouplaw.com/view/10.1093/law:ihrl/3326iachr82.case.1/law-ihrl-3326iachr82.
[599] Ibid.

to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, *inter alia*: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being[600].

Thus, the range of issues on which the IACtHR is authorized to provide advisory opinions is not limited to the provisions of the American Convention on Human Rights, but extends to other human rights treaties. Consequently, the Court has interpreted international treaties like the Convention on the Rights of the Child and the Vienna Convention on Consular Relations[601]. In addition, the subject-matter 'advisory jurisdiction' of the Court may also relate to the compatibility of the national legislation of the states with the provisions of the relevant international treaties. Jurisdiction *ratione personae* is also much broader than, for example, in the ECtHR: it is extended not only to the States Parties to the American Convention, but also to the member states of the Organization of American States.

'Advisory jurisdiction' of the ACtHPR. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in Article 4 provides for that at the request of a Member State of the OAU (now – African Union), the OAU, any of its organs, or any African organization recognized by the OAU, the Court may issue an opinion on any legal matter relating to the African Charter on Human and People's Rights or any relevant human rights instruments, provided that the subject matter of the opinion

[600] Ibid.

[601] Dicosola M., Fasone C. and Spigno I. The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System. *German Law Journal*. 2015. Vol. 16, No. 6. P. 1418.

is not related to a matter being examined by the Commission[602]. The fact that the AU itself can request an advisory opinion is innovative in the sense that no other international organisation enjoys a comparable right[603]. This Article does not explicitly require from AU organs to act within their sphere of competence but these distinctions are unlikely to have much, if any, practical meaning[604].

In the case of the ACtHPR, personal 'advisory jurisdiction' is the widest among existing international courts: besides the Organization, its bodies and member states, any African organization recognized by the AU may apply to the Court for an advisory opinion. These include governmental organisations, such as the Economic Community of West African States or the Southern African Development Community, however, Article 4 does not make clear whether non-governmental organisations can be regarded as organisations recognised by the AU[605].

On 26 May 2017, the African Court on Human and Peoples' Rights delivered Advisory Opinion in response to the application brought by Nigerian NGO, the Socio-Economic Rights and Accountability Project (SERAP)[606]. The SERAP application represents the first occasion on which the African Court has set out its thinking on the scope of NGO access to it, despite the fact that the Court has previously dealt with four separate applications from various NGOs in the period since 2012[607]. Since the previous four requests were each struck out on procedural grounds, the opinion of 26 May 2017 provides the first window onto the Court's substantive reasoning as to the locus standi of NGOs to

[602] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998). URL: https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf.

[603] Van der Mei A. The advisory jurisdiction of the African Court on Human and Peoples' Rights. *African Human Rights Law Journal*. 2005. Vol. 5. P. 32.

[604] Ibid.

[605] Van der Mei A. P. 35.

[606] Jones A. Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion. *African Human Rights Law Journal*. 2017. Vol. 17, No. 1. P. 321.

[607] Ibid.

seek advisory opinions under the Protocol[608]. The decision confirms that NGOs, in principle, are capable of bringing applications for advisory opinions, but imposes a powerful restriction on the type of NGOs which will be eligible[609]. The Court was of the view that the use of the term 'Organization' and the expression 'African organization' in Article 4 of the Protocol cover both inter-governmental and non-governmental organizations[610]. An organization can be considered 'African', with regard to NGOs, if they are registered in an African State, has structures at the sub-regional, regional or continental level, or undertakes its activities beyond the territory where it is registered, as well as any organization in the Diaspora recognized as such by the African Union[611]. However, the second half of the African Court's reasoning is surprising: NGO will only have standing to bring a request for an advisory opinion if that NGO has been granted observer status by the AU[612].

According to Articles 53-56 of the new Protocol on the Statute of the African Court of Justice and Human Rights, which has not yet entered into force, the right to ask advisory opinions is granted only to the bodies of the African Union. Protocol on the Establishment of an African Court on Human and Peoples' Rights, like the American Convention on Human Rights, confers the right to refer for advisory opinions on member states of the relevant organization (OAS or AU). It extends personal 'advisory jurisdiction' to states which are not parties to the relevant convention, i.e. states that did not ratify it. Unlike Article 5 of the Protocol on contentious jurisdiction, which only allows state parties to the Protocol to initiate a case against another state party, Article 4 does not impose the condition that a state must ratify the Protocol[613]. The purpose of advisory proceedings is to enable states to

[608] Ibid.
[609] Ibid.
[610] Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (2017). 2 AfCLR 572. Para. 46. URL: https://www.pulp.up.ac.za/images/pulp/books/legal_compilations/cases/eng/SERAP%20(Advisory%20Opinion)%20(2017)%202%20AfCLR%20572.pdf.
[611] Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project. Para. 48.
[612] Jones A. P. 323-324.
[613] Van der Mei A. P. 35.

obtain a judicial interpretation on human rights matters, which might also assist other states in fulfilling their human rights obligations[614].

The concept of 'advisory jurisdiction', as in the case of the IACtHR, covers any legal matter relating to the Charter or any other relevant human rights instruments. But the main distinction is that Article 4 of the African Protocol covers any relevant human rights *instruments*, while the American Convention refers to other *treaties* concerning the protection of human rights. In this way, the drafters of the African Protocol empowered the ACtHPR with the ability to interpret non-binding resolutions and recommendations.

Tasks and questions for individual work:

1. Explore objections to the 'advisory jurisdiction' of the ICJ in its advisory opinions.

To accomplish this task, please analyse Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010); Legal Consequences on the Construction of the Wall in the Occupied Palestinian Territory (2004); Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996).

2. Compare 'advisory jurisdiction' of the ECtHR and the CJEU: find the common features and differences.

To accomplish this task, please study the following documents: 1) Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. URL: https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf; 2) Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (2017). URL: https://echr.coe.int/Documents/Guidelines_P16_ENG.pdf; 3) Court of Justice of the European Union. Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (2019). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001.

[614] Ibid.

TOPIC 8
FORUM SHOPPING, MULTIPLE PROCEEDINGS AND OVERLAP OF JURISDICTIONS

Problem setting. In the past decade the topic of proliferation or multiplication of international courts and tribunals, competing jurisdiction between these courts and possible fragmentation of international law has increasingly received the attention of a vast array of scholars and practitioners[615]. The multiplication of international courts and tribunals as such is not a problem: on the contrary, it should be considered as a sign that states are prepared to use courts and tribunals more often for settling their disputes rather than using armed forces[616]. However, the multiplication of international courts and tribunals does raise problems if those courts arrive at divergent or even conflicting rulings[617]. Jurisdictions may overlap because a dispute is covered by a plurality of instruments, which select different methods of settlement[618]. In cases in which jurisdiction of a court overlaps with that of another court or tribunal, the parties to a dispute may select, through a special agreement, one particular method of settlement[619]. If no special agreement is concluded and the relevant courts or tribunals may be seized by unilateral application, the court or tribunal to which one of the parties applies is certainly entitled to exercise jurisdiction[620].

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[615] Lavranos N. Regulating Competing Jurisdictions Among International Courts and Tribunals. *Heidelberg Journal of International Law*. 2008. Vol. 68. P. 576.
[616] Ibid.
[617] Ibid.
[618] Gaja G. Relationship of the ICJ with Other International Courts and Tribunals / Zimmermann A., Tams Ch., Oellers-Frahm K., Tomuschat Ch. (eds.). *The Statute of the International Court of Justice: A Commentary*. Oxford University Press. 3rd ed. 2019. URL: https://www.ilsa.org/Jessup/Jessup2020/Basic%20Materials/Giorgio%20Gaja%20-%20Relationship%20of%20the%20ICJ%20with%20Other%20International%20Courts%20and%20Tribunals.pdf.
[619] Ibid.
[620] Ibid.

The same goes, however, for the other court or tribunal whose jurisdiction was also agreed, should it later be seized by one of the parties by unilateral application, because in general application to one court or tribunal does not prevent resort to the other court or tribunal[621]. The fact that a court has concurring jurisdiction with another court creates the risk of conflicting decisions over the same dispute, but does not *per se* affect the latter's exercise of its jurisdiction[622].

The doctrine uses the terms 'parallel jurisdiction', or 'multiple proceedings', to denote situations where a dispute is considered simultaneously or successively by several courts within the same national legal system, or national courts of different states, or international and national court, or different international courts. 'Forum shopping' is usually defined as the right of the plaintiff to initiate parallel proceedings in several forums competent to consider the dispute that leads to sequential or overlapping proceedings before different courts. It is usually used by plaintiffs in order to obtain legal or factual advantages and reach the most favorable jurisdiction for their interests. Thus, forum shopping is the cause of multiple proceedings which may lead to contradictory judgments of different courts in relation to the same subject-matter of the dispute. Forum shopping is the prerequisite, meanwhile, overlap of jurisdictions, multiple proceedings and conflicting decisions are the result. ITLOS stipulated in the *Southern Bluefin Tuna* case, that 'there is frequently a parallelism of treaties, both in their substantive content and in their provisions for the settlement of disputes arising thereunder'[623] which may lead to parallelism of jurisdictions.

Scholars define positive and negative aspects of the 'forum shopping' phenomenon. Among the positive aspects one may distinguish the following: equality of procedural rights of the parties to the dispute, ensuring the possibility of effective protection and restoration of violated

[621] Ibid.
[622] Ibid.
[623] Southern Bluefin Tuna case (Australia and New Zealand v. Japan). Award on jurisdiction and admissibility of the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (2000). Para. 52. URL: https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf.

rights of the plaintiff, positive competition between courts which leads to the fair adjudication. Among the negative aspects one may distinguish the following: excessive time and financial costs associated with multiple proceedings, overburdening of courts, conflicting decisions on the same legal issue and inconsistent rulings which can undermine the legitimacy and credibility of the judicial system, legal uncertainty about the final outcome of the dispute, etc.[624].

There is a difference between forum shopping in domestic and international courts. In many cases, overlapping jurisdictions among international tribunals are less of a concern as compared to overlapping jurisdictions of domestic courts. The treaty-based jurisdiction of international tribunals often means that even where there is overlapping jurisdiction, each tribunal decides a different aspect of the dispute[625]. Even if different tribunals decide the same issue, they often do so from a distinct legal angle[626].

In the context of international commercial arbitration, forum shopping usually means that the parties simultaneously try to initiate parallel proceedings in national courts and commercial arbitration. One of the procedural prerequisites for the existence of parallel proceedings and forum shopping in international commercial arbitration is the doctrine of 'competence-competence'. This doctrine empowers the arbitral tribunal to rule on its own jurisdiction.

At the European level, one of the overall justifications for efforts towards the unification of private international law in that region was the avoidance of forum shopping[627]. This can be derived from Recitals 6 of both Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual

[624] Pauwelyn J. and Salles L. Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions. *Cornell International Law Journal*. 2009. Vol. 42, Iss. 1. P. 84.
[625] Pauwelyn J. and Salles L. P. 81-83.
[626] Ibid.
[627] Ferrari F. Forum Shopping in the International Commercial Arbitration Context. NYU Center for Transnational Litigation and Commercial Law. P. 2. URL: https://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/10/Forum-Shopping-in-the-International-Commercial-Arbitration-Context-with-Index.pdf.

obligations (Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), both of which refer to the 'proper functioning of the internal market creat[ing] a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'[628].

Forum shopping and multiple proceedings are rare in case of criminal matters, because International Criminal Law has some safeguards including the principle of *ne bis in idem*. Though, international criminal tribunals may provide interpretations which would differ from those provided by other courts dealing with other aspects of the case. The example is well-known – the 'effective control' test in the *Case Concerning Military and Paramilitary Activities in And Against Nicaragua* (ICJ) and the 'overall control' test in *Tadić* case (International Criminal Tribunal for the former Yugoslavia).

There are a lot of examples of multiple proceedings in Private and Public International Law which relate to economic, environmental and human rights matters. The examples of multiple proceedings involving international courts which relate to environmental and/or economic matters are: the *Swordfish* case, initiated simultaneously by Chile versus the EU in the International Tribunal for the Law of the Sea on environmental aspects of the case and by the EU versus Chile in the WTO on trade aspects of the case; the *Pulp mills* case, decided by the International Court of Justice in 2010 (Argentina v. Uruguay) and the Arbitration Tribunal of MERCOSUR in 2006 (Uruguay v. Argentina); the *MOX Plant* case refers to three sets of litigation which comprise proceedings instituted by Ireland against the United Kingdom under the Convention for the Protection of the Marine Environment of the North-East Atlantic – within the arbitral tribunal; proceedings instituted by Ireland against the UK under the United Nations Convention on the Law of the Sea – within ITLOS and Annex VII arbitral tribunal; and proceedings instituted by the

[628] Ferrari F. P. 2-3.

European Commission against Ireland before the Court of Justice of the European Union; *Mexico-Soft Drinks* case decided within the framework of the WTO and initiated within the framework of NAFTA dispute settlement procedures; *Brazil – Retreaded Tyres* case brought within the WTO dispute settlement system and MERCOSUR; *Bosphorous Hava v. Ireland* considered by the ECtHR and the CJEU.

The examples of multiple proceedings in human rights, environmental and economic matters which involved national and international courts are *Ogoni* case considered by national courts of Nigeria, the United States, the Netherlands, the United Kingdom, the African Commission on Human Rights and the Economic Court of West Africa; *Texaco/Chevron* case considered by national courts of the United States, Ecuador, Canada, Argentina, Brazil, PCA, the IACtHR; *SGS v. Pakistan* case considered by the national court of Pakistan and the International Centre for Settlement of Investment Disputes.

Russian aggression against Ukraine led to a number of parallel proceedings in international courts: *Case on 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* (ICJ), *Case on Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ), *Case Concerning the Detention of Three Ukrainian Naval Vessels* (ITLOS), *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (UNCLOS Annex VII arbitral tribunal), *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (UNCLOS Annex VII arbitral tribunal), *Ukraine and the Netherlands v. Russia* (ECHR), *Ukraine v. Russia (re Crimea)* (ECHR), *Ukraine v. Russia (X)* (ECHR). Besides, ICC started its investigation into the matter of criminal responsibility for alleged genocide, war crimes and crimes against humanity. All these cases touch upon such issues as state/individual responsibility and human rights violations, although the courts interpret different international treaties.

Thus, sometimes courts exercise parallel jurisdictions which do not overlap directly, because they consider different aspects of the dispute

and give legal interpretations to international agreements connected with such particular aspects. The example is the above-mentioned set of cases concerning Russian aggression against Ukraine. But sometimes jurisdictions of several courts may come into direct conflict, especially when they dwell upon the same factual circumstances of the case. The examples are: *Nicaragua* and *Tadić* cases, *MOX Plant* case, *Southern Bluefin Tuna* case, etc.

Solutions. National and international law offer some solutions to settle the problem of multiple proceedings with conflicting jurisdictions:

1. The principle of *res judicata*. *Res judicata* is the principle that a cause of action may not be relitigated once it has been judged on the merits[629]. It applies to sequential proceedings in which one court is seized of a dispute that another court already decided earlier[630]. This principle is applied by courts from common and civil legal systems if the parties are the same, the subject-matter of the dispute is the same, and the cause of action is the same[631].

This principle is well-established in Public International Law. In its 2007 judgment in the *Case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) the ICJ had to consider the application of the principle of *res judicata* to the 1996 judgment in this case. The Applicant asserted that the 1996 Judgment, whereby the Court found that it had jurisdiction under the Genocide Convention, 'enjoys the authority of res judicata and is not susceptible of appeal' and that 'any ruling whereby the Court reversed the 1996 Judgment... would be incompatible both with the res judicata principle and with Articles 59, 60 and 61 of the Statute'[632]. There was no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret

[629] Legal Information Institute. Res Judicata. URL: https://www.law.cornell.edu/wex/res_judicata.

[630] Pauwelyn J. and Salles L. P. 85.

[631] Pauwelyn J. and Salles L. P. 103.

[632] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment of the International Court of Justice of 2007. Para. 114. URL: https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf.

it differently as regards judgments deciding questions of jurisdiction[633]. The ICJ concluded that 'the fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding upon the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose'[634].

2. The principle of *lis pendens*. The doctrine of *lis pendens* has been proposed in a civil law system as a possible solution to the problem of abuse of process arising from the initiation of parallel, rather than sequential, proceedings concerning the same dispute[635]. The *lis pendens* doctrine allows a court to suspend a case that is also being heard in another forum to avoid conflicting decisions on the merits. In 2006, the International Law Association produced Resolution No. 1/2006 and two valuable reports on the issue – Final Report on *Lis Pendens* and Arbitration as well as Final Report on *Res Judicata* and Arbitration. The ILA provided some recommendations how to use this doctrine in order to avoid inconsistent and conflicting judgments in commercial arbitration.

The principle of *lis pendens* is reflected in Article 35(2)(b) of the ECHR which provides that the Court shall not deal with any application submitted under Article 34 that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information[636]. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) adopted a *lis pendens* rule in Article 7 which proclaims that where proceedings involving the same cause

[633] Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Para. 115.
[634] Ibid.
[635] Pauwelyn J. and Salles L. P. 106.
[636] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL: https://www.echr.coe.int/documents/convention_eng.pdf.

of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion decline jurisdiction in favour of that court[637]. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.

In the *Certain German Interests* case the PCIJ examined *lis pendes* principle mainly in the relations between proceedings held in different states[638]. The Court stipulated: 'It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of *litis pendance*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country'[639].

3. *Forum non conveniens* doctrine. It is a common law legal doctrine used in parallel proceedings whereby a court acknowledges that another court is more appropriate to deal with the case. The doctrine allows a court with proper jurisdiction and venue to dismiss a case when factors such as convenience to the parties and the court indicate that an alternative forum would be more appropriate[640]. Civil proceedings may be suspended or dismissed in favor of proceedings in another jurisdiction which may be more convenient for the parties'

[637] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968). URL: https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm.

[638] Gaja G. URL: https://www.ilsa.org/Jessup/Jessup2020/Basic%20Materials/Giorgio%20Gaja%20-%20Relationship%20of%20the%20ICJ%20with%20Other%20International%20Courts%20and%20Tribunals.pdf.

[639] Certain German Interests (Germany v. Poland). The Judgment of the Permanent Court of International Justice on the Preliminary Objections of 1925. URL: https://jusmundi.com/en/document/decision/en-certain-german-interests-in-polish-upper-silesia-preliminary-objections-judgment-tuesday-25th-august-1925.

[640] Greenberg M. The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law. *International Tax and Business Lawyer*. Vol. 4. P. 155.

private or public interest, e.g. which has closer ties with the defendant or where the burden of litigation is less burdensome for the defendant. According to the doctrine, such foreign jurisdiction (court) must be adequate and available.

In its judgment in *Factory at Chorzów* case, the Permanent Court of International Justice stipulated: 'It has not escaped the Court that the Oberschlesische supported the action brought by it before the Germano-Polish Mixed Arbitral Tribunal upon, inter alia, Article 305 of the Treaty of Versailles. … Whatever construction in other respects the Mixed Arbitral Tribunals have placed or may place upon this article, with which construction the Court wishes in no way to interfere, the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice'[641].

In *Mexico-Soft Drinks* case the WTO Appellate Body considered the possibility to surrender its jurisdiction to the NAFTA tribunal and concluded that it had no discretion to decline to exercise its jurisdiction in the case that had been brought before it[642]. In other words, the WTO Appellate Body seemed to argue that if a WTO panel has jurisdiction in a case, it must exercise it by rendering a ruling, regardless of whether or not other courts or tribunals might have jurisdiction or have been seized with the dispute[643].

4. In international arbitration there are some other tools to reach consistency in dispute settlement, namely, consolidation, coordination or concentration mechanisms. Provisions on consolidation which are found in investment treaties restate the general rule that consolidation

[641] Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction) (Germany v. Poland). Judgment of the Permanent Court of International Justice of 1927. Para. 83. URL: http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm.

[642] Mexico – Tax Measures on Soft Drinks and Other Beverages. Report of the Appellate Body of 2006. WT/DS308/AB/R. Para. 57. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/308ABR.pdf&Open=True.

[643] Lavranos N. P. 592.

is possible when all of the concerned parties agree and also qualify the circumstances in which consolidation is allowed, for example where the claims have a question of law or fact in common and arise out of the same events or circumstances[644]. Such provisions trigger a process that involves the establishment of a consolidation tribunal[645].

Certain investment treaties provide for coordination or concentration mechanisms[646]. For instance, the requirement that the claimant waives or terminates any other proceedings or remedies – also referred to as 'no U-turn' approach – is found in many recent investment treaties[647]. The so-called 'fork-in-the-road' clauses offer the investor a choice between the host State's domestic courts and international arbitration; once the choice is made, it is final[648].

Article 8.22 'Procedural and other requirements for the submission of a claim to the Tribunal' of the Comprehensive Economic and Trade Agreement (CETA) between Canada, on the one part, and the European Union and its Member States, on the other part, provides some safeguards against forum shopping in the form of 'no U-turn' approach. It stipulates that an investor may only submit a claim to a special Tribunal established under the Agreement if the investor, *inter alia*, withdraws or discontinues any existing proceeding before another tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim and waives its right to initiate any claim or proceeding before another tribunal or court[649].

The example of the implementation of this kind of rules may be found in *Renco Group v. Peru* case which was initiated under US-Peru

[644] Possible reform of investor-State dispute settlement (ISDS). Multiple proceedings and counterclaims. Note by the Secretariat. A/CN.9/WG.III/WP.193. 22 January 2020. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/193_advance_copy_for_website.pdf.

[645] Ibid.

[646] Ibid.

[647] Ibid.

[648] Ibid.

[649] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (2017). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)#d1e17608-23-1.

Trade Promotion Agreement (2006). The Award of the UNCITRAL Tribunal dismissed Renco's claim on jurisdictional grounds due to its failure to submit a valid waiver[650]. According to Article 10.18.2 (b) of the Agreement, the foreign investor must submit a waiver together with a Notice of Arbitration (or request for arbitration) to the Respondent State[651]. The Tribunal reiterated that by means of a written waiver, the foreign investor waives the right to pursue legal proceeding in local courts, and any other forum for the settlement of disputes concerning the alleged violation(s)[652]. The case records show Renco introduced a declaration to the waiver provision reserving the right to bring the matter to another forum 'for a resolution on the merits' if the present claim were to be dismissed or declared inadmissible[653]. The Tribunal concluded that such declarations are contrary to the object and purpose of the waiver provision, which was designed to avoid parallel or subsequent procedures[654].

Article 8.24 'Proceedings under another international agreement' of CETA envisages another instrument – coordination. It stipulates that where a claim is brought pursuant to this Agreement and another international agreement and there is a potential for overlapping compensation, or the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Agreement, the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision or award[655].

[650] The *Renco Group, Inc. v. Republic of Peru*: An Assessment of the Investor's Contentions in the Context of Environmental Degradation. URL: https://harvardilj.org/2017/10/the-renco-group-inc-v-republic-of-peru-an-assessment-of-the-investors-contentions-in-the-context-of-environmental-degradation/.

[651] Ibid.

[652] Ibid.

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[655] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (2017). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX: 22017A0114(01) #d1e17608-23-1.

There exist two main approaches established in ICSID awards regarding the implementation of 'fork-in-the-road' clauses[656]. The first approach, shown in *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia* (2001), is based on the principle of *ne bis in idem*; requiring identity of the parties as well as identity of the cause and subject-matter of the actions[657]. Arbitral tribunals have applied the 'fork in the road' provision through the lens of strict conditions called a triple identity test: in order for such a provision to deploy its effects, the application brought before the national jurisdiction and before arbitral tribunals must have the same object, the same cause of action and must include the same parties[658]. The second approach adopted by ICSID tribunals as explained in *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania* (2009) highlights a qualitative test which is whether or not the 'fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere[659].

Tasks and questions for individual work:

1. Analyze the jurisdictional issues in the *Ogoni* case and answer the following questions:

1) what are the facts of the case?

2) tell about the litigation and jurisdictional principles applied in the courts of Nigeria;

3) tell about the litigation and jurisdictional principles applied in the courts of the United States;

4) tell about the litigation and jurisdictional principles applied in the courts of the Netherlands;

5) tell about the litigation and jurisdictional principles applied in the courts of the United Kingdom;

[656] Özçelik G. The Fork in the Road Clauses in ICSID Arbitral Awards. Public and Private International Law Bulletin. 2020. Vol. 40, No. 1. P. 498-499.
[657] Ibid.
[658] Fork in the Road Provision in Investment Arbitration. URL: https://www.acerislaw.com/fork-in-the-road-provision-in-investment-arbitration/.
[659] Özçelik G. P. 498-499.

6) tell about the litigation in the African Commission on Human Rights;

7) tell about the litigation in the Economic Court of West Africa.

2. Consider the moot case and answer the questions.

State A and State B are states with opposite coasts and share the common sea. They have a dispute concerning the functioning of a nuclear plant situated in the territory of State A. State B claims that the plant contaminates the common sea with nuclear wastes. States were not able to resolve the dispute by negotiations and decided to refer it to an international court.

State A and State B are Member States of the European Union and parties to the UN Convention on the Law of the Sea as well as the International Court of Justice Statute. Both states made declarations on the recognition of the ICJ jurisdiction without any exceptions. Upon the UNCLOS ratification State A made a declaration by which it had chosen an arbitral tribunal constituted in accordance with Annex VII as the main dispute settlement procedure and State B made a declaration by which it had chosen an arbitral tribunal constituted in accordance with Annex VIII as the main dispute settlement procedure for disputes involving dumping (it considers nuclear contamination as dumping into the sea).

State A claims that the dispute must be settled by the International Court of Justice or an arbitral tribunal constituted in accordance with Annex VII. State B claims that the dispute must be settled by an arbitral tribunal constituted in accordance with Annex VIII and International Tribunal for the Law of the Sea (it is going to request the Tribunal to prescribe provisional measures for the prohibition of the functioning of the plant till the judgment of an arbitral tribunal). States agree that the subject matter of the dispute concerns the application and interpretation of UNCLOS.

Which international court will have jurisdiction to hear the case?

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