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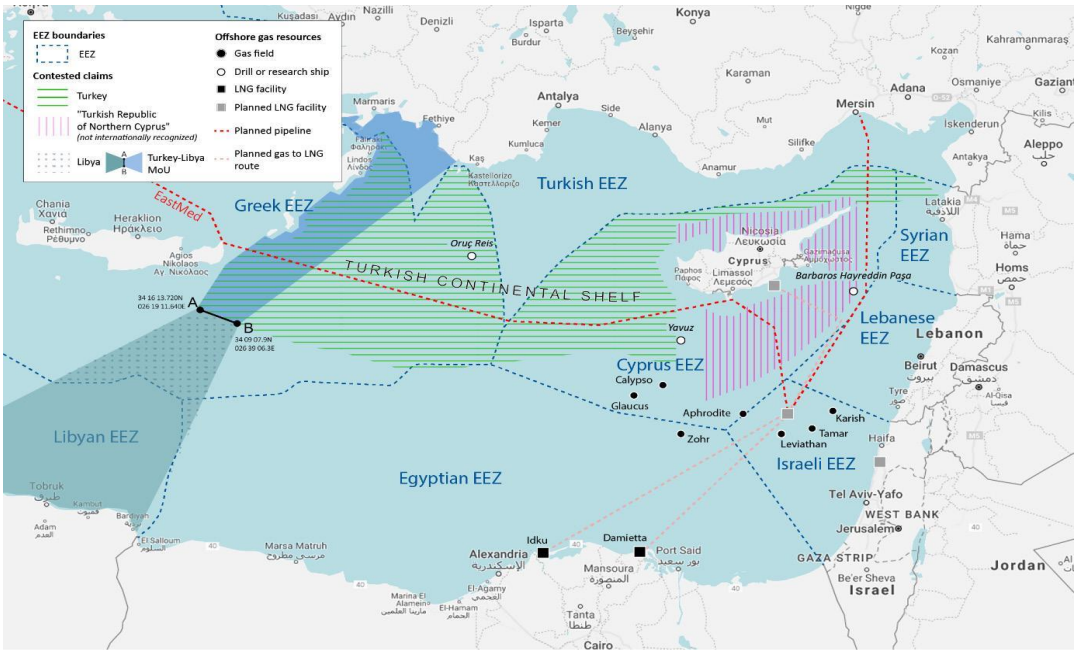

Master Thesis:

"The Turkey-Libya Memorandum of Understanding:

"Cutting-off" the very essence of International Law"

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For the cornerstones of my life,
my father, George, my mother, Vasiliki,
my sister, Chrusanthi,
and for my newborn niece

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Acknowledgement

When I started my academic journey in the University of Piraeus, never would I have imagined that the field of International Law would obtain such a special place in my heart and mind. In my eleven year career as a Lawyer I never had the chance to indulge in so many intriguing issues and I am sure that if it was not for my Supervisor Professor Mr. Petros Liakouras, I would have never walked this path. His devotion to science along with his students, his encouragement, patience, assistance and support towards contributing novel ideas with no academic restrictions and most importantly his trust in me, as Pr. Liacouras honored me with his proposal to undertake the pressing issue of the Turkey-Libya MoU and its legal repercussions in the context of my master thesis, consist the key factors of my inspiration and I will never stop being grateful to him. Of course, the undivided love and support of my family and friends, especially in the unprecedented era of the Covid-19 pandemic, was and will always be my driving force and I could never thank them enough.

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Michaela G. Tsitilakou

Abstract

In the era of grave geopolitical realignments, the international legal order faces challenges, constituting the need of amendments imperative, in order to secure legal certainty and stability within a just international environment that should be attributed with the means of legal enforcement and intervention, especially in cases of violation of norms set to serve and protect public interest. The present thesis, examines the case of the MoU that was signed between the States of Turkey and Libya on the 27th of November 2019, towards the delimitation of their alleged maritime boundaries and the legal issues deriving from the content of this agreement. In the context of a comprehensive study over the specific case of maritime delimitation, it is necessary to address the interrelation of the International Law of the Sea with International Law, the jurisdictional maritime zones and their legal status under the UNCLOS, with the Continental shelf being the main point of interest, the delimitation of maritime boundaries as a process, as well as the implications caused by dependent islands caught in the middle of it, and the legal nature of the MoU in question, which is determinative for the application of International Law, the Law of treaties and State Responsibility. The objectives of the current research are to provide proof of the illegal nature of the MoU, to detect all possible realized infringements, as well as to identify its legal consequences, the possible grounds of invalidity and the provided procedures towards its annulment, along with the established rights of the injured third States, under the scope of International Law.

Abbreviations

- *CCS* — *Geneva Convention on the Continental shelf*
- *CS* — *Continental shelf*
- *ECJ* — *European Court of Justice*
- *EEC* — *European Economic Community*
- *ECT* — *Energy Charter Treaty*
- *EECT* — *European Energy Charter Treaty*
- *EEZ* — *Exclusive Economic Zone*
- *GNA* — *Government of National Accord*
- *HOR* — *House of Representatives*
- *ICJ* — *International Court of Justice*
- *ILC* — *International Law Commission*
- *IOs* — *International Organizations*
- *ITLOS* — *International Tribunal for the Law of the Sea*
- *MoU* — *Memorandum of Understanding*
- *NEP* — *The Principle of non encroachment*
- *NCP* — *The Principle of non-cutting-off*
- *PCA* — *Permanent Court of Arbitration*
- *PCIJ* — *Statute of the Permanent Court of International Justice*
- *PSNR* — *Permanent Sovereignty over Natural Resources*
- *SMB* — *Single Maritime Boundary*
- *TPAO* — *Türkiye Petrolleri Anonim Ortakligi (Turkish Petroleum Corporation)*
- *TSC* — *Geneva Convention on the Territorial Sea and the Contiguous Zone*
- *UAE* — *United Arab Emirates*
- *UN* — *United Nations*
- *UNCLOS* — *United Nations Convention on the Law of the Sea*
- *UNTS* — *United Nations Treaty Series*
- *US* — *United States*
- *VCLT* — *Vienna Convention on the Law of Treaties*

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Decision of 14 March 1978, Reports of International arbitral awards Vol. XVIII pp. 3-413, UN 2006

- *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985, Reports of International arbitral awards, Vol. XIX pp. 149-196, UN 2006*
- *East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90*
- *Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, ICJ Reports 1951*
- *Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings of December 17th 1999*
- *In the Matter of an Arbitration between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016, PCA Case No 2013-19*
- *In the Matter of an Arbitration between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case No 2013-19*
- *Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136*
- *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I. C. J. Reports 1994, p. 112*
- *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, p. 61*
- *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3*
- *North Sea Continental shelf Cases (Federal Republic Of Germany v. Denmark; Federal Republic Of Germany v. Netherlands), Judgment of 20 February 1969, ICJ Reports 1969*
- *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p. 624*
- *The Grisbadara case between (Norway Vs Sweden), Award of the Tribunal of 23 October 1909, Unofficial English Translation*

Introduction

I. The nature of the International Law of the Sea

The socioeconomic and political importance of the Sea for human communities worldwide is interlinked with the history of humanity itself. From antiquity to the Renaissance, the freedom of navigation in high seas was self evident. Ever since the late medieval period, people around the world started to abolish self evidents and to make claims over marine areas progressively. From this point on, the constant changes upon the international community lead to radical developments as regards the oceans and the escalating interest of humanity towards their dominance and exploitation.[1] The ever-increasing use of the oceans gave birth to the constant need to call upon international rules governing various human activities in them. According to Pr. Tanaka: *"The body of international rules that bind States and other subjects of International Law in their marine affairs is called the International Law of the sea."*[2] The Law of the Sea reflects both classical and novel aspects of International Law. Thus, the Law of the Sea is indissolubly linked to the development of public International Law as a whole and must always be examined from this point of view.

The aforementioned need to study the Law of the Sea from the perspective of the development of International Law, in general, derives from the mere fact that, like the International Law of armed conflict and the law of diplomacy, the law of the sea is one of the oldest branches of public International Law, as well as a dynamic field of it just as the international human rights law and international environmental law.[3] Originally, the Law of the Sea consisted of a body of rules of customary law, progressively codified, later on. The Third United Nations (UN) Conference on the Law of the Sea, culminated the codification process in the field of the Law of the Sea, by successfully adopting the United Nations Convention on the Law of the Sea (UNCLOS) in 1982, which nowadays is considered and recognized as part of customary law as a whole, legally binding for the international community, by important international players, like the US.[4]

[1] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 2-5
[2] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p.3
[3] *Ibid*, p.3
[4] Letter dated 12 October 2021, from the the Secretary of State Washington *Antony Blinken* to the Prime Minister of Greece *Kyriakos Mitsotakis*, p. 2

II. Sources of the International Law of the Sea

Under the scope of being inextricably linked to International Law, the Law of the Sea shares the same sources with it. It is of high importance to get familiarized with the way the sources of International Law and the Law of the Sea thereof "*define the rules of the system"*.[5] Hence, in order for a newly introduced rule to be integrated to the body of rules governing the field of International Law, it is necessary for it to be confirmed by one of the sources of International Law.

The formally recognized sources of International Law are reflected in Article 38(1) of the Statute of the International Court of Justice (ICJ). Nonetheless, the UNCLOS via Article 83(1) refers to Article 38 of the Statute of the ICJ.[6] According to Article 38(1):

"1. The Court, whose function is to decide in accordance with International Law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States ;

b. international custom, as evidence of a general practice accepted as law;

c. the general Principles of law recognized by civilized nations ;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

The sources of International Law are often distinguished by writers in formal and material sources. According to Pr. Tanaka *"The formal sources refer to the source from which the legal rule derives its legal validity, while material sources denote the provenance of the substantive content of the rule."*[7] Pr. Crawford exquisitely notes that *"The distinction between formal and material sources is difficult to maintain. The former reduces to a quasi-constitutional Principle of inevitable but unhelpful generality. What matters more is the variety of material sources. These are the all-important evidence of a normative consensus among States (p. 19) and other relevant actors concerning particular rules or practices. Decisions of the International Court, resolutions of the General Assembly, and 'law-making' multilateral treaties are evidence of the attitude of these actors towards particular rules and of the presence or absence of consensus. Moreover, there is a process of interaction which gives these a status somewhat higher than other 'material sources'. Neither an*

[5] Crawford, J., 2019, *"Brownlie's Principles of Public International Law"*, 9th Edn, United Kingdom, Oxford University Press, p. 181

[6] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 33

[7] Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press, p.11

unratified treaty nor a report of the International Law Commission (ILC) to the General Assembly has any binding force as a matter of treaty law or otherwise. However, such documents stand as candidates for public reaction, approving or not as the case may be. They may approach a threshold of consensus and confront States which wish to oppose their being given normative force."[8]

II.1. Formal Sources

The formal sources of International Law are in essence the legal procedures by which legal rules emanate. More specifically the recognized formal sources are as follows:

a. Treaties[9]:

According to Article 2(1a) of the 1969 Vienna Convention on the Law of Treaties (VCLT), a treaty is defined as *"an international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"*. While a treaty may be described in various ways, such as "convention", "agreement" or "protocol", these terms are all interchangeable. Treaties can be bilateral, i.e. between two parties, or multilateral, i.e. between three or more parties. Treaties can also be "universal" or "regional".

In any case a treaty is binding only upon its parties, unless an obligation stated in a treaty is or becomes an obligation of general customary law. In this regard, Article 26 of the VCLT, under the heading *"pacta sunt servanda"*, provides that: *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith".* As a corollary of the Principle of *pacta sunt servanda*, the Principle *res inter alios acta nec noct nec prodest* (a transaction between others effects neither disadvantage nor benefit) applies to treaties. Under Article 34 of the VCLT, that Principle is expressed as follows: *"A treaty does not create either obligations or rights for a third State without its consent".*

A State becomes bound by a treaty by becoming a party to it. Under Article 11 of the VCLT, *"[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed"*. As the ICJ observed in the *Cameroon/Nigeria case*, a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into

[8] Crawford, J., 2019, *"Brownlie's Principles of Public International Law"*, 9th Edn, United Kingdom, Oxford University Press, p. 181

[9] Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press, p.15-16

force of a treaty, even though there are also cases where a treaty enters into force immediately upon signature. In practice, consent by ratification is the most popular method adopted.

b. Customary Law[10]:

Historically, customary International Law has been the main source of International Law, including the law of the sea. Customary International Law can be divided into two categories.

The first category is general customary law. While treaties are binding only upon the parties to them, it is widely accepted that rules of general customary law are binding upon all States in the international community. In this regard, the ICJ, in the *North Sea Continental shelf Cases*, stated that general or customary law rules and obligations *"by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour"*. Thus, rules of general customary law are also binding upon newly independent States, even though they did not participate in the formation of these rules concerned. Given that in the context of the law of the sea, there is no treaty to which all States are parties, rules of general customary law continue to be binding for them too. Customary law is also applied in situations where there is no established rule in relevant treaties.

The second category involves special or local customary law, which is applicable only within a defined group of States. A well-known example of local customary law is the practice of diplomatic asylum in Latin America. A special or local customary law may exist solely between two States.

c. General Principles of Law[11]:

Originally, *"general Principles of law recognized by civilized nations"* were provided in Article 38 of the Statute of the Permanent Court of International Justice (PCIJ) with a view to preventing non liquet, i.e. a finding that a particular claim could neither be upheld nor rejected because of lack of an existing applicable rule of law.

There are two possible interpretations with regard to the nature of the Principles. One interpretation is that the Principles concerned refer to legal Principles shared by municipal legal systems. According to this interpretation, "general Principles of law" can be derived from a comparison of the various systems of municipal law. Another interpretation is that the general Principles of law also include general Principles applicable to legal relations generally.

[10] Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press, p.12
[11] *Ibid*, p.17-18

In practice, neither the ICJ nor its predecessor, i.e. the PCIJ, has based a decision entirely and directly on such general Principles. In the Law of the Sea, general Principles of law are of limited value. Hence it may be said that customary International Law and treaties constitute two main sources of the International Law of the Sea.

II.2. Material Sources

Material sources of International Law provide, clarify, crystallize and finally determine the rules of law which become legally binding of general application and more specifically:

a. Judicial Decisions and the Writings of Publicists

Judicial decisions influence not only the International Law of the Sea, but also International Law in general, due to the four functions that Pr. Tanaka attributes to them[12]: i. *the identification of rules*, by either the application of a particular rule of law or the affirmation of its infringement, ii. *the consolidation of rules*, by following the case law as regards to the interpretation and application of rules of law, iii. *the clarification of rules*, by defining the meaning and the ambit of any rule of law in the context of settling disputes and iv. t*he formation of rules.*

Apart from jurisprudence, as Pr. Tanaka underlines *"writers, such as Grotius, Bynkershoek and Emer de Vattel, have had a formative influence on the development of International Law. Furthermore, the monumental treatise of Gilbert Gidel, Le droit international public de la mer (3 vols., Paris, 1932 – 34) has been considered as a work of great authority in this field. Some authoritative expert bodies, such as the ILC and the Institut de droit international, also furnish important materials analogous to the writings of publicists."*[13]

b. Non-Binding Instruments[14]

Non-binding instruments or as they are often called by the controversial term "soft law"[15], i.e. declarations, resolutions and guidelines adopted by international organizations such as the UN, which are of legal importance as they participate in various ways in the constituting of International Law. Hence, non-binding instruments may contribute to the conclusion of multilateral treaties or specific provisions of them, as in the case of the 1970 Declaration of Principles Governing the Deep

[12] Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press, p.18-19
[13] *Ibid*, p. 19
[14] *Ibid*, p. 19-20
[15] *Ibid*, p. 19

sea-bed, which formed the basis for Part XI of the LOSC concerning the Area, or they can provide guidance on interpretation of a treaty and amplify its terms, as in the case of the 1995 FAO Code of Conduct for Responsible Fisheries, which amplifies relevant provisions of the LOSC and the 1995 Fish Stocks Agreement.

Furthermore, non-binding instruments can affirm the existence of rules that reflect customary International Law. For example, the Arbitral Tribunal, in the 1977 Texaco Overseas Petroleum Company case, declared that the UN General Assembly Resolution on Permanent Sovereignty over Natural Resources (1803 (XVII)) reflected "*the State of customary law existing in this field* ." Last but not least non-binding instruments may provide for the emergence of new rules of customary International Law. By way of example, one may quote the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which seems to have given a strong impetus to the establishment of the right of self-determination as a Principle of International Law, back in time.

c. Unilateral Acts[16]

In principle, unilateral acts of a State cannot result in rights and obligations. In the context of the Law of the Sea, unilateral Statements of a State have had some formative effect on the development of the law. A case in point is the 1945 Truman Proclamation on the Continental shelf. As we shall see later, the Truman Proclamation constituted the starting point of the legal regime on the Continental shelf (CS).

d. Considerations of Humanity[17]

Human activities in the oceans hold high risks in many cases, thus in the context of the International Law of the Sea, considerations of humanity are taken into account both in jurisprudence and in the content of treaties. Hence, considerations of humanity can be seen in the 1949 *Corfu Channel judgment*, in the *M/V "Saiga"* (No. 2) case, in *the Enrica Lexie Incident case* in 2015, but also in the International Convention on Maritime Search and Rescue and Articles 18(2), 24(2), 44, 98 and 146 of the UNCLOS. Case law and international agreements, highlight the interrelation of the Law of the Sea and Human Rights[18].

[16] *Ibid*, p. 20-21
[17] *Ibid*, p. 21-22
[18] *Ibid*, p.21

III. The subjective scope of the International Law of the Sea[19]

Primarily, the International Law of the Sea is binding upon all States; however there are various categories of States as regards their governing rules. More specifically:

a. The relations among the contracting States are governed by the UNCLOS, along with the complementary implementation of general International Law and of any international act signed by them, always in accordance with the UNCLOS, regarding the maritime zones under their jurisdiction.

b. The relations among non–contracting States to the UNCLOS are governed by the general rules of the Law of the Sea, by any binding multilateral convention, as for example the 1958 Geneva Conventions and by the international acts signed between them.

c. The relations among a contracting and a non–contracting State to the UNCLOS are governed by the same legal status as in the above mentioned case in the second (b.) paragraph. However, there is a category of States which have signed the UNCLOS, but have not ratified it. In these cases it is possible for the UNCLOS to be implemented regarding their relations, even though it is not applied formally.

IV. The objective scope of the International Law of the Sea[20] – Marine and submarine zones

The International Law of the Sea and more specifically the UNCLOS is applied in all maritime zones worldwide, concerning the activities and the relations that evolve throughout the territorial sea to the oceans, including the Area (sea-bed and subsoil). The objective scope of the International Law of the Sea is in direct correlation with every specific marine or submarine space. In order to determine the applicable rules in each case there has to take place a distinction between the various marine or submarine spaces by setting two criteria: a factual and a legal one. The factual criterion, as a general rule, is the distance of a marine space from the coast, whereas the legal criterion is the jurisdiction granted by the International Law to States, i.e. coastal States, concerning a given marine

[19] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 42-43
[20] *Ibid*, p. 44-45

or submarine space. Consequently the marine and the submarine space of the planet is governed by different legal regimes, depending on the specific marine or submarine zone which is under study.[21]

The contemporary International Law of the Sea divides the ocean into multiple jurisdictional zones and more specifically: a. internal waters, territorial seas, the contiguous zone, archipelagic waters, the exclusive economic zone (EEZ), the fishery zone and the high seas, which consist the marine spaces provided for and b. The sea-bed and subsoil of internal waters, territorial seas and archipelagic waters, the Continental shelf (CS), the sea-bed and subsoil of the EEZ and the Area, which consist the submarine spaces provided for.[22]

IV.1. Territorial sea

The territorial sea is a marine space under the territorial sovereignty of the coastal State up to a limit not exceeding 12 nautical miles measured from baselines. The territorial sea comprises the sea-bed and its subsoil, the adjacent waters, and its airspace. The landward limit of the territorial sea is the baseline. In the case of archipelagic States, the inner limit of the territorial sea is the archipelagic baseline. The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.[23]

As regards the legal character of the territorial sea, the Permanent Court of Arbitration, in the 1909 Grisbadara case between Norway and Sweden, Stated that: "*Whereas this opinion conforms with the fundamental Principles of the law of nations, both ancient and modern, according to which maritime territory is an essential appurtenance of land territory, from which it follows that at the time when, in 1658, the land territory called the Bohuslän was ceded to Sweden, the radius of maritime territory forming the inseparable appurtenance of this land territory must have automatically formed a part of that cession;"*[24] According to Judge McNair, *"the possession of this territory [territorial waters] is not optional, not dependent upon the will of the State, but compulsory."*[25] Hence, it is indisputable that the territorial sea is under the territorial sovereignty of the coastal State.

[21] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 44-45
[22] Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press, p. 4
[23] *Ibid*, p. 102
[24] The Grisbadara case between (*Norway Vs Sweden*), Award of the Tribunal of 23 October 1909, Unofficial English Translation, p.4
[25] Verzijl, J. H. W., 1953, Territorial Controversies before the International Court of Justice, Netherlands International Law Review, p 255

IV.2. Continental Shelf (CS)

The legal definition of the CS is provided by Article 76(1) of the UNCLOS, according to which *"The Continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."* Thus, in a legal sense, the CS does not include the sea-bed of the territorial sea[26].

The coastal State exercises over the CS sovereign rights for the purpose of exploring and exploiting its natural resources[27]. The essential characteristics of sovereign rights can be summarized as follows:

(i) Sovereign rights exercised over the Continental shelf are inherent rights to territorial sovereignty[28], and do not depend on occupation, effective or notional, or on any express proclamation[29]. Consequently, the rights over the CS exist *ipso facto* and *ab initio*, as was ruled by the ICJ in the 1969 *North Sea Continental shelf Cases*[30], which lead to the establishment of customary law.

(ii) The sovereign rights of the coastal State over the CS are those of the exploration and exploitation of its natural resources.[31] According to the provision of Article 77(1) of the UNCLOS, the rights of the coastal State do not extend over non-natural resources, an argument that has been affirmed by the ILC in 1956, when it excluded wrecks and their cargoes from the regime of the CS[32]. More specifically, in its Commentary regarding Article 68 the ILC Stated that: *"It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the subsoil."*[33]

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[26] Article 76(1) of the UNCLOS
[27] Article 77(1) of the UNCLOS
[28] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 172; Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 176
[29] Article 77(3) of the UNCLOS
[30] *ICJ Reports 1969*, par. 19
[31] Article 77(1) of the UNCLOS
[32] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δικαιο Της Θάλασσας*, 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 181
[33] Yearbook of the International Law Commission, 1956, *Documents of the eighth session including the report of the Commission to the General Assembly*, Volume II, United Nation Publication, p. 298

(iii) Natural resources consist of the mineral and other non-living resources of the sea-bed and subsoil, but according to the UNCLOS, sedentary species are also included in the ambit of natural resources[34].

(iv) *Although there is no provision like Article 73(1) of the UNCLOS, there seems to be a general sense that sovereign rights include legislative and enforcement jurisdiction with a view to exploring and exploiting natural resources on the Continental shelf.*[35]

(v) The exercise of sovereign rights of the coastal State extends over every person or vessel without any restrictions considering their nationality. *Thus there is no limit concerning personal scope*[36].

(vi) Under the provision of Article 246(1,2) of the UNCLOS, coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their CS in accordance with the relevant provisions of this Convention. In case the coastal State does not exercise these rights, no one may undertake these activities without the express consent of the coastal State. Hence, the sovereign rights of the coastal State are *exclusive*[37]. However, the exclusivity of these rights must not lead in the breach of other rights and freedoms of other States as provided for in the UNCLOS [Articles 78(1), 78(2) and 79].[38]

Overall, sovereign rights over the CS are spatial, as they can be exercised only over the marine space in question, no matter the nationality of persons or vessels. Furthermore, the rights over the CS attribute spatial jurisdiction to the coastal State, in correspondence to the provisions for the Exclusive Economic Zone (EEZ). In addition to these sovereign rights, the coastal State has jurisdiction over artificial islands, marine scientific research, dumping, drilling operations and other purposes.

[34] Article 77(4) of the UNCLOS
[35] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 172
[36] *Ibid*, p. 172
[37] *Ibid*, p. 172
[38] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 180

IV.3. Exclusive Economic Zone (EEZ)

Article 55 of the UNCLOS provides that the EEZ is an area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baseline of the territorial sea. Given that the maximum breadth of the territorial sea is 12 nautical miles, as mentioned above, the maximum breadth of the EEZ is 188 nautical miles.

The EEZ is not a part of the high seas. On the contrary it is a *sui generis*[39] zone which according to Article 55 of the UNCLOS is *"[…] subject to the specific legal regime […]"* and cannot be identified neither with the sovereignty of the coastal State over the territorial sea nor with the freedom that governs the high seas. It is a marine zone where not only the coastal State exercises its rights, but also every other State has their own rights and freedoms, granted to them by the UNCLOS and exercised within the framework of the Convention, such as navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, according to Article 58 of the UNCLOS.[40]

Within the limits of the EEZ the coastal State exercises specific powers and most importantly: a. sovereign rights for the purpose of exploring and exploiting, mostly for economic purposes, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds, according to Article 56(1a) of the UNCLOS and b. jurisdiction over (i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research, and (iii) the protection and preservation of the marine environment, according to Article 60 of the UNCLOS. A key point that must be highlighted is the fact that opposite to the sovereign rights of the coastal State over the Continental shelf, the sovereign rights over the EEZ do not exist *ipso facto* and *ab initio*, but an express proclamation by the coastal State is required.[41]

[39] *Ibid*, σελ. 192
[40] *Ibid*, σελ. 193
[41] *Ibid*, σελ. 194

V. The concept of Sovereignty and Sovereign rights

Historically the sense of sovereignty is linked to the appearance of the modern State[42]. In the modern international society, sovereignty is based upon the mutual recognition that each State holds solely the competence of its national affairs and the right to prohibit any foreign interference.[43] Thus, sovereignty means that each State can act in any way deemed appropriate, as long as no breach of the International Law is taking place and no intervention in other States' rights is occurring.[44]

Usually, sovereignty has a negative and a positive expression.[45] Its negative expression is reflected in the absence of submission by a sovereign State to a foreign power, unless it consents to cede part of its sovereignty to another international entity (dual meaning of the concept of sovereignty), whereas its positive expression, according to Rousseau[46], is reflected in: a. the Principle of exclusivity of State competences, b. the Principle of the autonomy of State competences and c. the Principle of comprehensiveness of State competences. According to those Principles, the State sovereignty is exclusive, autonomous and comprehensive, even when limited by procedures recognized by International Law.[47]

In 1953 the International Law Commission (ILC) created the concept of *"sovereign rights"* in order to harmonize the various perceptions of the era as regards the nature of the rights of the coastal State over the CS, a term that was adopted by both the Geneva Convention on the Continental shelf [Art. 2(1)] and later the UNCLOS [Art. 77(1)]. Sovereign rights are defined as rights of special purpose (usually operational), related to territorial sovereignty since they are exercised over the Continental shelf, but different from it.[48] Territorial sovereignty means the exercise of all State competences, as mentioned above, whereas sovereign rights are limited to specific purposes. Moreover, territorial sovereignty is directly intertwined with its exclusive exercise, whereas sovereign rights do not depend on it.[49]

The term *"sovereign right"* is also adopted as regards the EEZ in Article 56(1a) of the UNCLOS, though it does not coincide with the one adopted concerning the CS. In both cases these

[42] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1990, *Δημόσιο Διεθνές Δίκαιο: Οι φορείς δικαιωμάτων και υποχρεώσεων στη διεθνή έννομη τάξη, Πανεπιστημιακές σημειώσεις,* Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 45
[43] *Ibid*, σελ. 46
[44] *Ibid*, σελ. 46
[45] *Ibid*, σελ. 46
[46] *Ibid*, σελ. 46
[47] *Ibid*, σελ. 47
[48] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 176
[49] *IIbid* , σελ. 177

rights are operational and of special purpose, mostly economic and have limited extend in comparison with the rights that derive straight from territorial sovereignty. Unlike the rights over the Continental shelf that exist *ipso facto* and *ab initio*, the homonymous rights over the EEZ are acquired in the occasion of an express proclamation by the coastal State. In addition, even though the EEZ is an exclusive zone, there are limitations *rationae materae* to some sovereign rights over it, namely in the case of utilization of the living resources as provided in Article 62(2) of the UNCLOS, due to which the coastal State holds the obligation to grant rights to other States.[50]

[50] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 194-195

Chapter 1: Delimitation of maritime boundaries

I. The concept of maritime delimitation

Maritime delimitation may be defined as *the process of allocating overlapping claims that the States concerned legitimately claim on the basis of an existing relationship to the marine areas in dispute*[51]· a process with the ultimate objective of reaching an *equitable solution*, which both International Law and International jurisprudence have highlighted as the very essence of this process.[52]

Maritime delimitation is not a unilateral act. Accordingly, the Chamber of the ICJ in the Gulf of Maine case affirmed this point, by stating: *"No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States."*[53] Consequently, it must be effected by agreement between relevant States. The reference to the term "agreement" highlights the international character of maritime delimitation.[54] *Hence, maritime delimitation is international by nature*[55] and as an agreement of such nature it is governed by the Principle *res inter alios acta* as stipulated under Article 34 of the VCLT.

The 1958 Geneva Conventions and the 1982 UNCLOS provide for four types of maritime delimitation and more specifically for the delimitation of: a. the territorial sea in Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone (TSC) and Article 15 of the UNCLOS, b. the contiguous zone in Article 24 of the TSC, c. the Continental shelf in Article 6 of the Geneva Convention on the Continental shelf (CCS) and Article 83 of the UNCLOS and d. the EEZ in Article 74 of the UNCLOS.[56] Furthermore, the delimitation process can be carried out via multiple methods and techniques, as the equidistance or median line, the bisector method, a perpendicular to the general direction of the coastal line, the extrapolation of the land boundary, Parallel lines (corridors) or enclavement.[57]

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[51] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 530
[52] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 332-333
[53] *ICJ Reports 1984,* p. 299, par. 112
[54] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 239
[55] *Ibid*, p. 237
[56] *Ibid*, p. 238
[57] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 182-198

As mentioned above, the delimitation process takes place either via the conclusion of an international agreement among the concerned States, or via means of peaceful settlement of the dispute.[58] Hence, in the event of failure to conclude an agreement, States have the right (having explicitly agreed upon it) to recourse to Courts (ICJ, ITLOS, PCA etc) in order to realize the delimitation of their maritime boundaries or draw a single boundary line. Over the years the International Courts have established three stages in which they proceed in order to reach the objective of reaching an equitable solution.

In the Case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*[59] in 2009, the ICJ describes in full analysis and with impressive precision these three separate stages[60] as follows:

"First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 745, para. 281). So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both.

Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the delimited. The Court considers elsewhere (see paragraphs 135-137 below) the extent to which the Court may, when constructing a single-purpose delimitation line, deviate from the base points selected by the Parties for their territorial seas. When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both Parties' coast-lines when choosing its own base points for this purpose. The line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts.

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of

[58] Γαβουνέλη, Μ., 2016, *"Ενεργειακές Εγκαταστάσεις στην Θάλασσα",* Νομική Βιβλιοθήκη ΑΕΒΕ, σελ.51
[59] *ICJ Reports 2009*, p. 101-103, par. 115-122
[60] Γαβουνέλη, Μ., 2016, *"Ενεργειακές Εγκαταστάσεις στην Θάλασσα",* Νομική Βιβλιοθήκη ΑΕΒΕ, σελ.57

the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria : Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 441, para. 288). The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable Principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result" (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 741, para. 271).

This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjustedby taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line (see paragraphs 214-215). A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa" (Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64)."

A fundamental rule of maritime delimitation derives from the provisions of Articles 15, 74 and 83 of the UNCLOS, which clarify that maritime delimitation is an undergoing process among neighboring States with opposite or adjacent coasts and the ratio of those provisions is that overlapping claims can surface solely between neighboring States i.e. in close vicinity, without the intervention of a third States entitlements in the area, which in such a case must be included in the delimitation processes. Regarding the nature of Articles 74(1) and 83(1) of the UNCLOS, in the case of maritime dispute (Peru Vs Chile), the ICJ ruled that:

"The Court proceeds on the basis of the provisions of Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS which, as the Court has recognized, reflect customary International Law (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 91, para. 167; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II), p. 674, para. 139). The texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the Continental shelf."[61] Therefore, as mentioned above, these provisions are binding for all States of the international community, even for the non-contracting States in the UNCLOS.

II. The notion of Single Maritime Boundary (SMB)

After the establishment of the EEZ by the UNCLOS and due to its proximity to the sense of the CS, it became more and more common in practice for neighboring States to form agreements by essentially drawing a single maritime boundary. It is reported that in 1985 there were 29 cases of contractual delimitations of EEZ, where the relevant States adopted delimitation lines that coincided with the ones of the CS.[62] Of course when a single maritime boundary is drawn, not all rules of maritime delimitation are applied but only those in common for all marine spaces under delimitation. Hence, in the *Case concerning delimitation of the maritime boundary in the Gulf of Maine area* in 1984, the ICJ refused to apply Article 6 of the TSC on the grounds that it is applicable only in the case of the CS delimitation.[63]

In the aforementioned *Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada/United States of America)*, the ICJ in 1984 ruled that:

"In reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the Continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradua1 adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand

[61] *ICJ Reports 2014*, p. 65, par. 179
[62] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δικαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 319
[63] *Ibid*, σελ. 320

for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation".[64]

In later years, the trend in State practice and jurisprudence[65] started to lean towards delimitations by single maritime boundaries. *In the 2005 International Maritime Boundaries Volume V, McRae and Yacouba observe a developing unity of the regimes within 200 nm as demonstrated by the fact that no agreement has been concluded in the period under consideration that delimits the water column alone, and only three agreements relating solely to the sea-bed within 200 nm.*[66]

III. The *Principles* of non-encroachment and non-cutting-off (NEP, NCP)[67]

One of the most controversial issues is the concept of non-encroachment and of the non-cutting-off as its corollary, which was introduced for the first time by the ICJ in the 1969 *North Sea Continental shelf Cases* as the Principle of natural prolongation. It then ruled that: *"delimitation is to be effected by agreement in accordance with equitable Principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the Continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;"*[68] According to the ICJ[69] the concept of non-encroachment is applicable in cases where the neighboring States share a common self, each one of which is the natural prolongation of the concerned States' territory and therefore what is of importance for the Court is that no encroachment occurs over the coastal extension of the concerned States.

Throughout the years, the case law has treated the concept of non-encroachment or non-cutting-off in various ways, either as an equitable Principle or as one of the relevant circumstances and even

[64] *Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada/United States of America)*, Judgment of 12 October 1984, ICJ Reports 1984, p. 85, par. 194

[65] i.e. *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985; *Case concerning the delimitation of maritime areas between Canada and France*, Decision of 10 June 1992, Court of Arbitration; *Case concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, ICJ Reports 1993; *Government of the State of Eritrea and the Government of the Republic of Yemen*, Award of the Arbitral Tribunal in the Second Stage of the Proceedings of December 17th 1999

[66] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation: the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 127

[67] *Ibid*, p. 530

[68] *ICJ Reports 1969*, p. 53, par. 101[C]

[69] *Ibid*, p. 36, par. 57

as a criterion in the context of the delimitation process[70]. These concepts, that case law has established as equitable Principles[71], are either applied implicitly in a variety of cases by Courts or invoked explicitly partially.[72] Either way, these Principles hold grave risks of resulting in unjust judgments in the name and in the context of reaching an equitable solution. The *1977 Channel Arbitration* is the most accurate example of the potential lurking perils as the Court Stated in the most scandalous way that *"The Channel Islands are not only "on the wrong side" of the mid-Channel median line but wholly detached geographically from the United Kingdom."*[73] This particular point could provide the ground for spurious assertions whenever islands are caught in the middle of overlapping claims between States. In the author's opinion, such an allegation in the *rationale* of the Court, apart from being extremely dangerous to be explicitly addressed, it could be considered as excess of jurisdiction because in essence, by questioning the geographical data, it "questions" sovereignty of the United Kingdom over the Channel islands, when no relevant claim had been submitted.

Jurisprudence[74] has proved to be parsimonious as regards to the application of these Principles, as in the vast majority of cases the Courts give effect in islands, as it will be explained below, and reject suggestions of enclavement.[75] If a different stance were to be adopted by the Courts, the provision of Article 121 of the UNCLOS would be rendered null and void leading to the circumvention of both the VCLT and customary law, in the sense that Article 121 reflects customary law, as it will be explained below.

[70] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 340
[71] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 530
[72] *Ibid*, p. 531
[73] *Delimitation of the Continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France),* Decision of 30 June 1977 and Decision of 14 March 1978, Reports of International arbitral awards Vol. XVIII, UN 2006, p. 94 par. 199
[74] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, pp. 530-536
[75] Award of the Arbitral Tribunal in the Second Stage (Maritime Delimitation) in the Matter between *Eritrea and Yemen*, 17 Dec. 1999, (2001) 40 ILM 983, paras. 154, 155; *ICJ Reports 2012,* pp. 700, 708 & 716, par. 206, 230 & 244

IV. The legal status of islands and their effect in the delimitation process

Article 121 of the UNCLOS provides that:

"*1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.*

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the Continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or Continental shelf."

The first paragraph sets the criteria upon which the legal sense of an island is structured. Hence, the area in question must be an area of land which must be attached to the sea-bed and have the nature of *terra firma*.[76] Furthermore, the formation of the island must have taken place naturally and not artificially. Thus, when human intervention sets in process of the formation, the outcome will not acquire the legal status of an island. Consequently, this formation shall not claim territorial sea. Last but not least, an island must be surrounded by water and be above it at high tide.

The second paragraph of Article 121 of the UNCLOS sets a general rule, according to which islands generate vast marine spaces.[77] Thus, they are entitled to the rights of territorial sea, contiguous zone, EEZ and CS.[78] The ICJ, in the 2001 *Qatar/Bahrain case* (Merits), pronounced that Article 121(2) of the UNCLOS reflects customary law, thus as mentioned earlier it is binding upon all States in the international community, even in the case of non-contracting States to the UNCLOS.[79]

Previous to the latter judgment it was also considered that the general rule set by Article 121(2) of the UNCLOS reflected customary International Law. More specifically, as regards the territorial sea, even since the Hague Conference in 1930, it was acknowledged that every island is entitled to its own internal waters. This perception was incorporated into Article 10(2) of the TSC and was established by the International Law of the Sea. Regarding the other marine zones, with emphasis to the CS, we must highlight the 1969 judgment of the ICJ in the North Sea Continental shelf Cases (par.63), which as regards Articles 1-3 of the Geneva Continental shelf Convention ruled that "*[...]*

[76] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 76
[77] *Ibid*, p. 7
[78] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 215-216
[79] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 84

these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary International Law relative to the Continental shelf [...]"[80].

Furthermore, with regard to the third paragraph of Article 121 of the UNCLOS, it is argued that rocks can be considered as a sub-category of islands.[81] It is absolutely profound that in the case of rocks which cannot sustain human habitation or economic life, these formations are restricted of having either EEZ or CS. It follows that rocks for the purposes of Article 121(3) generate only territorial sea and contiguous zone. Hence, the distinction between islands and rocks is of critical importance. Although the UNCLOS provides the tools for this distinction, the vagueness of the language, makes its application rather problematic. The Arbitral Tribunal in 2016, in the *South China Sea Arbitration*[82]*, specified the qualitative and temporal requirements in the interpretation and application of Article 121(3) of the UNCLOS.*[83]

Overall, it is of high importance for one to become aware of the nature of Article 121 of the UNCLOS as a whole. Hence, in the *Nicaragua/Colombia case*, the ICJ highlighted the *indivisible* of Article 121 of the UNCLOS. According to the Court *"By denying an exclusive economic zone and a Continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long-established Principle that "islands, regardless of their size,... enjoy the same status, and therefore generate the same maritime rights, as other land territory" (ibid.) and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary International Law."*[84]

The effect of the islands in the delimitation process is one of the most difficult and of high importance issues in the context of the International Law of the Sea, having raised intense controversy throughout the years in State practice, in legal theory and in case law. Their presence, causing the deviation of the delimitation line, constitutes a relevant circumstance according to which the island in question will be given full, partial or half effect. Of course, there are a few cases either in State practice or in case law where the effect of islands was totally disregarded. At this point, we must clarify that only dependent islands cause implications in the delimitation process, i.e. the

[80] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 216
[81] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 78&91
[82] *In the Matter of an Arbitration between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016, PCA Case No 2013-19*
[83] Tanaka Y., 2019, *The International Law of the Sea,* 3d Edn, United Kingdom, Cambridge University Press, p. 91
[84] *ICJ Reports 2012*, p. 674, par. 139

islands under a State's sovereignty, whereas independent islands participate in the above process but their *Statehood gives them the same potential for generating maritime projection under the condition laid down by International Law*.[85]

Both State Practice and case law present a variety of cases where the lack of common rules in the determination of the effect of islands in the delimitation process is profound. As Nugzar Dundua mentions in his paper concerning the *Delimitation of maritime boundaries between adjacent States* [86] *"In the India-Sri Lanka maritime boundary agreement, for example, the small Adams Bridge islands on both sides of the boundary were disregarded for delimitation purposes. A number of small islands were ignored in the delimitation of the Iran-Qatar boundary, and the somewhat larger island of Ven was ignored in the boundary settlement between Denmark and Sweden. In the Italian-Greek maritime boundary delimitation, partial effect was given to the Greek islands. In the Mediterranean Sea, some use has been made of the arcs technique. Along the Italian-Yugoslav maritime border, the Yugoslav islands are located very close to where the median line boundary would be. If all the Yugoslavian islands had been used as base points, the median line would have lain to Yugoslavia's advantage, much closer to the Italian coast. Finally the Yugoslavian claims for the two islands, Pelagosa and Caiola were limited to arcs with a radius of 12 nautical miles. In a boundary agreement between Italy and Tunisia, a 12 nautical mile arc was described around the Italian island of Lamione."*

Accordingly, the way the Courts treat the issue of islands highlight the absence of common methods or rule in a technical level. Pr. Cottier refers to a variety of cases, in order to underline this point: *"[…] disregard of islands to secure a median line in the Anglo-French Channel arbitration; enclavement of islands to retain general course of the bisector line in Nicaragua v. Honduras; giving half-effect to islands in the Dubai/Sharjah arbitration or partial effect in the Qatar/Bahrain case and the Nicaragua/Colombia case; giving half-effect to an archipelago in the Tunisia/Libya case; giving reduced effect to achieve a proportional closing line in the Gulf of Maine case; giving partial consideration of islands to compute the coastal lengths in the Guinea/Guinea-Bissau arbitration and the Nicaragua/Colombia case; disregarding islands for base points in the Romania/Ukraine case, the Nicaragua/Colombia case and the Bangladesh/Myanmar case; disregarding for base points and the computation of coastal lengths in Libya v. Malta and Romania*

[85] Dundua, N., 2006-2007, *Delimitation of maritime boundaries between adjacent States,* United Nations – The Nippon Foundation Fellow, p.60
[86] *Ibid*, p. 63

v. Ukraine; and ignoring the uninhabited islands in the CEIP delimitation and of Sable Island in the Newfoundland, Labrador and Nova Scotia arbitration."[87] Until the present time jurisprudence even in a vague way, shows the tendency of establishing a kind of methodology by putting into scales the contradicting interests of the States concerned, in order to achieve the utter goal of an equitable solution.

No matter the unsystematic approach and application of rules regarding the effect of islands in the delimitation process, it is worth mentioning that the ICJ in the *Qatar/Bahrain case* ruled that: *"In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a Principle which can be summarized as "the land dominates the sea" (North Sea Continental shelf, ICJ Reports 1969, p. 51, para. 96; Aegean Sea Continental SheIf; I. C. J. Reports 1978, p. 36, para. 86). It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary International Law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory."*[88], only to be reiterated and affirmed later by the ICJ in the *Nicaragua/Colombia case* in 2012.[89]

[87] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 638
[88] *ICJ Reports 2001*, p.97, par. 185
[89] *ICJ Reports 2012*, p. 689, par. 176

Chapter 2: International Agreements under the scope of International Law

I. Special issues of International Agreements i.e. Treaties

As analyzed above, Article 2(1a) of the VCLT, which is considered to reflect customary law[90], defines the meaning of treaties, setting at the same time a number of certain prerequisites that have to be fulfilled, in order for an international agreement to be identified as a treaty under the scope of the VCLT. More specifically in order for an agreement to be considered as a treaty it has to be **a.** international, **b.** concluded between States, **c.** in written form and **d.** governed by International Law. According to Pr. Hollis *"Article 2(1)(a) adopts an almost exclusively constitutive approach. It identifies elements necessary to constitute a treaty...while dismissing other elements—the title(s) and number of instruments—as non-essential. In doing so, the VCLT does not explicitly differentiate the treaty from other concepts of commitment or agreement."*[91] On the basis of the VCLT itself and more particularly Article 3, we can argue that even though the sole purpose of the VCLT definition of treaties is to identify inter-State agreements[92], its content is wider and depends on the actual context of the agreement. Hence, given the never ceasing evolution of international relationships, we could define a treaty in a broader sense as *any international agreement between two or more members of the international community, which poses the competence to conclude international agreements*.[93] In addition, even though the term "treaty" is accepted worldwide, quite often in practice international agreements bear a variety of titles, such as *act, agreed minute, charter, convention, covenant, declaration, memorandum of agreement, MoU, note verbale, protocol or statute.*[94]

The notion of International Agreements preoccupies Scholars, lawyers and Courts till this day, triggering theorizations and exhaustive analyses as regards their conclusion, their regulation, their enforcement, their definition for the purposes of International and Domestic Law and a variety of

[90] *ICJ Reports 2002,* p. 429, par. 263
[91] Hollis, D.B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 12
[92] *Ibid*, p.13
[93] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 38
[94] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 30

infinite issues[95] that unfortunately cannot be discussed in the present paper. One of the main issues that have to be discussed though is the conclusion of International Agreements among States or International entities that hold the competence to do so. The process of conclusion in its broad sense consists of acts and procedures that are absolutely necessary in order to be legally finalized. The once classic process of conclusion consisted of four stages, namely: the negotiation, the signature, the ratification and the exchange of ratification documents. Nowadays, given the evolution in international affairs, this process became more complex with the inclusion of additional elements.

Conclusion, in its narrow sense, is the critical and decisive act of expressing the consent of a State or an International entity to be bound by the context of the agreement as provided in the VCLT in Articles 11-18. The consent, once expressed solely by the ratification process, nowadays can be expressed by a "definitive signature"[96] if so agreed. At the same time along with the process of ratification the VCLT provides for other more simplified forms of commitment such us acceptance, approval or accession (as regards multilateral treaties), or any other means if so agreed.[97] In practice though it is quite common for the contracting parties to include a ratification clause, in order for the agreement to enter into force in accordance with Article 24 of the VCLT. Furthermore, the VCLT[98] provides for an additional wording, that of the registration and publication of International Agreements.

For the purposes of the author's thesis there are two specific points that have to be underlined as regards the conclusion of International Agreements and more specifically a. the issue of ratification and b. the issue of registration, as regards bilateral treaties.

I.1. The ratification of an International Agreement

Ratification is the traditional and most common way through which States express their consent to be bound by a treaty towards the international community. By taking this step the domestic political actor attributed with the *treaty-making power* of a State approves the content of the concluded agreement and at the same time it takes over the responsibility and the obligation of implementing the agreement in good faith, in the name of the State.[99] Ratification, which is in

[95] *Ibid*, p. 9-82
[96] *Ibid*, p. 222
[97] Article 11 of the VCLT
[98] Article 80 of the VCLT
[99] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*,

essence a process of evaluation and monitoring of the outcome of negotiation, is a unilateral act. Still, for the creation of *vinculum juris* and the finalization of the conclusion as its corollary, coincidence of wills must occur via the exchange of the necessary instruments. In addition, ratification is an international and free act of a State, in the sense that a State has no legal obligation to ratify any agreement against its will, without bearing international responsibility for its refusal.[100] Overall the process of ratification lies upon the State's discretion. Furthermore, the competent authority to ratify an agreement varies as it is regulated by the domestic Law of the relevant States each time.[101]

Among others, Article 14 of the VCLT stipulates the necessity of the ratification for the conclusion of an agreement when it is explicitly provided for in the context of the agreement. As Pr. Hollis observes *"As explained by the ILC in its commentary to the draft articles on the law of treaties, ratification was, in earlier times, merely a formal confirmation by the sovereign, once the treaty had been drawn up, that his or her representative had been invested with the authority to negotiate the treaty that resulted. In contrast, the modern institution of ratification—developed in the course of the nineteenth century—evolved into a process to submit the treaty-making power of the executive to parliamentary control, thereby mutating ratification into a condition for the treaty to become binding on the State."*[102] Indeed, the ICJ in 1952, in the *Ambatielos Case (Greece v. United Kingdom)*, ruled that *"The ratification of a treaty which provides for ratification, as does the Treaty of 1926, is an indispensable condition for bringing it into operation."*[103] Hence, depending on the context of the agreement, the lack of ratification can be a factor of the non entry into force of the agreement or the agreement shall be rendered non-legally binding.

I.2. The Registration of an International Agreement to the UN

As mentioned above the registration[104] of an International Agreement, provided for in Articles 102 of the UN Charter and 80 of the VCLT, is interlinked with the conclusion of agreements, in the sense of being an additional wording intended to giving the appropriate publicity to International Agreements. Nonetheless, registration is categorized as a depositary function provided in Article

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Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 109-110

[100] *Ibid*, σελ. 112

[101] *Ibid*, σελ. 114-117

[102] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 222

[103] *ICJ Reports 1952*, p. 43

[104] Article 80 of the VCLT

77(1h) of the VCLT. Mandatory registration and publication of treaties was established by the Covenant of the League of Nations (Covenant) in Article 18, for the purpose of eliminating secret diplomacy and secret alliance agreements that were considered as the primary causes of war.[105]

The UN Charter poses the obligation for the UN Members to register any International Agreements they conclude with the Secretariat, but does not establish the agreements' entry into force as a requirement for the registration. From that point onward, the Secretariat bears the obligation to publish all registered treaties in the United Nations Treaty Section (UNTS). Thus, the legal obligation to register international agreements lies with the UN Member and not the Secretariat. *The Treaty Section is the unit of the Secretariat charged with responsibility for receiving, recording, and publishing treaties.*[106] Despite the fact that the registration with the UN Secretariat lies solely with UN Members, the Secretariat also registers treaties concluded between Member State(s) and non-Member State(s), even when submitted to the Secretariat by the non-Member State(s), as in the case of the *Agreement on the Reciprocal Promotion and Protection of Investments (Switzerland-Uruguay)*, which was registered by Switzerland in 1997 even though the latter did not become a UN Member until 2002.[107] This fact illustrates the formality of the act of registration.

Pr. Hollis notes that *"Like its title, registration may indicate an intent (albeit of only the registering party) that the agreement constitutes a treaty. But since States do not regularly monitor treaty registrations, registration says little, if anything, about the other State(s)' intentions. Moreover, the UN is careful to regularly indicate that the Secretariat's acceptance of an instrument for registration 'does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status' ".*[108] Under this perspective the registration as a process is not determinative. Nevertheless, in the case of *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, in 2017, the ICJ noted that *"The MOU is a written document, in which Somalia and Kenya record their agreement on certain points governed by International Law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration*

[105] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 138
[106] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 277
[107] *Ibid*, p.278
[108] *Ibid*, p. 31

until almost five years thereafter (see paragraph 19 above).”[109] By stating such an opinion, the ICJ categorized registration among the objective factors that attribute the status of a treaty to an agreement, citing at the same time the lack of objection to a registration as a further indication of an agreement's treaty status.[110] In a *contra* interpretation though, the ICJ upgraded the status of objections in one of the negative objective factors in attributing the treaty status to an agreement.

Furthermore, in the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility (Qatar v Bahrain),* in 1994, the ICJ Stated[111] *that “an international agreement or treaty that has not been registered with the Secretariat of the United Nations may not, according to the provisions of Article 102 of the Charter, be invoked by the parties before any organ of the United Nations. Non-registration or late registration, on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties. The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months after they were signed that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement . . . Accordingly Bahrain's argument on these points also cannot be accepted.”* Hence, the registration does not qualify as a manifesto of validity or invalidity (*argumentum a contrario)* of an international agreement.

II. Informal Agreements: Is an MoU legally binding?

The definition of informal agreements derives from a *contra* interpretation of the notion of formal agreements, i.e. treaties.[112] Scholars and authors approaching the meaning and context of informal agreements tend to use a variety of terminology and more often than not interrelate informality with non-bindingness.[113] In order to determine whether an informal agreement is binding or not under International Law, in the sense of being subject to the law of treaties and the law of State Responsibility or not respectively, we have to consider the international State practice in the context of negotiations, legal effects and identification.[114]

[109] *ICJ Reports 2017*, p. 21-22 par. 42
[110] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 31
[111] *ICJ Reports 1994*, p. 122 par. 29
[112] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 60
[113] *Ibid*, p.60-61
[114] *Ibid*, p. 61

In the stage of negotiations, legal bindingness is a key issue to be discussed among participants. For example, in the negotiation process between the US and China towards the conclusion of a trade agreement in the form of an MoU, it became clear that the US consider the MoU's as legally binding instruments.[115] On the contrary, by late 1991, the United Kingdom, as well as Canada and Australia, sharing common legal and political systems, treated MoU's as "*gentlemen's agreements*" and consequently as not legally binding instruments.[116] For the bindingness of an agreement to be determined the language or the obligations' accuracy or the provisions regarding dispute settlement or the kind of actors negotiating instruments and commitments (State actors or not; government officials etc), consist key components to be taken into account. Thus, non-binding international agreements must always be examined *vis a vis* binding ones.[117]

Approaching the field of legal effects, we encounter different point of views. On the one hand, there are Scholars (i.e. Pauwelyn, Wessel, and Wouters) which argue that a key factor for the determination of an agreement as binding or not is the provisions that impose behavioral restrictions or alternations to States, interrelating legality under International Law with the effectiveness of the terms of the agreement towards States' conduct.[118] On the other hand, part of authors argue that behavioral effectiveness does not correspond with formal lawmaking, as there are formal agreements that do not impose behavioral constraints, such as human rights agreements, as opposed to a number of non-binding agreements that have legal consequences, such as the *Basel Accords* (a series of three sequential banking regulation agreements).[119]

Identifying an informal agreement as a treaty or as a non-binding instrument, is of critical importance in terms of *the application of the law of treaties, the law of State responsibility, the jurisdiction of international tribunals, and the application of domestic approval processes associated with different kinds of international commitments*.[120] Inter-governmental organizations, Scholars and jurisprudence joined efforts throughout the years, towards the formation of a system of determinative objective criteria over an informal agreement's legal nature. A most indicative example in case law is the 1994 decision in the *Maritime Delimitation and Territorial Questions*

[115] *Ibid*, p. 62
[116] McNeill, John H. "International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding." The American Journal of International Law, vol. 88, no. 4, American Society of International Law, 1994, pp. 822
[117] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 62-63
[118] *Ibid*, p. 64
[119] *Ibid*, p. 64-65
[120] *Ibid*, p. 66

between Qatar and Bahrain, when the ICJ ruled that *"The Court would observe, in the first place, that international agreements may take a number of forms and be given a diversity of names……In order to ascertain whether an agreement of that kind has been concluded, 'the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up'"*[121], setting objective factors that could lead to the determination of the legal nature of an agreement. In this context, the Court examined the actual text of the instruments in question in order to determine whether the concerned parties undertook commitments to each other and once it determined so, the ICJ equated their existence with the existence of legal commitments, ruling that the minutes of meetings between Government officials of the States in dispute were of a legally binding nature. Furthermore, in the 2015 *South China Seas Arbitration* Award[122], the Court examined the intent of States to conclude a legally binding agreement, attributing the nature of an objective factor to the notion of States intent.

In practice, in compliance with jurisprudence, international agreements of a legally binding nature may take *a number of forms and be given a diversity of names*[123], such as "act", "agreed minute", "charter", "convention", "covenant", "declaration", "memorandum of agreement", "MoU", "note verbale", "protocol", "statute", as well as "treaty".[124] Thus, the title attributed to an international agreement is not determinative of its treaty status.[125] However, the name "treaty" may be a strong indicative that the instrument in question is governed by International Law, while other names such as "MoU" are often used in agreements of non binding nature. According to the UN Treaty Handbook[126] *"The term memorandum of understanding (MoU) is often used to denote a less formal international instrument than a typical treaty or international agreement. It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. An MoU typically consists of a single instrument and is entered into among States and/or international organizations. For example, the United Nations usually concludes MoUs with Member States in order to organize its peacekeeping operations or to*

[121] *ICJ Reports 1994,* p. 120-121, par. 23
[122] *In the Matter of an Arbitration between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case No 2013-19,* p. 102, par. 243-245
[123] *ICJ Reports 1994,* p. 120, par. 23
[124] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 30
[125] McNeill, John H. "International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding." The American Journal of International Law, vol. 88, no. 4, American Society of International Law, 1994, p. 823
[126] Treaty Section of the office of Legal Affairs of the United Nations, *Treaty Hanbook*, 2012, United Nations Publication, p. 68

arrange United Nations conferences. The United Nations considers such MoUs concluded by the United Nations to be binding and registers them ex officio."

By conducting a thorough examination of the instrument's text and by applying objective criteria such as *the language and types of clauses included or its very subject matter*[127], even agreements bearing other titles than "treaty" can be evaluated and determined as such. Thus, *State practice and Scholarship tend to associate treaty-status with instruments that use certain language, including particular verbs ('shall', 'must', 'agree', and 'undertake'), terms ('parties', 'articles', 'obligations'), adjectives ('binding', 'authentic', 'authoritative'), or clauses (including those on consent to be bound, entry into force, the depositary, amendment, termination, compulsory dispute settlement).*[128] Applying the objective criterion of the language used in the text of the instrument in question, the ICJ in its 2017 Judgment in the case of *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* ruled that *"The inclusion of a provision addressing the entry into force of the MoU is indicative of the instrument's binding character."*[129]

The MoU is a widely acknowledged instrument by both International Law and State practice. Evidently, the British expert Lord McNair has identified the MoU as *"an informal but nevertheless legal agreement between two or more parties."*[130] *In its Commentary on what became the 1969 Vienna Convention on the Law of Treaties, the International Law Commission recognized that MoUs "are undoubtedly international agreements subject to the law of treaties."*[131] In the context of consistency of the current chapter, we must note that one way to determine the legal bindingness of an MoU is by applying the aforementioned objective criteria such as the language used and more specifically by the actual terms embodied to its text such as "the parties" and "agree," or the included clauses as regards its entry into force, which contribute to the identification of a legally binding intent.[132]

[127] *Ibid*, p. 27
[128] *Ibid*, p. 28
[129] *ICJ Reports 2017*, p. 21, par. 42
[130] McNeill, John H. "International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding." The American Journal of International Law, vol. 88, no. 4, American Society of International Law, 1994, pp. 821
[131] *Ibid*, p. 823
[132] *Ibid*, p.824

III. The concept of Validity

Norms in legal systems often require rules to determine whether they are legitimate or not. On the one hand these rules are required in order for the legal system to be able to discern between law and non-law for a variety of reasons.[133] On the other hand legal systems focus on validity standards is to defend the systems' core Principles.[134] The assertion that a rule or instrument is valid, usually implies that it is applicable within a specific community and must be regarded as such by its members, but that does not always lead to its bindingness. Validity is not the same as bindingness· on the contrary the latter derives from validity. A dimensional interpretation, allows us to assume that the bindingness of an instrument can be affected either by issues of validity or invalidity, or by other factors. Thus, if a treaty never enters into force or in the case of its termination, the abrogation of its bindingness would not correspond to validity transgressions.[135] *For everyday purposes, it suffices to proclaim that validity is doxastic in nature: what matters is that valid norms need to be accepted by their audiences, not why they must be so accepted.*[136]

The international legal order, provides rules on validity, but few of them are explicitly defined to achieve its establishment. International Law is primarily concerned with facilitating agreements. Thus the main validity prerequisite is State's consent.[137] Nevertheless, the validity requirements set in International Law, are not confined to the role of consent in treaty-making, as there are also *jus cogens* considerations. Accordingly consented instruments do not automatically acquire the treaty status. Despite the informality of the international legal order, various criteria-rules of validity can be identified, as for example *the rules on decision-making within international organizations (IOs)*.[138] The rules on the validity and invalidity of treaties, as stipulated in Articles 46 through 53 of the VCLT, are the only explicit validity norms set in the international legal order. In essence, the majority of them (Articles 46 through 52) deal with flaws in a State's consent to be bound, reinforcing the contention that consent is the most significant general validity condition when it comes to treaties.[139]

[133] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 545
[134] *Ibid*, p. 546
[135] *Ibid*, p. 547
[136] *Ibid*, p.547
[137] *Ibid*, p.548
[138] *Ibid*, p. 548
[139] *Ibid*, p. 550

IV. The grounds of Invalidity

In his early study regarding *The Law on Invalidity of Treaties*, Pr. Rozakis, notes that *"An examination of the law on invalidity under the Vienna Convention shows that the rules of the Convention, taken together, constitute an independent and autonomous legal system consisting of a fusion of the experience of the domestic legal systems and the realities of International Law*[140] *[....] The position of the present writer is that the Vienna Convention has created a system of rules on invalidity which, although bearing some external similarities to the corresponding systems of municipal orders, is invariably adjusted to the needs and limitations of the international legal order as it presently is, that is, without making any substantive step toward changing it."*[141]

The independence of the body of rules of the VCLT governing invalidity of treaties can be identified not only by their exclusivity, precluding the application of other legal provisions, but also by the differences with the multiple national legal orders as regards the repercussions of invalidity and the provided procedures, as will be explained later. Indeed, the VCLT stipulates its exclusive application in Article 42(1)[142] which provides that "*The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.",* incorporating eight grounds of invalidity in Articles 46 through 53, exhaustively enumerated. Their examination reaffirms that Articles 46 through 52 address the issue of invalidity due to defects in States consent, as was explained earlier, whereas Article 53 sets a ground of invalidity in terms of *jus cogens*.

Articles 46 and 47 of the VCLT set the first two grounds of invalidity which are based on the violation of provisions of internal law regarding the competence to conclude treaties and the violation of specific restrictions on authority of a representative to express the consent of a State, respectively. In the sense that Governments bear responsibility for the negotiation process through the entry into force of a treaty, the ILC highlighted the exceptional character of the circumstances under which these grounds of invalidity should and could be invoked[143] (*ultimum remedium*[144]).

[140] ROZAKIS, C. L. (1974). *The Law on Invalidity of Treaties*. *Archiv Des Völkerrechts*, *16*(2), p. 189
[141] *Ibid*, p.159
[142] *Ibid*, p. 153
[143] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 224
[144] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 555

Thus, Articles 46 and 47 stipulate specific prerequisites without which States are deprived of their ability to seek the application of the provisions in question.[145]

The third ground is provided for under Article 48 of the VCLT where *errors* related to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty can be invoked as invalidating State consent, excluding linguistic ones which are rectifiable under Article 79. It is argued by Scholars[146] that the notion of errors most likely corresponds to geographical representations, which apart from the actual wording they are illustrated graphically via maps, the invalidation of which is almost impossible. Thus, it is argued that this particular ground is of no practical use.

Article 49 of the VCLT, stipulates *fraud* as the next ground invalidating State consent. In an effort to articulate the concept of fraud and determine the meaning of it, in order to make its distinction from the notion of error apparent, the ILC in its 1966 commentary uses the expression *fraudulent conduct* which includes *"any false Statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given."*[147] The distinction was of high importance for the ILC, as fraud was considered as a destructive factor for the mutual trust between States and not a mere defect in their consent and certainly not as innocent as a simple error.[148]

The ILC, in its 1966 commentary, upholding the same stance as earlier, proceeded in a further and rather important distinction between fraud and *corruption*, both being grounds of invalidity. It was argued that the latter manifests in a *special manner*, different from fraud and thus the term "corruption", embodied in Article 50 of the VCLT, was used in order *"to indicate that only acts calculated to exercise a substantial influence on the disposition of the representative to conclude the treaty may be invoked as invalidating the expression of consent which he has purported to give on behalf of his State."*[149] The ILC excluded small courtesy and favor shown to a State's representative from the notion of corruption and the invalidity of consent, as its corollary.

Article 51 of the VCLT incorporates the traditional notion of *force*, in the sense of an *act of force* towards the State's representative, as a ground of invalidity under the term *coercion*.[150] Given a

[145] *Ibid*, p. 554
[146] *Ibid*, p. 557-558
[147] ILC Yearbook, 1966, Vol. II, p. 245
[148] *Ibid*, p. 244
[149] *Ibid*, p. 245
[150] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 233-234

number of historical incidents, the ILC notes in its 1966 commentary that *"There is general agreement that acts of coercion or threats applied to individuals with respect to their own persons or in their personal capacity in order to procure the signature, ratification, acceptance or approval of a treaty will unquestionably invalidate the consent so procured."*[151] According to the ILC, the notion of coercion through acts or threats directed against the State's representative consists of *any form of constraint of or threat against a representative affecting him as an individual and not as an organ of his State. It would therefore include not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as also a threat to injure a member of the representative's family with a view to coercing the representative.*[152]

Prior to the articulation of the VCLT, up until the establishment of the UN Charter, International Law and Scholarship did not acknowledge the use of *force* against a State as a ground of invalidity. On the contrary, it was viewed as a proper and legal means towards obtaining State consent, in the context of the general consideration of the era that force is a legal means of practicing international politics.[153] Under the veil of peaceful relationships and peaceful settlement of disputes, the ILC in its 1966 commentary considered that *the invalidity of a treaty procured by the illegal threat or use of force is a Principle which is lex lata in the International Law of to-day.*[154] Thus, Article 52 of the VCLT stipulates coercion of a State by the threat or use of force as the seventh ground of invalidity. The ILC indentified the notion of coercion solely with that embodied in the UN Charter addressing military force, but after an explosive situation during the 1968 Vienna Conference its Final Act (ANNEX) incorporated a declaration prohibiting coercion also by non-forceful means, including political and economic pressure.[155]

The most intriguing and broadly discussed ground of invalidity derives from the violation of *jus cogens*, stipulated in Article 53 of the VCLT. At an early stage it was argued as being revolutionary[156], given that, for the first time, International Law acknowledged the existence of rules which by their particular nature[157] are set in order to preserve and protect the fundamental interests of States and of the international community as a whole and therefore cannot succumb to contractual freedom. The ILC, in its 1966 commentary, rejected the inclusion of examples of rules of *jus cogens*,

[151] ILC Yearbook, 1966, Vol. II, p. 245-246
[152] *Ibid*, p. 246
[153] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 236
[154] ILC Yearbook, 1966, Vol. II, p. 246
[155] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 238-239
[156] *Ibid*, p. 239-240
[157] ILC Yearbook, 1966, Vol. II, p. 247

such as human rights, the equality of States or the Principle of self-determination etc, for a few reasons and in response it noted that *"The article, therefore defines rules of jus cogens as peremptory norms of general International Law from which no derogation is permitted "and which can be modified only by a subsequent norm of general International Law having the same character" [...] in conjunction with Article 61 [...]* (today, Article 64)*"*[158], and at the same time it clarified that rules of *jus cogens* do not identify with the general rules of International Law, as the majority of them do not have such character. Nonetheless, State practice, Scholarship and jurisprudence have acknowledged multiple rules that identify as rules of *jus cogens*, such as *the prohibitions of genocide, torture, apartheid, slavery, and aggression*[159], *the rule of pacta sunt servanta, human rights, the right of peoples to self determination*[160], still for the ranks to be closed.[161]

V. The consequences of invalidity: *Relative v Absolute nullity* - The procedures of annulment

The independence and autonomy of the rules governing invalidity in the VCLT, do not suggest their unprecedented articulation, as the aforementioned grounds of invalidity are incorporated in the ambit of domestic legal systems. This correspondence has cultivated the conviction among States and Scholars that the effects of the established grounds of invalidity should fall under the distinction of relative and absolute nullity[162], in terms of consequences and procedure, as stipulated in domestic legal orders, even though the VCLT does not include such an approach and a thorough examination reveals the differences.

In the context of domestic legal orders, relative nullity[163] of an act or a contract (or the consent) constitutes the sanction for violating private interest, therefore can be invoked by a specific group of people (beneficiaries) in respect of which it is hereby established and it is not automatic. Due to its nature, relative nullity is not taken into consideration *ex officio.* The act or the contract must be

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[158] *Ibid*, p. 248 (4,6)

[159] Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 563; ILC Yearbook 2001, Vol. II, p. 85

[160] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 240; ILC Yearbook 2001, Vol. II, p. 85

[161] Report of the International Law Commission, 2019, p. 146-147

[162] ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts*, *16*(2), p. 156, supra note 12; Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 560; ILC Yearbook, 1966, Vol. II, p. 5, 15, 45, 246, 326, 327, 331.

[163] ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts*, *16*(2), p. 156-157, supra note 12

annulled mainly through adjudication and the constitutive decision can be invoked *erga omnes*. A relatively null act or contract produces full effect, in the sense that rights and obligations accrue, up until their annulment which retroactively subverses the effects produced. The beneficiaries can cure the relatively null act or contract by confirming its validity either via the renunciation of the right to invoke this kind of nullity or due to prescription.

On the contrary, absolute nullity[164] of an act or contract constitutes the sanction for the violation of public interest, providing the right of its invocation to anyone with legitimate interest (*erga omnes*). Adjudication in this case is not required, but if the dispute is to be settled by Courts it is taken into consideration *ex officio.* This kind of nullity constitutes the act or contract void *ab initio* and by the operation of law, in the sense that they do not produce any effects, i.e. rights and obligations and it is not up to anyone's discretion to cure it. Therefore, the renunciation of the right to invoke this kind of nullity is void.

Under the VCLT, the eight grounds of invalidity can be distinguished into two categories: a. those stipulated in Articles 46-50 and b. those stipulated in Articles 51-53.[165] The first category of rules is set for the protection of private interest, as regards the integrity of will and *consensus* of the contracting parties, i.e. States, which are the beneficiaries holding the right to invoke the existing nullity. In these cases the kind of nullity in question bears resemblance to relative nullity as incorporated in domestic legal orders, for the additional reason that a treaty concluded under a defect in consent is not automatically rendered null and void; nullity must be invoked, but it can also be cured as its invocation lies with the discretionary power of the beneficiary State.[166]

Despite the resemblances, there are differences in terms of the procedure of annulment and its consequences. Thus, according to Article 65(1,2) of the VCLT, the annulment of a treaty or consent based on the first category of the grounds of invalidity can be realized with acquiescence and not via adjudication or unilateral acts, in the sense that the concerned party has to notify the other parties of its claim along with the indication of a specific measure to be taken, after which the total number of parties involved have to consent to the application of the proposed measure, explicitly or implicitly.[167] Annulment comes with repercussions provided in Article 69 of the VCLT, first of them being the consideration of the treaty as null and void, in case of a bilateral agreement, whereas in

[164] *Ibid*, p. 156-157, supra note 12
[165] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 244
[166] *Ibid*, p. 245
[167] *Ibid*, p. 246

case of a multilateral one, the annulment affects States consent and not the whole treaty.[168] Despite the explicit retroactive power of annulment in the text of the above Article, the VCLT seems to provide for ways of *"abrogation",* stipulating that some of the legal or material repercussions of consent or the treaty itself can remain valid after the annulment[169] and that acts performed in good faith cease to exist due to their illegality *ex nunc,* not *ex tunc*.[170] Last but not least, Article 44(3) of the VCLT provides for the possibility of pursuing the annulment of specific provisions and not treaty as a whole, which of course introduces a major difference with domestic legal systems.

The second category of rules governing invalidity of treaties embodied in the VCLT in Articles 51 through 53 that stipulate nullity *ab initio,* giving the impression of resemblance to the notion of absolute nullity incorporated in municipal systems. This impression is enhanced for the additional reason that by the wording of Articles in question it seems that nullity falls under the operation of law and that anyone, even third States, with legitimate interest obtain the right of its invocation.[171] For all the reasons that will be explained below, this *prima facie* impression could not be more erroneous.

Despite the fact that Articles 51 through 53 form a body of rules governing the "so-called *absolute nullity*"[172] under the VCLT, the latter provides differently for these grounds of invalidity in terms of procedure and repercussions of annulment. Pr. Rozakis in his 1974 early study argues that the VCLT creates *two sub-categories and treats them differently*.[173] Indeed, the first sub-category contains Articles 51 and 52 that share the same rationale to Articles 46 through 50 governing the "so-called *relative nullity*"[174] under the VCLT, as their wording allows the conclusion that they are set for the protection of private interest, thus the right to invoke the annulment of a treaty lies with specific beneficiaries. However, contrary to what follows *relative nullity,* the beneficiaries lack the ability to cure nullity due to Article 45 of the VCLT that precludes its application in cases of coercion, as the ILC, in its 1966 commentary, highlighted the necessity of considering a treaty concluded under coercion as absolutely void in all its parts in order for the coerced State to be fully free to decide upon its future treaty relations.[175]

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[168] *Ibid*, p. 248
[169] Article 69(2a) stipulates that *"each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed".*
[170] *Ibid*, p. 248
[171] ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts, 16*(2), p. 166
[172] *Ibid*, p. 165
[173] *Ibid*, p. 167
[174] *Ibid*, p. 157
[175] ILC Yearbook, 1966, Vol. II, p. 238-239

Article 69 of the VCLT stipulates the consequences of the invalidity of a treaty in cases of *relative nullity*, as was explained earlier. However, it is applied in cases of coercion, leading us to the conclusion that even nullity in the context of Articles 51 and 52 of the VCLT will be invoked in the ambit of Article 65, meaning that acquiescence is a prerequisite for the annulment of a treaty concluded under coercion, as arbitrary invocations were mostly feared when the VCLT was articulated.[176] Of course the selection of this procedure does not subverse the *ab initio* character of nullity contained in Articles 51 and 52.[177] The main difference of nullity stipulated in the latter Articles and absolute nullity under municipal systems focuses on the fact that under the VCLT the right to invoke nullity is attributed to beneficiaries, whereas in municipal systems it has an *erga omnes* function, as was explained earlier.[178]

The second sub-category of *absolute nullity* under the VCLT consists solely of Article 53 and supplementary of Article 64, as they provide for the same ground of invalidity, i.e. the collision of a treaty with a peremptory norm of general International Law (*jus cogens*), with a difference in the time of existence of the peremptory norm.[179] Both Articles are stipulated for the protection of public interest, thus a general interest of the international community.[180] Despite the *prima facie* resemblance with the notion of absolute nullity stipulated in municipal systems, the examination of nullity under these Articles reveals major differences between them. Given that invalidity is not automatic, the procedure of annulment on the basis of Article 53, is once again provided for in Article 65(1,2) of the VCLT in the ambit of acquiescence, as in all previous cases, which constitutes the right of invoking the invalidity of the treaty a non *erga omnes* one, as this right is once again attributed to *ad hoc* beneficiaries, i.e. the parties to the treaty in question.[181]

It is quite remarkable that the establishment of the so-called *absolute nullity* under the VCLT, which holds grave importance in all domestic legal systems, is bestowed on the same entities that will have concluded an *ab initio* illegal international agreement *vis a vis* public interest. In an attempt to compromise this leniency, or better yet the weakening of the right to invoke nullity depriving third States to make use of it in such particular cases, Article 44(5) of the VCLT precludes the possibility of separation of the provisions of the treaty, stipulating the annulment of the latter as a

[176] ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts*, *16*(2), p. 168-169
[177] Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, σελ. 252
[178] ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts*, *16*(2), p. 169
[179] *Ibid*, p. 170-171
[180] *Ibid*, p. 171
[181] *Ibid*, p.171

whole and Article 45 clarifies that *absolute nullity* under the VCLT is not curable.[182] In the same context, Article 71(1) of the VCLT that provides for the consequences of the invalidity of a treaty which conflicts with *jus cogens*, treats international agreements in the ambit of Article 53 as void by operation of law, not in the sense that their nullity is automatic, but in the sense that the procedure for its establishment is "declaratory" and not "constitutive".[183] The same Article, contrary to Article 69, is of compulsory nature, as the subversion of the repercussions of the illegal treaty is not a matter lying upon the discretion of the parties to it, stipulating its retroactive power indisputably.[184]

In the context of the second sub-category of *absolute nullity* under the VCLT, Article 64, which in essence supplements Article 53, provides for the emergence of a new rule of *jus cogens* leading to the invalidity and the compulsory termination of a treaty. According to Pr. Rozakis *"In most legal systems, the term »invalidity« has a different function and ratio from »termination«; and therefore has different external characteristics as well[44]). In consequence, this terminological marriage seems to unnecessarily complicate the otherwise clear type of sanction pertaining to such cases. It appears that the word »void« was added in order to strengthen the imperative character of termination under article 64, which apparently is a special type of termination for public purpose and in favour of the law."*[185] This special type of termination is regulated by Article 71(2) of the VCLT, which establishes the *ex nunc* termination of a treaty in this case and the extinguishment of its effects up to the degree of their collision with the new peremptory norm. The *ratio* is to align law order with the peremptory norm of International Law and not the punishment of the parties that in the time of conclusion not only did they not have the intention to breach any legal rules, but also could not predict the emergence of a rule of *jus cogens*.[186]

As far as Article 64 is concerned, there is a divergence of opinions among Scholars about whether the procedure of termination of treaties under Article 65(1,2) of the VCLT is compulsory or not in this case. Contrary to the Expert Consultant *Waldock,* Pr. Rozakis argued that based on the fact that Article 64 provides essentially for the termination and not the invalidity of a treaty, Article 42(1), which leads to the procedure under Article 65, is not applied, due to the fact that Article 42(1) provides for invalidity, which is not the case.[187] Finally, as regards Articles 44 and 45 of the VCLT that are not applicable in the case of Article 53, as was explained earlier, there is a differentiation in

[182] Ibid, p. 172
[183] *Ibid*, p. 173
[184] *Ibid*, p. 173
[185] *Ibid*, p. 174
[186] *Ibid*, p. 175
[187] *Ibid*, p. 175-176

the case of Article 64. While Article 44, in the ambit of leniency towards the parties to the subsequently illegal treaty, can be applied, allowing the separation of its provisions and not terminating the treaty in question as a whole, Article 45, in the context of the protection of public interest, precludes the confirmation of validity in the case of emergence of a rule of *jus cogens*.[188]

[188] *Ibid*, p. 176

Chapter 3: The Turkey-Libya Memorandum of Understanding: a circumvention of International Law – The perspective of its annulment

> *"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED*
>
> *to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and to promote social progress and better standards of life in larger freedom,*
>
> *AND FOR THESE ENDS*
>
> *to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of Principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples […]"*[189]

I. History

Up until 2018, Turkey claimed alleged rights or entitlements over marine spaces in the Eastern Mediterranean in between the meridians of 32^{o} and 28^{o} and nowhere beyond the latter. Despite these official claims, Turkey's true ambitions are actually portrayed in the maxim[190] (as Pr. Liacouras defines it) of *Mavi Vatan* or else *Blue Homeland*, which was introduced over a decade ago by a retired naval officer of Turkey, *Gem Gurdeniz*. *Mavi Vatan*, which is now the core of Turkey's foreign policy, strongly promoted and pursued especially by the Turkish Minister of Defense *Hulusi Akar*[191], in fact ignores the effect of the islands of Cyprus, Crete, Rhodes, Karpathos, Kasos and Kastelorizo[192], *"erasing"* them from the map and moves the Turkish claims over marine spaces that

[189] Preamble of the Charter of the United Nations

[190] Λιάκουρας Π., *Η οριοθέτηση των θαλασσίων ζωνών στην Ανατολική Μεσόγειο: η συμφωνία Ελλάδας – Αιγύπτου*, Καστελόριζο, 19 Σεπτεμβρίου 2020, "*Η οριοθέτηση των θαλασσίων ζωνών στην Ανατολική Μεσόγειο: Νομικά ζητήματα και προκλήσεις",* Ολομέλεια των Προέδρων των Δικηγορικών Συλλόγων Ελλάδος, σελ.1

[191] Team, ΤοΒΗΜΑ. "Κρεσέντο προκλήσεων από Ερντογάν, Ακάρ." *Ειδήσεις - νέα - Το Βήμα Online*, 31 Aug. 2021, www.tovima.gr/2021/08/31/politics/tourkia-proklitikos-erntogan-gia-tin-katastrofi-tis-smyrnis-gia-galazia-patrida pou-perilamvanei-tin-kypro-ekane-logo-o-akar/.

[192] Meletis, Nikos. "Η Γαλάζια Πατρίδα και οι φιλοδοξίες Ερντογάν | LiberalGr." *Www.liberal.gr*, 2 Mar. 2019, www.liberal.gr/diplomacy/i-galazia-patrida-kai-oi-filodoxies-erntogan/242440.

stretch out all the way to the meridian of 25^{o}, depriving Greece, Cyprus and Egypt of their legal rights in the Eastern Mediterranean.

In this context, on the 27th of November 2019 Turkey signed a Memorandum of Understanding (MoU)[193] with the Government of National Accord (GNA) of Libya, by which the two States agreed on the delimitation of their alleged maritime boundaries and decided on a single boundary line for the marine zones of the CS and the EEZ from Point A (34° 16' 13.720"N – 26° 19' 11.640"E) to Point B (34° 09' 07.9"N – 26° 39' 06.3"E)[194], with the intention of depriving Greece of its *ipso facto* and *ab initio* sovereign rights over the CS of the islands of Crete, Rhodes, Karpathos, Kasos and Kastellorizo. Despite the fact that the MoU stipulated the obligation of each party to ratify the "agreement" according to its internal legal procedures in order for it to enter into force[195] and despite the fact that the Turkish Parliament ratified the MoU on the 5th of December 2019, the House of Representatives in Libya, denounced the alleged "agreement" as null and void on the 4th of January 2020 and up until today refuses to proceed with the motion of its approval. Still, being a mere formality, as mentioned above, the MoU was registered[196] with the Secretariat of the UN on the 30th of September 2020.

A fact of high importance is that the Speaker of the House of Representatives (HOR) of Libya Chancellor *Aguila Saleh* immediately addressed a letter to the Secretary General of the United Nations, *António Guterres*[197], in which **a.** he profoundly Stated the unlawfulness of the Government of National Accord, asking the issuance of a resolution to withdraw its recognition and **b.** he explicitly denounced the Turkey-Libya MoU as null and void, asking for the non-recognition of it. Even the Libyan General *Khalifa Haftar* denounced the MoU as null and void[198] right after its signature. In addition, in the early beginning of 2021, the HOR of Libya announced that an appeals court on the East side of Libya has canceled the border demarcation and security cooperation

[193] *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*, Instabul, 27 November 2019

[194] Stanicek, B., 2020, *Turkey: Remodelling the eastern Mediterranean Conflicting exploration of natural gas reserves*, Briefing, European Parliament, European Union, September 2020, p. 5

[195] *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*, Instabul, 27 November 2019, p. 3

[196] Certificate of Registration with the Secretariat of the United Nations, No 69975, New York, 30 S*eptember 2020*

[197] "Aguila Saleh to the UN Security Council: We Demand 3 Urgent Steps Including Withdrawing Recognition of the GNA." *Al Marsad*, 2 Dec. 2019, almarsad.co/en/2019/12/02/aguila-saleh-to-the-un-security-council-we-demand-3-urgent-steps-including-withdrawing-recognition-of-the-gna/.

[198] ---. "Συνάντηση Ν. Δένδια με τον Χαλίφα Χαφτάρ στη Λιβύη – 'Ακυρα και επιβλαβή' τα τουρκολιβυκά μνημόνια | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 22 Dec. 2019, www.kathimerini.gr/politics/1057423/synantisi-n-dendia-me-ton-chalifa-chaftar-sti-livyi-akyra-kai-epivlavi-ta-toyrkolivyka-mnimonia/.

agreements between the GNA of Libya and Turkey.[199] A further indication of the firm stance of the HOR of Libya towards the illegal MoU is the fact that even recently, in the event of his visit to Greece on july 2021, Chancellor *Aguila Saleh* reaffirmed and reiterated that the Turkey-Libya MoU is null and void.[200]

Nonetheless, up until today, the GNA of Libya adopts an ambiguous stance. In a Letter dated 26 December 2019 from the Chargé d'affaires a.i. of the Permanent Mission of Libya to the United Nations addressed to the Secretary-General[201], while focusing on the effort to support the alleged validity of the MoU and its compliance with International Law and the International Law of the Sea, it leaves the door open for other concerned States, and in particular Greece, as it refers to it explicitly, to engage into negotiations or form an agreement with the GNA of Libya so as to recourse to the ICJ. *Inter alia* it notes: *"The Government of National Accord […] is acting on the basis of the Principle of good faith and stands ready to engage in bilateral dialogue with any party that believes the memorandum violates any of its sovereign rights. In that regard, the Government also affirms its commitment to Article 33 of the Charter of the United Nations and the Principles of public International Law. It recognizes the right of any State claiming that this memorandum violates its national borders to have recourse to the International Court of Justice. Libya has a good record of compliance with the rulings of that Court. For example, it agreed on one occasion with the Republic of Malta and on another with the Republic of Tunisia to have recourse to the International Court of Justice to delimit Continental shelf boundaries."* Affirming the ambiguity of conduct of the GNA of Libya, the current Prime Minister of Libya's interim Government of National Unity *Abdul Hamid Dbeibeh*, a few months after his election in 2021, stated that the MoU is beneficial for the State of Libya, but at the same time he reiterated that negotiations with third States are open for discussion.[202]

The announcement of the Turkey-Libya MoU signature caused chain reactions worldwide, due to its illegal nature. The first country to denounce the MoU as null and void was Greece via a Letter dated 9 December 2019, annexed to the letter dated 14 February 2020, from the Permanent

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[199] "East Libya Court Annuls GNA Agreements with Turkey." *Asharq AL-Awsat*, 28 Jan. 2021, english.aawsat.com/home/article/2770536/east-libya-court-annuls-gna-agreements-turkey.

[200] Έλλις, Αθανάσιος. "Ακίλα Σάλεχ στην 'Κ': Να φύγουν όλα τα ξένα στρατεύματα από τη Λιβύη | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 5 July 2021, www.kathimerini.gr/politics/561421204/akila-salech-stin-k-na-fygoyn-ola-ta-xena-strateymata-apo-ti-livyi/.

[201] A/74/634

[202] Νέδος, Β. and Κωστίδης, Μ., 2021. *Ελληνοτουρκικά: Διπλωματικό σκάκι με φόντο τη Λιβύη | Η ΚΑΘΗΜΕΡΙΝΗ*. [online] Kathimerini.gr. Available at: <https://www.kathimerini.gr/politics/561328465/ellinotoyrkika-diplomatiko-skaki-me-fonto-ti-livyi/>

Representative of Greece to the United Nations addressed to the Secretary-General[203], only to be followed by either similar Letters or Notes addressed to the Secretary-General of the UN, or even Joint Declarations or Statements *inter alia* on behalf of Egypt[204], Cyprus[205], the Syrian Arab Republic[206], France along with the United Arab Emirates (UAE)[207], Israel[208], Russia[209] and Saudi Arabia[210].

Furthermore, *Washington* Stated that the MoU is *"unhelpful and provocative"*[211] and the US Ambassador to Greece *Geoffrey Pyatt* commented that *"The US legal judgment that the Turkish government in its assertions regarding maritime claims and specifically continental shelves differs with our legal analysis and also the UNCLOS legal analysis regarding the status of islands, that is that inhabited islands as a matter of customary International Law are entitled to the same treatment as continental territory."*[212] Moreover, the European Council in its Conclusions on the 12th of December 2019[213] states that *"The Turkey-Libya Memorandum of Understanding on the delimitation of maritime jurisdictions in the Mediterranean Sea infringes upon the sovereign rights of third States, does not comply with the Law of the Sea and cannot produce any legal consequences for third States. The European Council unequivocally reaffirms its solidarity with Greece and Cyprus regarding these actions by Turkey.",* only to be reaffirmed by the Vice-President *Josep Borell* on behalf of the European Commission in the European Parliament[214] later on. Furthermore, after conducting a thorough research the Scientific Service of the German Parliament issued in the early beginning of 2020 its opinion, reaffirming that the Turkey-Libya Memorandum circumvents the

[203] A/74/831
[204] A/74/628
[205] A/74/824–S/2020/332
[206] A/74/831
[207] Joint Declaration adopted by the Ministers of Foreign Affairs of Cyprus, Egypt, France, Greece and the United Arab Emirates (11.05.2020)- Announcements - Statements - Speeches.
[208] "Ισραηλινός ΥΠΕΞ: Παράνομη η συμφωνία Τουρκίας και Λιβυής." *Euronews*, 24 Dec. 2019, gr.euronews.com/2019/12/24/israeli-foreign-minister-israel-katz-paranomi-i-symfonia-tourkias-kai-libyhs-kypros-ellada.
[209] "Και η Μόσχα καταδικάζει τη συμφωνία Τουρκίας - Λιβύης." *Euronews*, 3 Dec. 2019, gr.euronews.com/2019/12/03/kai-h-mosxa-katadikazei-th-symfonia-toyrkias-libyhs.
[210] ---. "Ν. Δένδιας: Ελλάδα και Σ. Αραβία έχουν την αντίληψη ότι τα μνημόνια Τουρκίας-Σαράτζ είναι άκυρα | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 24 Jan. 2020, www.kathimerini.gr/politics/1061769/n-dendias-ellada-kai-s-aravia-echoyn-tin-antilipsi-oti-ta-mnimonia-toyrkias-saratz-einai-akyra/.
[211] "{{NgMeta.title}}." *Www.amna.gr*, 3 Dec. 2019, www.amna.gr/en/article/412925/US-State-Dept-Turkey-Libya-maritime-zones-agreement-unhelpful-and-provocative.
[212] Newsroom. "Ambassador Says US Analysis of Turkey-Libya Deal 'Very Different' from Ankara's | EKathimerini.com." *Www.ekathimerini.com*, 13 Dec. 2019, www.ekathimerini.com/news/247524/ambassador-says-us-analysis-of-turkey-libya-deal-very-different-from-ankaras/.
[213] European Council conclusions, 12 December 2019, p.4, par. 19
[214] "Answer for Question P-004324/19." *Www.europarl.europa.eu*, 6 Feb. 2020, www.europarl.europa.eu/doceo/document/P-9-2019-004324-ASW_EN.html.

International Law of the Sea and International customary law.[215] At the same period of time after a meeting held in Cairo among the Ministers of Foreign Affairs of Greece, Egypt, Cyprus, Italy and France, they concluded in a univocal decision of jointly denouncing the MoU as null and void once again.[216]

On the 2nd of January 2020, Greece, Cyprus and Israel concluded an agreement for the construction of the Eastern Mediterranean Pipeline (East Med Pipeline) that will carry natural gas 1,900km from the Eastern Mediterranean basin to the European market. From this point onward, Turkey engaged in an extremely aggressive conduct in the area of the Eastern Mediterranean and especially in the Aegean Sea, causing frictions and tensions for the most part of 2020.[217] In this context, at the end of May 2020 Turkey launched an international tender for the licensing of the maritime blocks in compliance with the illegal Turkey-Libya MoU.[218] The deadline for bidding expired in mid-September of that year and it was expected to be announced that the contract would be awarded to the Turkish Petroleum Corporation (TPAO).[219] In the meantime, in compliance with the International Law of the Sea, Greece concluded two valid agreements as regards maritime delimitation, one with Italy on the 9th of June 2020 and one with Egypt on the 6th of August 2020, both ratified by all concerned States. The latter, irritated Turkey even more so, as it covers the same maritime area that Turkey divided up with Libya in the context of the illegal MoU, to the point of provoking the collision of a Greek with a Turkey frigate only a few days later, with France intervening to restore security in the area by preventing further provocations from the Turkish side.[220]

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[215] "Γερμανική Βουλή: Παράνομο το μνημόνιο Τουρκίας - Λιβύης." *M.naftemporiki.gr*, 23 Jan. 2020, m.naftemporiki.gr/story/1553561/germaniki-bouli-paranomo-to-mnimonio-tourkias-libuis.

[216] ---. "Ν. Δένδιας για πενταμερή: 'Συμφωνούμε ομόφωνα ότι τα μνημόνια Τουρκίας-Σάρατζ είναι άκυρα και χωρίς ισχύ' | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 8 Jan. 2020, www.kathimerini.gr/politics/1059250/n-dendias-gia-pentameri-symfonoyme-omofona-oti-ta-mnimonia-toyrkias-saratz-einai-akyra-kai-choris-ischy/.

[217] Psaropoulos, J. (2020, December 24). *Annus horribilis: Key greek-turkish developments in 2020*. News | Al Jazeera. (online) Available at: https://www.aljazeera.com/news/2020/12/23/annus-horribilis-key-greek-turkish-developments-in-2020.

[218] Λιάκουρας Π., *Η οριοθέτηση των θαλασσίων ζωνών στην Ανατολική Μεσόγειο: η συμφωνία Ελλάδας – Αιγύπτου*, Καστελόριζο, 19 Σεπτεμβρίου 2020, "*Η οριοθέτηση των θαλασσίων ζωνών στην Ανατολική Μεσόγειο: Νομικά ζητήματα και προκλήσεις",* Ολομέλεια των Προέδρων των Δικηγορικών Συλλόγων Ελλάδος, σελ. 2

[219] *Ibid*, p.2

[220] Solutions, K.G.N.W., 2020. Greek and Turkish warships in 'mini collision,' says Defense Source. *knews.com.cy*. Available at: https://knews.kathimerini.com.cy/en/news/greek-and-turkish-warships-in-mini-collision-says-defense-source

Upon the aforementioned events and given the profound new era of Turkey's international alienation, one would presume that Turkey would engage in moderate conduct, yet to be astounded by its escalating aggression in the Eastern Mediterranean, especially towards Greece. In a Letter dated 15 June 2021 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General[221], Turkey for the first time questioned Greece's sovereignty over its islands, islets and rocks which as Turkey States *"were not ceded to Greece through valid international instruments"*, only to reiterate this absurd and legally unfound contention in its Letter dated 13 July 2021[222], even more aggressively, invoking the Treaty of Lausanne of 24 July 1923 and the Treaty signed at Paris on 10 February 1947 in a fully distorted perspective, one that profoundly serves the neo-ottoman aspirations of Turkey.[223]

Following the method of psychological manipulation known as *gaslighting*, broadly used as a term in the context of psychiatric studies and political commentary[224], Turkey portrays Greece as a potential threat due to the militarization of several Aegean islands such as *the island of Samos, Lesbos, Chios, Kos, Symi and Meis (located in the Mediterranean)*, which are in close proximity to the Anatolian coast, distorting the historic truth that Greece is the one facing a *casus belli*, a threat of war, by Turkey since 1995[225] in case Greece exercises its sovereign rights in accordance with International Law. Thus, Turkey blatantly distorts reality and historical facts, taking this historical distortion a step further by claiming that due to the militarization Greece lacks sovereignty over the islands in question. In response, Greece via its Permanent Representative to the UN has already restored the historical truth before the international community addressing a Letter dated 22 July 2021[226] and a Letter dated 27 July 2021[227] to the Secretary-General, crystallizing the legal foundation and historical proof of its undisputed sovereignty over the islands in question.

Turkey, in a Letter dated 28 September 2021[228] addressed to the Secretary-General, demonstrates its imperialistic stance once again, threatening Greece in a scandalous way before the

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221 A/75/929

222 A/75/961–S/2021/651

223 Maziad, M. and Sotiriadis, J., 2021. *Turkey's Dangerous New Exports: Pan-Islamist, neo-ottoman Visions and Regional Instability*. [online] Middle East Institute. Available at: <https://www.mei.edu/publications/turkeys-dangerous-new-exports-pan-islamist-neo-ottoman-visions-and-regional> **;** Aditya, P., 2021. '*neo-ottomanism' in Turkish foreign policy | ORF*. [online] ORF. Available at: <https://www.orfonline.org/expert-speak/neo-ottomanism-turkish-foreign-policy/; Akca, A., 2021. *neo-ottomanism: Turkey's foreign policy approach to Africa*. [online] Csis.org. Available at: <https://www.csis.org/neo-ottomanism-turkeys-foreign-policy-approach-africa>

224 G. A. Sinha, Lies, Gaslighting and Propaganda, 68 Buff. L. Rev. 1037 (2020), p. 1088

225 Mfa.gr. 2021. *Territorial sea - Casus belli - Relevant Documents*. [online] Available at: <https://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/territorial-sea-casus-belli.html>

226 A/75/972

227 A/75/976–S/2021/684

228 A/76/377

UN by stating *"We urge Greece to adopt a constructive approach and to refrain from faits accomplis or unilateral actions in the region, which would only escalate tensions.",* making abundantly clear which State poses a threat to the other on a profound breach of the UN Charter. In its last Letter dated 30 September 2021, Turkey attempts one more time to distort the historical truth as a part of its never ceasing efforts to aggravate the situation in the Eastern Mediterranean, in the context of its aforementioned neo-ottoman aspirations, which at this point has become so obvious, causing the further escalation of its international alienation. Within this unsteady environment, that serves Turkey's policy, Greece has enhanced its role in the region as a player oriented towards the preservation of peace and stability in the Eastern Mediterranean, having already concluded bilateral agreements with the UAE[229], France[230], the U.S.[231] and the U.K.[232], towards *inter alia* mutual military and defense cooperation.

In the event of these agreements and the agreements concluded by other regional players, Turkey has escalated its aggression once again, causing constant frictions in the area. A profound indication of Turkey's aggressive policy, occurred in mid-September 2021[233], when the French-owned research vessel "Nautical Geo" (under the Maltese flag) attempted to carry out surveys in an area east of Crete, in the context of mapping the possible route of the East Med pipeline, but every time it was beyond the Greek territorial waters (6 nautical miles) it was blocked by Turkish warships under the pretext of the illegal Turkey-Libya MoU, disregarding and violating Greece's legit rights in the area deriving from the valid delimitation agreement with Egypt. Meanwhile, at the end of September 2021[234], almost a year after the events that took place in Nagorno-Karabakh with the Turkish implication in favor of Azerbaijan, Turkey announced the conclusion of a new agreement with the latter concerning natural gas. Right after this announcement, as stated from the Permanent Representative of Cyprus to the UN in a Letter addressed to the Secretary-General and dated 13

[229] Nedos, V., 2020. Greece, UAE commit to Mutual Defense Assistance. *eKathimerini.com*. Available at: https://www.ekathimerini.com/news/259450/greece-uae-commit-to-mutual-defense-assistance/

[230] Reuters. 2021. *Greek parliament approves defence pact with France*. [online] Available at: <https://www.reuters.com/world/europe/greece-france-defence-pact-protects-against-third-party-aggression-greek-pm-2021-10-07/>

[231] U.S. Embassy & Consulate in Greece. 2021. *StateMENT BY SECRETARY ANTONY J. BLINKEN: Signing of Protocol of Amendment to the Mutual Defense Cooperation Agreement with Greece*. [online] Available at: <https://gr.usembassy.gov/Statement-by-secretary-antony-j-blinken-signing-of-protocol-of-amendment-to-the-mutual-defense-cooperation-agreement-with-greece/>

[232] Nedos, V., 2021. *Bilateral framework inked with UK | eKathimerini.com*. [online] Ekathimerini.com. Available at: <https://www.ekathimerini.com/news/1170550/bilateral-framework-inked-with-uk/>

[233] - Νέδος, Β., 2021. *Τουρκική παρενόχληση ανατολικά της Κρήτης | Η ΚΑΘΗΜΕΡΙΝΗ*. [online] Kathimerini.gr. Available at: <https://www.kathimerini.gr/politics/561503455/paichnidia-agkyras-me-vasi-to-mnimonio-toyrkias-livyis/> [Accessed 1 November 2021].

[234] O'Byrne, D. (2021, September 24). Azerbaijan and Turkey tight-lipped over new gas deal. Eurasianet. (online) Available at: https://eurasianet.org/azerbaijan-and-turkey-tight-lipped-over-new-gas-deal.

October 2021[235] *"on 3 October 2021, two (2) Turkish war ships, namely the frigate "ORUC REIS" and the corvette "BAFRA", harassed and prevented the Maltese-flagged and Italian-owned survey vessel "NAUTICAL GEO", duly licensed by the competent authorities of Cyprus, from carrying out a survey on the potential route of the "EASTMED PIPELINE PROJECT". The project is of significant regional importance and has also been designated a Project of Common Interest of the European Union in the field of energy."*

Bearing in mind the sequence of events within the present era of geopolitical restructuring, anyone evaluating Turkey's stance in the region of the Eastern Mediterranean is able to comprehend its interrelation with the obstruction of constructing the East Med pipeline, due to its hegemonic aspirations and its hidden agenda. Often enough, Turkey via announcements highlights its self-claimed regional supremacy and dominance by ordering all players in the Eastern Mediterranean to reach for Turkey's permission and approval towards any development. Under the veil of *Mavi Vatan* and neo-ottomanism, Turkey's arguments as regards maritime delimitation when islands are involved in the process and when Turkey does not question their sovereignty in order to serve its purposes, focus on the *Principles* of non-encroachment and non-cutting-off. More often than not, Turkey portrays the aforementioned *Principles* as a fundamental rule of customary International Law according to which not only *"a delimitation should accord to each State's seaward extension of its coast and aims to avoid any kind of cut-off or distorting effects on the seaward projection of the concerned States"*[236], but also they are *"intended to prevent third States from amputating the natural prolongation of other concerned States"*[237]

The most vivid example of Turkey's perspective over this issue is embodied in two Letters dated 15 November 2019 and 15 June 2021[238] from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General where it states, respectively: *"Turkey reserves its rights to further submit the geographical coordinates of the Turkish Continental shelf to the west of longitude 28-00-00.000E, which extends to the outer limits of territorial waters of the islands facing the relevant area in the Mediterranean, given that the insular features in that maritime area cannot encroach upon and/or cut off Turkey's coastal projection and Continental shelf."* and *"As far as the maximalist and excessive maritime boundary claims are concerned, Greece persistently tries to*

[235] A/76/407–S/2021/816
[236] Yunus Emre Acikgonul (2016) *Reflections on the Principle of Non-Cut Off: A Growing Concept in Maritime Boundary Delimitation Law*, Ocean Development & International Law, 47:1, p. 52, DOI: 10.1080/00908320.2016.1124485
[237] *Ibid*, p.53
[238] A/74/550 and A/75/929

impose automatic full effect for all islands in generating the exclusive economic zone and Continental shelf, including the island of Castellorizo. According to this irrational claim, a 10 km 2 island, which is only 2 km away from the Turkish mainland and 580 km away from the Greek mainland, is supposed to create a 40,000 km 2 Continental shelf/exclusive economic zone area." These statements alone, indicate the main objective of Turkey's foreign policy towards Greece: to "*eradicate*" the islands in the Aegean Sea, in order to accomplish its neo-ottoman aspirations.

II. Transgressions under the scope of International Law

In compliance with State practice, Scholarship and Jurisprudence, the legally binding nature of the Turkey-Libya MoU can safely be determined, as was explained earlier, solely by the application of the objective criterion of the language used in its text. Indeed, it embodies not only the term "Parties"[239], but also clauses as regards its entry into force and potential amendments[240]. Furthermore, Turkey and Libya invoke International Law in the text of MoU and most importantly they have incorporated the provision of the MoU's ratification, which is the traditional and most common way through which States express their consent to be bound by a treaty towards the international community. Therefore, as a legally binding agreement, its illegality and invalidity will be examined in the context of International Law, the Law of treaties and State Responsibility. As will be explained below, not only has the MoU in question violated general Principles of International Law, customary Law, the UNCLOS, because even though none of the two States are contracting parties to it, they seem to invoke and exploit provisions of the Convention when convenient, but also and most importantly the Law of the Treaties, *inter alia* in terms of *jus cogens*.

II.1. The Principle of Good Faith

Good faith is acknowledged as one of the cornerstone Principles of the international legal order, stipulating the obligation of behavioral morality in social relationships, based on the notions of honesty, loyalty, and reasonableness. *Before gaining its legal character in classical Roman law, bona fides or good faith had been understood as one's commitment to his/her own words, fidelity and honesty while symbolizing tacitum in pectore numen: The virtue of loyalty existing in the*

[239] *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*, Instabul, 27 November 2019, p. 2

[240] *Ibid*, p. 3

internal world of the human beings.[241] The Principle of good faith is applied in an international level leading to the unification of different legal norms through their similarities. Due to the universal nature of the Principle of good faith, it is applied in International Law and the International Law of the Sea, being one of its branches. Good faith is embodied in the UNCLOS (Article 300), in the UN Charter [Article 2(2)], in the VCLT [Articles 26&31(1)] as well as in the Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations [General Assembly Resolution 2625 (XXV)]. Thus, even though good faith is a general Principle of Law, applied in international legal affairs, it is stipulated in the UNCLOS as a special contractual obligation.[242]

As mentioned above, maritime delimitation must be effected by agreement between neighboring States. The procedural premise of effecting delimitation of maritime boundaries by agreement constitutes special manifestation of the general Principle of peaceful settlement of international disputes, highlighting the obligation of States' to negotiate in good faith towards the conclusion of an agreement.[243] In order for States to negotiate in good faith, simple meetings and discussions are not enough; all parties must show reasonable consideration for the other's rights and interests, so as to conclude a clear agreement amicably. *In other words, the negotiations must be meaningful*.[244] Breach of good faith can include: abruptly terminating negotiations, causing unusual delays, failing to follow agreed-upon procedures, or systematically refusing to consider adverse offers or interests.

In the case of maritime delimitation, geography and law put an additional obligation on the negotiating parties: to proceed to their border demarcation with regard to the rights or interests of third parties, not included in the delimitation process, as stipulated in Article 34 of the VCLT and in Article 59 of the Statute of the ICJ. Thus, the Principle of good faith obligates the parties to consider adverse interests of their own, but also interests of third parties, otherwise a serious transgression committed by the parties is obvious. Up until now, the ICJ has linked the obligation of conducting negotiations in good faith to legal rights solely, excluding acts between States that do not correspond to a legal obligation.[245] Hence, even if the Turkey-Libya MoU had been concluded between neighboring States, which is not the case, the parties had the legal obligation to take into

[241] Uçaryılmaz, Talya. (2020). The Principle of Good Faith in Public International Law. Estudios de Deusto. 68. 43. 10.18543/ed-68(1)-2020pp 43-59.
[242] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δικαιο Της Θάλασσας*, 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 17
[243] Delimitation of maritime boundaries between adjacent States, Nugzar Dundua United Nations – The Nippon Foundation Fellow 2006-2007, p. 4
[244] Reinhold, Steven. (2013). Good Faith in International Law. Journal of Law and Jurisprudence. 2. 10.2139/ssrn.2269746, p. 56-57
[245] *Ibid*, p.56-57

consideration the rights and interests not only of Greece, but also of Egypt. This obligation was violated by both parties; a violation that would be recognized before the ICJ, given its point on view on the matter, as mentioned above.

II.2. The Principle of good neighborliness

Many years have passed since 1945 when the peoples of United Nations declared their determination to promote international cooperation and respect among neighboring States towards reaching the ultimate objective: the maintenance of international peace and security. In 1970, the UN General Assembly Resolution 2625 (XXV)[246] proclaimed the Principles of friendly relations and cooperation, as embodied in the duties assigned to each and every State[247]. *Inter alia*, the *Declaration on Friendly Relations* stipulated the Principle of Sovereign equality, which is considered as the basis for the Principle of good neighborliness[248], along with Article 2 of the UN Charter.

Throughout the years, the establishment and the constant development of the Principle of good neighborliness via State practice has triggered the divergence of opinions among Scholars as regards its legal nature. While most Scholars attribute the nature of the Principle of good neighborliness to customary International Law, a minority argues that it is a general Principle of International Law within the content of Article 38(1)(c) of the Statute of the ICJ.[249] Among other reasons, this controversy has its roots in the fact that customary law prevails over the general Principles of law, in terms of the hierarchy of sources of International Law.[250] On the other hand, the UN Charter has classified the Principle of good neighborliness as a general Principle of International Law.[251]

Whatever the classification of the legal nature of the Principle of good neighborliness, the mere fact of being a Principle imposes the obligation of specifying its content in the sense of rights and duties attributed to all States of the international community. The resolutions of the UN General Assembly and the related discussions within the Organization throughout the years contribute to the clarification and crystallization of its substance.[252] According to the analysis of the Sub-Committee

[246] Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations, General Assembly on 24 October 1970 (resolution 2625 (XXV)
[247] Sucharitkul, Sompong, *"The Principles of Good-Neighborliness in International Law*" (1996). Publications. Paper 559, p. 5-6
[248] Basheska, E. (2014). The good neighborliness Principle in EU law. [S.n.], p. 12-15
[249] *Ibid*, p. 16-17
[250] *Ibid*, p. 17
[251] *Ibid*, p. 17-19
[252] Sucharitkul, Sompong, "The Principles of Good-Neighborliness in International Law" (1996). Publications. Paper 559, p. 2-18; Kalicka-Mikołajczyk, A. (2019) “The Good Neighborliness Principle in Relations Between the

of the Legal Committee of the UN[253] the main duties of States, deriving from the Principle of good neighborliness are: a) the duty to refrain from harmful domestic activities, b) the duty to take measures to eliminate or minimize the harm, c) the duties to inform, consult and negotiate with neighboring States, d) the duty of tolerance, e) the duties to refrain from actions which could aggravate a conflict and to take measures to attenuate a conflict and f) the duty to take measures to improve and develop friendly relations.

The International Law of the Sea altered the concept of *neighborhood*, once confined in geographical proximity, whereas nowadays grown to cover a larger segment of territories in all dimensions: the sea, the ocean-floor, the water column and the superjacent airspace. Under the UNCLOS, States have become neighbors, with opposite or adjacent coasts, bearing the right and the obligation at the same time, in terms of maintaining peace and security, to mutually delimit their maritime zones, CSs and EEZs. Sharing common resources, such as minerals, water-courses and the resources of the sea, sea-bed and subsoil thereof, it is of imperative importance for neighboring States to fulfill the duties imposed to them by the Principle of good neighborliness[254], during the process of maritime delimitation, duties that both Turkey and Libya ignored and proceeded in negotiations in bad faith resulting in the signature of the illegal MoU, disregarding in the most scandalous way the rights of Greece and Egypt. Moreover, in the case of Turkey one must note that on the 5th of March 1953 Turkey became a contracting party in the *Treaty of Friendship and co-operation between the Turkish Republic, the Kingdom of Greece and the Yugoslav People's Federal Republic*, in the context of which Turkey *inter alia* undertook the obligations of "*consulting together on all matters of common interest"* and *"continue their efforts for the maintenance of peace and security in their area".*[255]

European Union and its Eastern European Neighbours", Adam Mickiewicz University Law Review, 9, p. 137-138 supra note 2

[253] Basheska, E. (2014). The good neighborliness Principle in EU law. [S.n.], p. 24-39

[254] Sucharitkul, Sompong, "The Principles of Good-Neighborliness in International Law" (1996). Publications. Paper 559, p. 9-10

[255] Treaty of Friendship and co-operation between the Turkish Republic, the Kingdom of Greece and the Yugoslav People's Federal Republic, 5th March 1953, Document C-M (53)17, NATO UNCUSSIFIED and PUBLIC DISCLOSED, Articles 1&2

II.3. The Principle of non-interference with third party rights (*"pacta tertiis nec nocent nec prosunt"*)

"*Equity as a legal concept is a direct emanation of the idea of justice."*[256] In the context of maritime delimitation, justice is served when States' agreements or Courts' decisions reflect an equitable solution among States in dispute. When States choose to form an agreement, the delimitation can only be *res inter alios acta·* thus it cannot be held valid *erga omnes*.[257] This argument is founded upon Article 34 of the VCLT and Article 59 of the ICJ Statute, which consist the legal basis of the Principle of non-interference with third-party rights, a Principle of general International Law. Thus, treaty rights and obligations have no effect on third parties.[258] Following Article 34, Articles 35 and 36 of the VCLT provide for the way third States can undertake treaty obligations and rights respectively: solely by consent.[259] More specifically, in order to accept a treaty obligation third States must do so *"expressly"* and *"in writing"*, whereas their assent to treaty rights *"shall be presumed so long as the contrary is not indicated, unless the treaty provides otherwise"*.

Within the scope of equity, no contention can be supported that claims and rights of neighboring third parties- coastal States are to be disregarded. Even though there are cases that this kind of rights have been acknowledged either contractually or by recourse to Courts, it is more common for disputes to arise due to unsettled rights and controversial claims of non-parties thereof. Still, as Pr. Cottier notes *"delimitation must not encroach upon what can be lawfully claimed by the third State (pacta tertiis nec nocent nec prosunt)."*[260] Jurisprudence[261] up until today is fully harmonized with this approach and seems to have endorsed the Principle of non-interference with third party rights in its full perspective, making the lack of Courts' jurisdiction over third parties' rights and claims abundantly clear. One of the most indicative decisions of the Courts' stance towards this issue, is the *Decision of 14 February 1985* in the *Delimitation of the maritime boundary between Guinea and*

[256] *ICJ Reports 1982*, p. 60 par. 71
[257] *ICJ Reports 1969*, p. 14, par. 5; Charney, J. I. (1981) *"The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context,"* American Journal of International Law, Cambridge University Press, 75(1), p. 37; Feldman, M. B., & Colson, D. (1981). *The Maritime Boundaries of the United States.* The American Journal of International Law, *75*(4), P. 748
[258] Hollis, D.B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press, p. 720
[259] *Ibid*, p. 720
[260] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 491
[261] *ICJ Reports 1982,* p. 62 par. 75; *Guinea v. Guinea-Bissau arbitration*, p. 183, par. 93; Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United
Kingdom, Cambridge University Press, p. 493, supra notes 186-188

Guinea-Bissau where the Court Stated that *"A delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region."*[262]

The ability of Courts to state the law depends heavily on the consideration of third-party rights and interests. It could be argued that they should be bound solely by the parties' motions, whereas third-party rights compel the application of the *iura novit curia* Principle under the scope of the UNCLOS, whenever such third party interests are implicated.[263] The court must intervene if the parties to a treaty choose a common ground at the expense of a third party. As a result, in the *Guinea/Guinea-Bissau* dispute, the Tribunal did not adopt either party's position. On the contrary, it relied upon an approach that took into account the shape of the entire West African coast and area, upholding the importance of third parties' rights in the region. Unfortunately, in the case of the Turkey-Libya MoU the contracting parties disregarded Greece's and Egypt's legal rights along with jurisprudence, violating yet another Principle of general International Law.

II.4. Articles 74 and 83 of the UNCLOS: A circumvention of customary law

As mentioned above, maritime delimitation may be defined as *the process of allocating overlapping claims that the States concerned legitimately claim on the basis of an existing relationship to the marine areas in dispute*.[264] It is profound that for overlapping claims to surface, the neighboring States ought to be in "close" vicinity and that can solely be argued in the case of States with opposite or adjacent coasts. In is of high importance to reiterate that Articles 15, 74 and 83 of the UNCLOS, set the legal grounds maritime delimitation among neighboring States, clarifying that for States to be considered as neighboring they must have opposite or adjacent coasts. Reflecting customary law[265], Articles 74(1) and 83(1) of the UNCLOS, indicate their general application and their bindingness for all States of the international community, even for the non-contracting States to the UNCLOS, such as Turkey, which has not signed the Convention up until today, and Libya, which has not ratified it.

Under the scope of the International Law of the Sea, Turkey and Libya cannot be considered as neighboring States, as their coasts are neither opposite nor adjacent. Thus, these two States could never legally argue that they have overlapping claims in the area of the Eastern Mediterranean, as

[262] *Guinea v. Guinea-Bissau arbitration*, p. 183, par. 93
[263] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 493
[264] Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press, p. 530
[265] *ICJ Reports 2014*, p. 65, par. 179

they do not meet the prerequisites set by Articles 74(1) and 83(1) of the UNCLOS. What is worse, Turkey and Libya, overstepping the rights that International Law provides for all States of the International Community, acting in bad faith, circumventing customary law, ignored the rights of their true neighboring States and for the first time in the history of maritime delimitation they signed their illegal MoU, distorting not only the very essence of International Law, but also the geographical data. Staring at a map, anyone with half an eye can see and affirm that even from a geographical point of view Turkey and Libya can never and will never be neighboring States, as between the two States the land mass of Crete is inserted.

II.5. Lack of ratification

As mentioned above, ratification is the traditional and most common way through which States express their consent to be bound by a treaty towards the international community, which as a process is of outmost importance for the conclusion of an agreement according to Article 14 of the VCLT, especially when it is explicitly provided for in the context of the agreement. The significance of ratification as regards the entry into force of the agreement was affirmed by the ICJ in 1952, in the *Ambatielos Case (Greece v. United Kingdom)*, which ruled that *"The ratification of a treaty which provides for ratification, as does the Treaty of 1926, is an indispensable condition for bringing it into operation."*[266]

According to Article VI entitled *"Entry into Force"* of the Turkey-Libya MoU[267] *"This Memorandum of Understanding shall enter into force on the date of receipt of the last written notification by which the Parties notify each other through diplomatic channels of the, completion of their internal legal procedures required for the entry into force of the Memorandum of Understanding."*. Thus, it is profound that the ratification of the MoU is explicitly provided for in its context and is necessary for its conclusion and its entry into force.

As was mentioned above the competent authority to ratify an international agreement varies. In the case of Libya, Article 8(2f) of the Libyan Political Agreement (2015)[268] and the endorsement of the Rome Communiqué of 13 December 2015 by the Security Council through Resolution 2259, adopted unanimously on 23 December 2015[269] provides that *"The Presidency Council of the Council*

[266] *ICJ Reports 1952*, p. 43
[267] *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*, Instabul, 27 November 2019, p. 3
[268] *Libyan Political Agreement*, signed on the 17th of December 2015, p. 8
[269] Resolution 2259 (2015), UN Security Council, adopted on the 23d of December 2015

of Ministers, which comprises the Prime Minister, as well as the membership of the Deputy Prime Ministers and three Ministers shall have the following terms of reference: […] 2.[…] f. Conclude international agreements and conventions provided that they are endorsed by the House of Representatives."

Under the scope of the Resolution 2259, the sole competent authority to ratify the MoU is the HOR of Libya, which as mentioned above not only denounced the alleged "agreement" as null and void on the 4th of January 2020, but also consistently refuses to proceed with the motion of its approval, thus its ratification. Hence, one can validly argue that the conclusion of the illegal MoU in question was never completed and has never entered into force, leading to the profound inability of both States to invoke their alleged agreement before the International Community.

In the context of consistency, we must reiterate that the registration of the illegal MoU in question with UN Secretariat[270], though it should not have taken place due to the lack of ratification and the non entry into force as an immediate consequence, it is legally inconsequential, in the sense that, as was explained earlier, it consists a merely formal procedure which does not attribute neither validity nor the status of a treaty to any agreement. Nonetheless, even if anyone argues that the registration of the MoU lies among the objective factors that attribute the status of a treaty to an agreement in accordance with the the ICJ's ruling in the in the case of *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, in 2017[271], he should bear in mind that in the same decision the ICJ upgraded the status of objections in one of the negative objective factors in assigning treaty status to an agreement.

In this context, we need to highlight the fact that not only did a vast part of the international community reacted immediately in the event of the illegal MoU denouncing it as null and void, but also many States submitted their Letters of objections before the Secretary General of the UN. More specifically, as mentioned earlier, apart from Greece, Egypt, Cyprus and the Syrian Arab Republic, the Speaker of the HOR of Libya Chancellor *Aguila Saleh* addressed a Letter of objections to the Secretary General of the UN, asking *inter alia* for the non-recognition of it. Thus, the sole competent authority to ratify the MoU is the one that objected to it before the UN immediately.

[270] Certificate of Registration with the Secretariat of the United Nations, No 69975, New York, 30 September 2020
[271] *ICJ Reports 2017*, p. 21-22 par. 42

II.6. The right to self-determination of peoples: Breaching a peremptory norm of general International Law (*"jus cogens"*)

One of the main objectives of the UN, consistently, is the promotion and cultivation of respect for human rights and fundamental freedoms, as stipulated in the Preamble of the UN Charter, in the context of which, under Articles 1&55, the UN established the right to self-determination of peoples. Towards the accomplishment of this primary goal, the UN General Assembly in 1948 moved to the promulgation of the Universal Declaration of Human Rights.[272] *Inter alia* Article 17 of the latter stipulates that "*everyone has the right to own property alone as well as in association with others"* and "*no one shall be arbitrarily deprived of his property."*

In the era of endorsement of the Universal Declaration, part of the international community, sharing the same perspective, argued that human rights should be embodied in a treaty, binding upon its parties. Multiple negotiation processes in the Commission on Human Rights, over this matter, resulted in the 1966 adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights by the General Assembly of the UN.[273] Among other human rights, both International Covenants on Human Rights stipulated the right to self-determination of peoples in Article 1 respectively- substantial part of which derives from the aforementioned Article 17 of the Universal Declaration of Human Rights - and at the same time defined its meaning as well as its essential elements. Prior to the International Covenants on Human Rights, the work of UN bodies had proved the Organization's intention towards the recognition of the right to self-determination of peoples as a fundamental human right.[274]

Part of the key constituents of the right to self-determination of peoples, under the aforementioned Article 1, contained in its 2nd paragraph, is their right to freely pursue their economic development by virtue of their right to dispose their natural wealth and resources, thus the means of their subsistence, which constitutes an inalienable right of humanity.[275] This responsibility falls primarily on sovereign states, which are responsible for enacting progressive economic and social reforms and ensuring full participation of their citizens in the development process and rewards.[276] Throughout the years, various Resolutions of UN bodies reaffirmed the right of peoples to freely

[272] *Civil and Political Rights*: The Human Rights Committee, Fact Sheet No.15 (Rev.1), p. 1
[273] *Ibid*, p.1
[274] Cristescu, A., *The right to self-determination· Historical and current development on the basis of United Nations Instruments*, 1981, New York, United Nations, p. 4-8
[275] *Ibid*, p. 53
[276] *Ibid*, p. 56

pursue their economic development with the General Assembly Resolution 2625 (XXV) of 24 October 1970 being a reference point.[277]

Since the early 1950's, in the fields of economic development and human rights and at the same time during the process of decolonization[278], the Commission on Human Rights and the Third Committee of the General Assembly of the UN were preoccupied with the Principle of Permanent sovereignty over natural resources (PSNR), as an essential element of the right to self-determination of peoples.[279] In the ambit of his study in 1983, Pr. Sloan refers to the General Assembly Resolution 626 (VII) of 21 December 1952, according to which "*the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations"*[280], a subsequent reference point in State practice. The determination of the General Assembly to include an article relating to the right of peoples to self-determination in the International Covenants on Human Rights in conjunction with the recommendations of the Commission on Human Rights as regards the permanent sovereignty of States over their natural wealth and resources, resulted in the adoption of a text, on the basis of which the right to self-determination of peoples was shaped and articulated under Article 1 of both International Covenants on Human Rights and acquired a crystallized content[281], without which it would be an indefinite legal concept. All this activity, lead to the 1958 establishment of a Commission on PSNR by the General Assembly, the work of which was to determine the fundamental elements of the right to self-determination, which resulted in the 1962 Declaration on permanent sovereignty over natural resources by the General Assembly Resolution 1803 (XVII).[282]

The actual meaning and content of PSNR, as an essential element of the right to self-determination of peoples, is defined in the 1962 Declaration, according to which *"the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned"* and that *"the exploration, development and disposition of such resources, as well as the*

[277] *Ibid*, p. 53; *Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations [General Assembly Resolution 2625 (XXV)]; "Permanent sovereignty over natural resources" [General Assembly Resolution 3171 (XXVIII)]; Declaration on the Establishment of a New International Economic Order [General Assembly Resolution 3201 (S-VI)]; "Charter of Economic Rights and Duties of States" [General Assembly Resolution 3281 (XXIX)]*.

[278] *Ibid*, p. 71

[279] Sloan, B. and Secretary-General, U.N., N.Y., 1983, *Implications, under International Law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories*, p. 4

[280] *Ibid*, p. 4

[281] *Ibid*, p. 5

[282] General Assembly Resolution 1314 (XIII)

import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities."[283] Pr. Schrijver points out the wide range of resources and activities contained in the PSNR Principle and its enrichment over time through the various Resolutions of the General Assembly of the UN, from territorial natural resources through marine ones[284], with the Resolution 3016 (XXVII) of 18 December 1972 being the one reaffirming *"the right of States to permanent sovereignty over all their natural resources, on land within the international boundaries as well as those found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters;"*[285]

When it comes to the definition of the term *natural resources*, apart from the various meanings attributed to it from an economic and geographic perspective, International Law does not provide a legal definition.[286] The only instruments providing clarifications of the actual meaning of the term, resembling to definitions, are various treaties, among which the UNCLOS that stipulates in Article 77(4) [Article 2(4) of the CCS] that *"The natural resources referred to in this part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil."*[287] Article 1(2) of both 1966 International Covenants on Human Rights, provides not only for the natural resources, but also for natural wealth of States and their right to freely dispose them. Thus, among various attempts being made to clarify the difference between natural resources and natural wealth and define the meaning of the latter, Jan Tinbergen, a Dutch economist, in 1965 noted that the constituents of States wealth are: *"[i] its natural wealth, such as land for agricultural purposes, minerals, natural means of communication, geographic position and climate, and [ii] the capital goods it owns, i.e. the goods partly produced by human labour which are used for further production or consumption: Buildings, roads, harbours, machinery, raw material stocks, stocks of consumer goods."*[288] and Pr. Schrijver concluded that *"The concept of*

[283] General Assembly Resolution 1803 (XVII)
[284] Schrijver, N. J., 1995, *Sovereignty over natural resources: balancing rights and duties in an interdependent world,* s.n., p. 10-11& 84-86; *General Assembly Resolution 523 (VI); General Assembly Resolution 2692 (XXV); General Assembly Resolution 3016 (XXVII;· UNIDO II, 1975; General Assembly Resolution 3201 (S-VI); General Assembly Resolution 3281(XXIX)*
[285] General Assembly Resolution 3016 (XXVII)
[286] Schrijver, N. J., 1995, *Sovereignty over natural resources: balancing rights and duties in an interdependent world,* s.n., p. 12-14
[287] *Ibid*, 14-15
[288] *Ibid*, p. 15, supra note 55

natural wealth may come close to what is commonly called 'the environment' as a description of a physical matter, being the air, the sea, the land, flora and fauna and the rest of the natural heritage."[289]

In the years between, multiple discussions and Resolutions took place over the extension of the PSNR Principle to the economic activities correlating with natural resources, the main argument being that sovereignty or sovereign rights over natural resources are void, unless nations are able to exploit them and define prices.[290] This matter was regulated in a European level with the establishment of the European Energy Charter Treaty (EECT) in 1994 (currently the consolidated ECT), which in Article 1(5) in conjunction with Article 18 defines economic activity in the energy sector, always in the ambit of sovereignty and sovereign rights over natural resources, as *"an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products ..., or concerning the distribution of heat to multiple premises."*[291]

Reiterating what was analyzed earlier, every coastal State exercises exclusive sovereign rights over its CS, which are inherent rights to territorial sovereignty[292] and do not depend on occupation, effective or notional, or on any express proclamation[293], affirming their *ipso facto* and *ab initio* existence.[294] Sovereign rights over the CS are those of the special economic purpose of exploration and exploitation of its natural resources[295], that attribute exclusive national jurisdiction to the coastal State over artificial islands, installations and structures, marine scientific research, dumping, drilling operations and other purposes (Article 77(1-3), Article 80 in conjunction with Article 60, Article 81 of the UNCLOS). Of course, it is indisputable, as it is explicitly stipulated under Article 121 of the UNCLOS which reflects customary law according to the ICJ[296], that islands regardless of their size generate the same maritime rights as other land territory, including *inter alia* sovereign rights over their CS. Generally, sovereign rights are defined as rights of special purpose, mainly economic and related to territorial sovereignty since they are exercised over the CS, but different from it[297], in the sense that a. territorial sovereignty means the exercise of all State competences, whereas sovereign

[289] *Ibid*, 15-16
[290] *Ibid*, p. 17-18
[291] Articles 1(5) and 18 of the EECT
[292] Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press, p. 172; Ιωάννου Κ. και Στρατή Α., 2000, *Το Δικαιο Της Θάλασσας*, 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 176
[293] Article 77(3) of the UNCLOS
[294] *ICJ Reports 1969*, par. 19
[295] Article 77(1) of the UNCLOS
[296] *ICJ Reports 2001*, p.97, par. 185; *ICJ Reports 2012*, p. 674, par. 139
[297] Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας, σελ. 176

rights are limited to specific purposes and b. territorial sovereignty is directly intertwined with its exclusive exercise, whereas sovereign rights do not depend on it.

On the 8th of July 2010, an order for reference for a preliminary ruling made in proceedings between *Mr Salemink*, a Netherlands national who had been employed on a gas-drilling platform on the CS of the Netherlands and resident in Spain, and the *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (UWV)* (Management Board of the Employee Insurance Agency) was lodged at the European Court of Justice (ECJ) [Case C-347/10], concerning the refusal of the *UWV* to grant *Mr Salemink* invalidity benefit, contrary to Regulation (EEC) No 1408/71 of the Council of 14 June 1971, as amended, and Article 39 EC.[298] More specifically, Article 13(2a) of the Regulation in question stipulates that *"a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;"*.

During the hearing on the 14th of June 2011, the *UWV*, the Spanish, Greek and Netherlands Governments and the European Commission addressed the question of whether work carried out on the Continental shelf must be considered as carried out within the territory of the Netherlands.[299] The European Commission along with the Spanish and Greek Governments argued that EU law, as the Regulation in question, is fully applicable in the case of a worker as Mr Salemink, employed in a facility located on the Continental shelf of a Member State[300], with the European Commission maintaining that *"as the Regulation itself is silent on the matter, work carried out in the part of the Continental shelf belonging to a Member State must be regarded as work that is carried out within the territory of that Member State, since this can be inferred from the Principles of public International Law concerning the rules relating to the Continental shelf."*[301]

Advocate General Cruz Villalon in his Opinion regarding Case C-347/10, delivered on the 8th of September 2011, examined the case, *inter alia*, from the perspective of the *'territorial status'* of the CS[302]. In his extensive *rationale*[303], he analyzes *inter alia* how the delimitation of a territory over which State sovereignty is exercised can be realized only in terms of International Law, via treaties

[298] *Case C-347/10 (A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*), Judgment of the Court (Grand Chamber), 17 January 2012, p. 2 (par.1) & 8
[299] *Case C-347/10 (A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*), Opinion of Advocate General Cruz Villalon, 8 September 2011, par. 28 & 30 p. 6
[300] *Ibid*, par. 33 p. 7
[301] *Ibid*, par. 22(a) p. 5
[302] *Ibid*, par. 41 p. 8
[303] *Ibid*, p. 7-15

that define boundaries and points out the fact that *as a physical space under the sovereignty of a State, the concept of territory covers territorial space as such and also airspace and maritime space*.[304] Unlike sovereignty, being determined and acknowledged by International Law as a primary official authority, sovereign rights stem from the will of the international community, but even so, since both of them are vested in States, then the power to exercise their official authority extends over areas where this exclusive authority is indisputable.[305] In order for him to define the scope of EU Law, he argues that the fundamental criterion is the extent of the competences, that are actually granted to the EU, lawfully exercised by its Member States, within the framework of International Law[306], only to conclude that the area over which Member States exercise the competences of the EU is not necessarily "territorial", based on the fact that the effectiveness of State enforcement is not necessarily confined in a "physical territory" but it can be achieved in "extraterritorial" areas, given the historical development of the modern State and the fact that International Law has extended State power over these "extraterritorial" areas[307], just like in the case of the CS.

According to Advocate General Cruz Villalon, even though States under International Law have functional jurisdiction over their CS, what is of high importance is the range of authority vested in the coastal state and the extent to which such authority has been delegated to the EU.[308] In this context, he argues that the exploitation of natural resources of the CS constitutes an exclusive competence of the coastal State, which has the authority to engage into activities for the utilization of these resources using labor which must necessarily be subject to the employment legislation of the coastal State, which, in this sense, is entitled to exercise sovereignty *mutantis mutandis*[309], thus official authority under International Law.[310] Hence, in his point of view *"if territory is defined as the space where the sovereign power of the State manifests itself through the exercise of the competences legitimately vested in it under International Law, then the Continental shelf adjacent to its coast is the territory of the Member State within this meaning, that is to say, it is the space over which the Member State exercises exclusive competence in relation to, in this case, employment relationships entered into for the purpose of the economic exploitation of such space. Furthermore,*

[304] *Ibid*, par. 43-44 p. 8
[305] *Ibid*, par. 52-53 p. 10
[306] *Ibid*, par. 55 p. 10
[307] *Ibid*, p. 11 supra note 24
[308] *Ibid*, par. 59 p. 12
[309] *Ibid*, par. 60-61 p. 12
[310] *Ibid*, par. 70 p. 13

as State 'territory' within that precise meaning, it is also EU 'territory' for the purposes of the application of EU law."[311]

The ECJ *(Grand Chamber)* in this Case via its own *rationale*, in essence adopted the Adocate' s Opinion only to conclude that *"Since a Member State has sovereignty over the Continental shelf adjacent to it — albeit functional and limited sovereignty (see, to that effect, Case C-111/05 Aktiebolaget NN [2007] ECR I-2697, paragraph 59) — work carried out on fixed or floating installations positioned on the Continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law (see, to that effect, Case C-37/00 Weber [2002] ECR I-2013, paragraph 36, and Case C-6/04 Commission v United Kingdom [2005] ECR I-9017, paragraph 117)."*[312] This Judgment of the ECJ in 2012 sets the ground for an *argumentum a minori ad maius*. Indeed, since the Court affirms sovereignty of States (functional and limited) over the CS and acknowledges the applicability of EU Law over this marine area, equating this space to land territory, particularly in terms of exploitation of the natural resources, then it is beyond doubt that the scope of peremptory norms of general International Law ("*jus cogens*") extends to the CS of States, given their superiority and grave importance for the International community, the EU included.

Furthermore, in support of the current argument, the ICJ in its 1969 judgment[313] argued that sovereign rights over the CS exist *ipso facto* and *ab initio* by virtue of a State's sovereignty over its land territory and *by extension of that sovereignty in the form of the exercise of sovereign rights for the purposes of the exploration of the seabed and the exploitation of its natural resources*, affirming the inherent nature of those rights, that are in no need of proclamation and are exclusive *in the sense that if the coastal State does not choose to explore or exploit the areas of self appertaining to it, that is its own affair, but no one else may do so without its express consent*. The exclusivity of the rights to explore and exploit the natural resources of the CS and the *de facto* "ownership" of a State over these resources is further reflected in the UNCLOS. Article 82 of the UNCLOS provides for the States obligation to make payments and contributions with respect to the exploitation of the non-living natural resources of the Continental shelf beyond 200 nautical miles, which with an *argumentum a contrario* stipulates that the resources and their subsequent exploitation within the 200 nautical miles space of the CS "belong" to the coastal State, which has exclusive authority over

[311] *Ibid*, par. 77 p. 14
[312] *Case C-347/10 (A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*), Judgment of the Court (Grand Chamber), 17 January 2012, par. 35 p. 6
[313] *ICJ Reports 1969*, p. 22 par. 19

them, this being the reason for no additional obligation vested upon it. In any case, the ILC in 2001 acknowledged that the Principle of PSNR, which is the basis of Article 1(2) of both International Covenants on Human Rights, extends not only to the resources within the States territory but also to those under their jurisdiction or control.[314] Last but not least, the consolidated Energy Charter Treaty (ECT) which is an international multilateral agreement, with currently fifty-three Signatories and Contracting Parties to it, Turkey being one of them[315], stipulates in Article 18(1) that *"The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law."*

Throughout the years, the right to self-determination of peoples, as a norm, has triggered the divergence of opinions, as on the one hand, it was argued that it constitutes a Principle of general International Law and an obligation *erga omnes*, while, on the other hand, it was maintained that it is a legal norm that has the status of a *jus cogens* rule.[316] The concept of jus cogens norms (peremptory norms) emerged in International Law in 1969 with the establishment of the VCLT, in the context of which, Article 53 provides that *"For the purposes of the present Convention, a peremptory norm of general International Law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general International Law having the same character."*, stipulating at the same time the legal consequences in case of infringement, providing that "*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general International Law."*

In the text of the draft conclusions, adopted by the ILC in 2019, on first reading, Conclusion 4 established two criteria that have to be met by a norm in order to be identified as a peremptory norm of general International Law (*jus cogens*)[317], namely the norm in question must be one of general International Law and it must be accepted and recognized *by a very large majority of States* of the international community as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general International Law having the same character.[318] In

[314] ILC Yearbook 2001, Vol. II, p. 146

[315] Energycharter.org. 2021. *Energy Charter Treaty - Energy Charter*. [online] Available at: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>

[316] Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, *Human Rights Law Review*, Volume 11, Issue 4, December 2011, p. 609–644

[317] A minority of Scholars doubt the legal certainty and stability provided, i.e. Matsumoto, S., 2020, *Jus Cogens and the Right to Self-Determination - Falsifiability of Tests -*, Researh Paper September 2020, Policy Center for the New South, RP-20/12

[318] Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN

the context of the attempt to construct a methodology and process for identifying peremptory norms of general International Law (*jus cogens*)[319], the ILC via Conclusion 5 set the bases of these norms, namely customary International Law, treaty provisions and general Principles of law.[320]

Furthermore, under Conclusions 8 and 9, the ILC determined a non-exhaustive list of forms that constitute evidence that a norm is accepted and recognized as a peremptory norm, *inter alia* Resolutions adopted by international organizations and decisions of national courts[321], and the subsidiary means for the determination of the peremptory character of norms of general International Law and more specifically the decisions of international courts and tribunals, in particular of the International Court of Justice and the works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations.[322] At the same time, after many years of discussions and controversy, the ILC under Conclusion 17[323] correlated and acknowledged the link between the peremptory norms of general International Law (*jus cogens*) with the obligations owed to the international community as a whole (obligations *erga omnes*)[324], creating the necessary space for other norms to be granted with the *jus cogens* status.

Pursuant to all the methodological and systematic instruments introduced in the text of the draft conclusions, the ILC in 2019, under Conclusion 23, introduced a non-exhaustive list of norms that the Commission has previously referred to as having the status of peremptory norms of general International Law (*jus cogens*)[325], one of them being the right of self-determination.[326] Historically, the right of self-determination *inter alia* was argued as being part of customary International Law and *perhaps even a peremptory norm of general International Law*[327], as well as an *erga omnes*

General Assembly, p. 142-143 (Conclusions 4&7)

[319] *Ibid*, p.147

[320] *Ibid*, p. 158

[321] *Ibid*, p. 143: Conclusion 8: *... "2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference."*

[322] *Ibid*, p. 143 (Conclusion 9)

[323] *Ibid*, p. 145

[324] *Ibid*, p.190-192, *Commentary*

[325] *Ibid*, p. 146-147

[326] *Ibid*, p. 207, *Commentary: (12) The final norm listed in the annex is the right of self-determination. In describing the norm as having peremptory character, the Commission has used the formulation "the right of self-determination", although it has at times referred to the "right to self-determination".*

[327] *Ibid*, p. 159-160 supra note 744 *..the statements by the United Kingdom (A/C.6/34/SR.61, para. 46) and Jamaica (A/C.6/42/SR.29, para. 3)*; p. 169 supra note 793 *...the separate opinion of Vice-President Ammoun in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 79*; p. 194-195 *The International Court of Justice, in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

obligation[328], which now is interlinked with norms of *jus cogens*, according to the ILC, while as was analyzed earlier it was established via multiple Resolutions of the UN General Assembly, which are now a recognized form of evidence of the *jus cogens* status of a norm. As the Special Rapporteur Dire Tladi notes[329], the right to self-determination is a norm previously identified by the Commission[330] as one of jus cogens and *is a classical norm of jus cogens whose peremptory status is virtually universally accepted*, not only in State practice, but also in jurisprudence and Scholarship.[331] Of course, the importance of the rules of *jus cogens* for the international community as a whole, lead the ILC to intertwine these norms with the rules on the responsibility of States for internationally wrongful acts under (Conclusions 17-19[332]), perhaps following the case law of the ICJ.[333]

As was analyzed in the present paper, the Turkey-Libya MoU signed, on the 27th of November 2019[334], by which the two States agreed on the delimitation of their alleged maritime boundaries and decided on a single boundary line for the marine zones of the CS and the EEZ from Point A (34° 16' 13.720"N – 26° 19' 11.640"E) to Point B (34° 09' 07.9"N – 26° 39' 06.3"E)[335], deprives Greece of its *ipso facto* and *ab initio* sovereign rights over the CS of the islands of Crete, Rhodes, Karpathos, Kasos and Kastellorizo. Given that Greece as a sovereign State has the exclusive right to explore and exploit the natural resources of the CS of all the islands under its sovereignty, where Greece essentially exercises its sovereignty, even in a limited way as was clarified earlier, both Turkey and Libya have violated the absolute right to self-determination of Greece, by breaching two of its vital constituents and more specifically the right of Greece to freely pursue the economic development of

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[328] *Ibid*, p. 191 supra note 863 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, para. 180*; p. 191 supra note 863 *East Timor (Portugal v. Australia) , p. 102, para. 29*; p. 199 supra note 907 *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario), Case C-104/16 P, Judgment of 21 December 2016, Court of Justice of the European Union (Grand Chamber), Official Journal of the European Union, C 53/19 (20 February 2017), para. 88 et seq., especially para. 114*

[329] Fourth report on peremptory norms of general International Law (*jus cogens*) by Dire Tladi, Special Rapporteur, International Law Commission Seventy-first session Geneva, 29 April–7 June and 8 July–9 August 2019, UN General Assembly, p. 48-49

[330] ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001, p. 85 (par. 5) & p. 112-113; ILC Yearbook 2001, Vol. II, p. 85 (par. 5) & p. 112-113

[331] Fourth report on peremptory norms of general International Law (*jus cogens*) by Dire Tladi, Special Rapporteur, International Law Commission Seventy-first session Geneva, 29 April–7 June and 8 July–9 August 2019, UN General Assembly, p. 49-52

[332] Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN General Assembly, p. 190-197

[333] *Ibid*, p. 191; *See also Commentary* p. 190-193

[334] *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*, Instabul, 27 November 2019

[335] Stanicek, B., 2020, *Turkey: Remodelling the eastern Mediterranean Conflicting exploration of natural gas reserves*, Briefing, European Parliament, European Union, September 2020, p. 5

its citizens and the State's as a whole by virtue of its right to dispose its natural wealth and resources[336], born under the veil of the Principle of PSNR, which, in the author's opinion, could be raised in a rule of *jus cogens* itself. It is more than evident that by breaching the right to self-determination of Greece, the Turkey- Libya illegal MoU conflicts with a peremptory norm of general International Law (*jus cogens*) and consequently, for the protection of public interest, the MoU is void *ab initio* by operation of law[337], setting in motion not only the provisions of the VCLT towards its annulment, but also the rules on the Responsibility of States for internationally wrongful acts.

[336] Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights by the General Assembly of the UN

[337] Article 53 of the VCLT

Conclusions

Throughout centuries, humanity faced many hardships and injustices that raised international awareness and triggered the realization of the ultimate necessity of constituting a more solid and functioning legal order towards the protection of not only private interest, but also and most importantly of public interest, as there are pressing matters that concern the international community as a whole. Up until today, States, Scholars, Courts and International Organizations have made consistent efforts to set the rules of a just international environment, but unfortunately, there are cases that these rules seem to be extremely inadequate, either because of States defiance, or because of the lack of the means of enforcement. One of the most accurate examples of this inefficiency is reflected in Article 53 of the VCLT. No more precise commentary could ever be made than the one by Pr. Rozakis, who in his 1974 early study notes that *"The ambitious ground of article 53 seems to fail to fulfil its ratio legis within the framework of the Convention due to the latter's inadequacy, in its procedural provisions, to stipulate law suitable to a nullity of absolute nature. Beyond the fact that it allows an illegal treaty to effectively operate until the time of its invalidation without even insuring that invalidation will take place, the letter of article 65 excludes any third party from invoking the machinery of the procedural articles (65 and 66) in order to bring about the invalidation of an illegal treaty. Under these circumstances, the invalidation or non-invalidation rests upon the parties to the illegal treaty and the political pressures exerted on them to extinguish the wrong done."*[338] Hence, despite the undeniable illegality and *ab initio* invalidity of the Turkey-Libya MoU, the annulment of this agreement, even if simply declaratory, rests upon these two States and their willingness to engage in legal conduct by complying with International Law.

Under the rules of the Responsibility of States for internationally wrongful acts[339], an internationally wrongful act of a State, which can be attributed to it under International Law and infringes an international obligation it holds, entail its international responsibility (Articles 1,2&3). Undoubtedly, the violation of a peremptory norm of general International Law (*jus cogens*) constitutes a wrongful act (Article 26) and according to the ILC one of those norms is the right to self-determination[340]. Any State responsible for such an act is under the obligation of making full reparation for the damage caused, whether material or moral (Article 31), with the form of restitution, compensation and satisfaction, either singly or in combination (Article 34).

[338] ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts*, *16*(2), p. 192
[339] ILC Yearbook 2001, Vol. II, p. 20-143; see in particular Articles 1,2,3, 26, 31, 34, 36, 40, 41, 42, 43&47 and *Commentary*
[340] *Ibid*, par. 5 p. 85

Compensation corresponds to any financially assessable damage including loss of profits insofar as it is established (Article 36). As regards serious breaches by a State of an obligation arising under a rule of *jus cogens*, serious being the breach when it involves a gross or systematic failure by the responsible State to fulfill the obligation (Article 40), no State has the right to recognize such an unlawful situation (Article 41). The injured State is entitled to invoke via a notice of claim the responsibility of the responsible State or group of States, when *inter alia* the obligation is owed to the international community as a whole and this breach affects the injured State in particular (Article 42,43&47).

Unfortunately, even in terms of State Responsibility, an injured State, just like in the case of Greece, faces obstacles that in essence hinder its right to claim reparation for the damage caused by the responsible State or States, even when the wrongful act derives from the breach of a rule of *jus cogens*. The first fundamental legal obstacle is set by the Statute of the Permanent International Court of Justice and that of the ICJ, which stipulate that the prerequisite of these Courts jurisdiction over a case is the consent of the parties for the judicial settlement of their dispute[341] and as Pr. Pigrau notes *"It seems, therefore, that, in the current state of evolution of International Law, a peremptory norm is not sufficiently powerful to affect the right of a State not to give its consent to be judged by the ICJ. Naturally, this deprives each State and the entire international community of a fundamental legal way to claim that a norm, 'from which no derogation is permitted', be applied. Only a highly unlikely reform of the ICJ's Statute could correct what appears to be a legal contradiction [...]"*[342] The second legal obstacle is set again by the ICJ, that treats disputes as being bilateral by nature, having precluded in several cases group actions against the same defendant or actions against joint defendants, with space being left solely for the intervention of proceedings by a third State. [343]

Overall, despite having acknowledged the illegal nature of the Turkey-Libya MoU, particularly due to the violation of a *jus cogens* norm, making use of all legal instruments available in International Law, no immediate legal action can be taken on behalf of Greece towards either its annulment or the invocation of the responsibility of the States of Turkey and Libya, as an injured third State. Of course, knowledge acquired is never to be disregarded, as disputes in an international level can be settled via diplomatic channels and contact. Thus, having in mind the international alienation of Turkey, in conjunction with the forthcoming national elections in Libya on the 24th of

[341] Pigrau, A., *Reflections on the effectiveness of peremptory norms and erga omnes obligations before international tribunals, regarding the request for an advisory opinion from the International Court of Justice on the Chagos Islands*, 2019, p.135-137
[342] *Ibid*, p.137
[343] *Ibid*, p. 137-138

December of the current year and the consistency in the diplomatic level of the Ministry of Foreign Affairs of Greece, towards the preservation of peace and stability in the Eastern Mediterranean basin, we are on hold of the imminent geopolitical developments that will set the context of Greece's national politics in the area.

References

1. Γαβουνέλη, Μ., 2016, *"Ενεργειακές Εγκαταστάσεις στην Θάλασσα",* Νομική Βιβλιοθήκη ΑΕΒΕ
2. "Ισραηλινός ΥΠΕΞ: Παράνομη η συμφωνία Τουρκίας και Λιβυής." *Euronews*, 24 Dec. 2019, gr.euronews.com/2019/12/24/israeli-foreign-minister-israel-katz-paranomi-i-symfonia-tourkias-kai-libyhs-kypros-ellada.
3. Ιωάννου Κ. και Στρατή Α., 2000, *Το Δίκαιο Της Θάλασσας,* 2η Εκδ., Αντ. Ν. Σάκκουλας
4. Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1988, *Δημόσιο Διεθνές Δίκαιο: Θεωρία των πηγών*, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή
5. Ιωάννου Κ., Οικονομίδη Κ., Ροζάκη Χ. και Φατούρου Α., 1990, *Δημόσιο Διεθνές Δίκαιο: οι φορείς δικαιωμάτων και υποχρεώσεων στη διεθνή έννομη τάξη, Πανεπιστημιακές σημειώσεις,* Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή
6. "Και η Μόσχα καταδικάζει τη συμφωνία Τουρκίας - Λιβύης." *Euronews*, 3 Dec. 2019, gr.euronews.com/2019/12/03/kai-h-mosxa-katadikazei-th-symfonia-toyrkias-libyhs.
7. Λιάκουρας Π., *Η οριοθέτηση των θαλασσίων ζωνών στην Ανατολική Μεσόγειο: η συμφωνία Ελλάδας – Αιγύπτου*, Καστελόριζο, 19 Σεπτεμβρίου 2020, "*Η οριοθέτηση των θαλασσίων ζωνών στην Ανατολική Μεσόγειο: Νομικά ζητήματα και προκλήσεις",* Ολομέλεια των Προέδρων των Δικηγορικών Συλλόγων Ελλάδος
8. ---. "Ν. Δένδιας για πενταμερή: 'Συμφωνούμε ομόφωνα ότι τα μνημόνια Τουρκίας-Σάρατζ είναι άκυρα και χωρίς ισχύ' | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 8 Jan. 2020, www.kathimerini.gr/politics/1059250/n-dendias-gia-pentameri-symfonoyme-omofona-oti-ta-mnimonia-toyrkias-saratz-einai-akyra-kai-choris-ischy/.
9. ---. "Ν. Δένδιας: Ελλάδα και Σ. Αραβία έχουν την αντίληψη ότι τα μνημόνια Τουρκίας-Σαράτζ είναι άκυρα | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 24 Jan. 2020, www.kathimerini.gr/politics/1061769/n-dendias-ellada-kai-s-aravia-echoyn-tin-antilipsi-oti-ta-mnimonia-toyrkias-saratz-einai-akyra/.
10. Νέδος, Β. and Κωστίδης, Μ., 2021. *Ελληνοτουρκικά: Διπλωματικό σκάκι με φόντο τη Λιβύη | Η ΚΑΘΗΜΕΡΙΝΗ*. [online] Kathimerini.gr. Available at: <https://www.kathimerini.gr/politics/561328465/ellinotoyrkika-diplomatiko-skaki-me-fonto-ti-livyi/>
11. ---. "Συνάντηση Ν. Δένδια με τον Χαλίφα Χαφτάρ στη Λιβύη – 'Ακυρα και επιβλαβή' τα τουρκολιβυκά μνημόνια | Η ΚΑΘΗΜΕΡΙΝΗ." *Www.kathimerini.gr*, 22 Dec. 2019, www.kathimerini.gr/politics/1057423/synantisi-n-dendia-me-ton-chalifa-chaftar-sti-livyi-akyra-kai-epivlavi-ta-toyrkolivyka-mnimonia/.
12. Aditya, P., 2021. '*neo-ottomanism' in Turkish foreign policy | ORF*. [online] ORF. Available at: <https://www.orfonline.org/expert-speak/neo-ottomanism-turkish-foreign-policy/
13. "Aguila Saleh to the UN Security Council: We Demand 3 Urgent Steps Including Withdrawing Recognition of the GNA." *Al Marsad*, 2 Dec. 2019, almarsad.co/en/2019/12/02/aguila-saleh-to-the-un-security-council-we-demand-3-urgent-steps-including-withdrawing-recognition-of-the-gna/.
14. Akca, A., 2021. *neo-ottomanism: Turkey's foreign policy approach to Africa*. [online] Csis.org. Available at: <https://www.csis.org/neo-ottomanism-turkeys-foreign-policy-approach-africa>
15. "Answer for Question P-004324/19." *Www.europarl.europa.eu*, 6 Feb. 2020, www.europarl.europa.eu/doceo/document/P-9-2019-004324-ASW_EN.html.
16. Basheska, E. (2014). The good neighborliness Principle in EU law. [S.n.].

17. Certificate of Registration with the Secretariat of the United Nations, No 69975, New York, 30 September 2020
18. Charney, J. I. (1981) "The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context," American Journal of International Law, Cambridge University Press, 75(1), pp. 28–68.
19. *Civil and Political Rights*: The Human Rights Committee, Fact Sheet No.15 (Rev.1)
20. Cottier, T., 2015, "*Equitable Principles of maritime boundary delimitation : the quest for distributive justice in International Law",* 1st Edn, United Kingdom, Cambridge University Press
21. Crawford, J., 2019, *"Brownlie's Principles of Public International Law"*, 9th Edn, United Kingdom, Oxford University Press
22. Cristescu, A., *The right to self-determination· Historical and current development on the basis of United Nations Instruments*, 1981, New York, United Nations
23. *Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations*, General Assembly on 24 October 1970 (resolution 26/25 (XXV)
24. Dundua, N., 2006-2007 *"Delimitation of maritime boundaries between adjacent States",* United Nations – The Nippon Foundation Fellow
25. "East Libya Court Annuls GNA Agreements with Turkey." *Asharq AL-Awsat*, 28 Jan. 2021, english.aawsat.com/home/article/2770536/east-libya-court-annuls-gna-agreements-turkey.
26. Energycharter.org. 2021. *Energy Charter Treaty - Energy Charter*. [online] Available at: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>
27. European Council conclusions, 12 December 2019
28. Feldman, M. B., & Colson, D. (1981). The Maritime Boundaries of the United States. *The American Journal of International Law*, *75*(4), 729–763. https://doi.org/10.2307/2201352
29. Fourth report on peremptory norms of general International Law (*jus cogens*) by Dire Tladi, Special Rapporteur, International Law Commission Seventy-first session Geneva, 29 April–7 June and 8 July–9 August 2019, UN General Assembly, http://undocs.org/en/A/CN.4/727
30. G. A. Sinha, Lies, Gaslighting and Propaganda, 68 Buff. L. Rev. 1037 (2020). Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss4/3
31. General Assembly Resolution 1314 (XIII), 1958
32. General Assembly Resolution 1803 (XVII), 1962
33. General Assembly Resolution 3016 (XXVII), 1972
34. Hollis, D. B., 2020, *The oxford Guide to Treaties*, 2nd Edn, United States of America, Oxford University Press
35. "Joint Declaration Adopted by the Ministers of Foreign Affairs of Cyprus, Egypt, France, Greece and the United Arab Emirates (11.05.2020) - Announcements - Statements - Speeches." *Www.mfa.gr*, 11 May 2020, www.mfa.gr/en/current-affairs/Statements-speeches/joint-declaration-adopted-by-the-ministers-of-foreign-affairs-of-cyprus-egypt-france-greece-and-the-united-arab-emirates-11052020.html.
36. ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001
37. ILC Yearbook, 1956, Vol. II
38. ILC Yearbook, 1966, Vol. II
39. ILC Yearbook 2001, Vol. II

40. Sloan, B. and Secretary-General, U.N., N.Y., 1983, *Implications, under International Law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories :. [online] United Nations Digital Library System. Available at: <https://digitallibrary.un.org/record/53555>*

41. Kalicka-Mikołajczyk A. (2019) *"The Good Neighborliness Principle in Relations Between the European Union and its Eastern European Neighbours"*, Adam Mickiewicz University Law Review, 9. doi: 10.14746/ppuam.2019.9.09.

42. Letter dated 12 October 2021, from the the Secretary of State Washington *Antony Blinken* to the Prime Minister of Greece *Kyriakos Mitsotakis*

43. Letter dated 13 July 2021 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, https://www.undocs.org/en/A/75/961

44. Letter dated 13 November 2019 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, https://undocs.org/en/A/74/550

45. Letter dated 13 October 2021 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General, https://www.undocs.org/en/a/76/407

46. Letter dated 14 February 2020 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, http://undocs.org/en/a/74/706

47. Letter dated 15 June 2021 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, http://undocs.org/en/A/75/929

48. Letter dated 20 April 2020 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, https://undocs.org/en/A/74/819

49. Letter dated 22 July 2021 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, http://undocs.org/en/A/75/972

50. Letter dated 24 April 2020 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General, http://undocs.org/en/a/74/824

51. Letter dated 26 December 2019 from the Chargé d'affaires a.i. of the Permanent Mission of Libya to the United Nations addressed to the Secretary-General, https://undocs.org/en/A/74/634

52. Letter dated 27 July 2021 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General, http://undocs.org/en/A/75/976

53. Letter dated 28 September 2021 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, https://www.undocs.org/en/A/76/377

54. Letter dated 29 April 2020 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, http://undocs.org/en/a/74/831

55. Letter dated 30 September 2021 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, https://www.undocs.org/en/A/76/379

56. *Libyan Political Agreement*, signed on the 17th of December 2015

57. Maziad, M. and Sotiriadis, J., 2021. *Turkey's Dangerous New Exports: Pan-Islamist, neo-ottoman Visions and Regional Instability*. [online] Middle East Institute. Available at: <https://www.mei.edu/publications/turkeys-dangerous-new-exports-pan-islamist-neo-ottoman-visions-and-regional>

58. Matsumoto, S., 2020, *Jus Cogens and the Right to Self-Determination - Falsifiability of Tests* - ,Researh Paper September 2020, Policy Center for the New South, RP-20/12. Available at: https://www.policycenter.ma/publications/jus-cogens-and-right-self-determination-falsifiability-tests

59. Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, *Human Rights Law Review*, Volume 11, Issue 4, December 2011, Pages 609–644, https://doi.org/10.1093/hrlr/ngr025

60. McNeill, J., 1994, *"International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding."* The American Journal of International Law, vol. 88, no. 4, American Society of International Law, pp. 821–26, https://doi.org/10.2307/2204146.

61. Meletis, Nikos. "Η Γαλάζια Πατρίδα και οι φιλοδοξίες Ερντογάν | LiberalGr." *Www.liberal.gr*, 2 Mar. 2019, www.liberal.gr/diplomacy/i-galazia-patrida-kai-oi-filodoxies-erntogan/242440.

62. Mfa.gr. 2021. *Territorial sea - Casus belli - Relevant Documents*. [online] Available at: <https://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/territorial-sea-casus-belli.html>

63. *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*, Instabul, 27 November 2019

64. McNeill, John H. *"International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding." The American Journal of International Law*, vol. 88, no. 4, American Society of International Law, 1994, pp. 821–26, https://doi.org/10.2307/2204146.

65. Nedos, V., 2020. Greece, UAE commit to Mutual Defense Assistance. *eKathimerini.com*. Available at: https://www.ekathimerini.com/news/259450/greece-uae-commit-to-mutual-defense-assistance/

66. Nedos, V., 2021. *Bilateral framework inked with UK | eKathimerini.com*. [online] Ekathimerini.com. Available at: <https://www.ekathimerini.com/news/1170550/bilateral-framework-inked-with-uk/>

67. "{{NgMeta.title}}." *Www.amna.gr*, 3 Dec. 2019, www.amna.gr/en/article/412925/US-State-Dept-Turkey-Libya-maritime-zones-agreement-unhelpful-and-provocative.

68. Newsroom. "Ambassador Says US Analysis of Turkey-Libya Deal 'Very Different' from Ankara's | EKathimerini.com." *Www.ekathimerini.com*, 13 Dec. 2019, www.ekathimerini.com/news/247524/ambassador-says-us-analysis-of-turkey-libya-deal-very-different-from-ankaras/.

69. Note verbale dated 23 December 2019 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General, http://undocs.org/en/a/74/628

70. Pigrau, A., *Reflections on the effectiveness of peremptory norms and erga omnes obligations before international tribunals, regarding the request for an advisory opinion from the International Court of Justice on the Chagos Islands*, 2019

71. Psaropoulos, J. (2020, December 24). *Annus horribilis: Key greek-turkish developments in 2020*. News | Al Jazeera. (online) Available at: https://www.aljazeera.com/news/2020/12/23/annus-horribilis-key-greek-turkish-developments-in-2020.

72. Reinhold, Steven. (2013). *Good Faith in International Law.* Journal of Law and Jurisprudence. 2. 10.2139/ssrn.2269746, pp 40-63

73. Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN General Assembly, p. 141-208. Available at: https://undocs.org/en/A/74/10

74. Resolution 2259 (2015), UN Security Council, adopted on the 23^{d} of December 2015

75. Reuters. 2021. *Greek parliament approves defence pact with France*. [online] Available at: <https://www.reuters.com/world/europe/greece-france-defence-pact-protects-against-third-party-aggression-greek-pm-2021-10-07/>

76. ROZAKIS, C. L. (1974). The Law on Invalidity of Treaties. *Archiv Des Völkerrechts*, *16*(2), 150–193. http://www.jstor.org/stable/40797607

77. Schrijver, N. J., 1995, *Sovereignty over natural resources: balancing rights and duties in an interdependent world*, s.n.

78. Solutions, K.G.N.W., 2020. Greek and Turkish warships in 'mini collision,' says Defense Source. *knews.com.cy*.
Available at: https://knews.kathimerini.com.cy/en/news/greek-and-turkish-warships-in-mini-collision-says-defense-source

79. Stanicek, B., 2020, *Turkey: Remodelling the eastern Mediterranean Conflicting exploration of natural gas reserves*, Briefing, European Parliament, European Union, September 2020, p.5

80. Sucharitkul, Sompong, *"The Principles of Good-Neighborliness in International Law"* (1996). Publications. Paper 559. http://digitalcommons.law.ggu.edu/pubs/559

81. Tanaka Y., 2019, *The International Law of the Sea*, 3d Edn, United Kingdom, Cambridge University Press

82. Team, ToBHMA. "Κρεσέντο προκλήσεων από Ερντογάν, Ακάρ." *Ειδήσεις - νέα - Το Βήμα Online*, 31 Aug. 2021, www.tovima.gr/2021/08/31/politics/tourkia-proklitikos-erntogan-gia-tin-katastrofi-tis-smyrnis-gia-galazia-patrida-pou-perilamvanei-tin-kypro-ekane-logo-o-akar/.

83. *Treaty of Friendship and co-operation between the Turkish Republic, the Kingdom of Greece and the Yugoslav People's Federal Republic*, 5th March 1953, Document C-M (53)17, NATO UNCUSSIFIED and PUBLIC DISCLOSED

84. Treaty Section of the office of Legal Affairs of the United Nations, *Treaty Hanbook*, 2012, United Nations Publication

85. Uçaryılmaz, Talya. (2020). *The Principle of Good Faith in Public International Law.* Estudios de Deusto. 68. 43. 10.18543/ed-68(1)-2020pp43-59.

86. U.S. Embassy & Consulate in Greece. 2021. *Statement by Secretary Antoiny J. Blinken: Signing of Protocol of Amendment to the Mutual Defense Cooperation Agreement with Greece*. [online] Available at: <https://gr.usembassy.gov/Statement-by-secretary-antony-j-blinken-signing-of-protocol-of-amendment-to-the-mutual-defense-cooperation-agreement-with-greece/>

87. Verzijl, J. H. W., 1953, *Territorial Controversies before the International Court of Justice*, Netherlands International Law Review, 1, pp 234-268 doi:10.1017/S0165070X00028862

88. Yearbook of the International Law Commission, 1956, *Documents of the eighth session including the report of the Commission to the General Assembly*, Volume II, United Nation Publication

89. Yunus Emre Acikgonul (2016) *Reflections on the Principle of Non-Cut Off: A Growing Concept in Maritime Boundary Delimitation Law*, Ocean Development & International Law, 47:1, 52-71, DOI: 10.1080/00908320.2016.1124485