

UDC 341.6

CHALLENGES TO INTERNATIONAL MARITIME LAW AFTER ANNEXATION OF CRIMEA

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The article is devoted to the problem of effectiveness of legal mechanisms that can be used by Ukraine and international community in response to annexation of Crimea by Russian Federation. The focus of article is on the need for Ukraine to use all legal possibilities to protect its rights in coastal waters. The legal mechanism of the UN Convention on the Law of the Sea is analyzed. The attention on the similar cases brought before arbitral tribunal were made. The ways of improvement of legal position of Ukraine in the arbitral tribunal are proposed.

Keywords: UN Convention on the Law of the Sea, International arbitral tribunal, annexation of maritime zones.

Scientific and practical problem. These days Ukraine and international community remember the third anniversary of the illegal annexation of Crimea by Russia. The status of peninsula is not only the subject of a political and territorial dispute between Russia and Ukraine, it is a serious challenge to international law as well. International reactions to the annexation of Crimea by the Russian Federation have almost always been supportive of Ukraine's sovereignty and territorial integrity; the annexation of Crimea attracted widespread condemnation. The General Assembly of the United Nations rejected it, as did the Parliamentary Assembly of the Council of Europe.

Despite international opinion however, Crimea is *de facto* under Russian occupation.

But the consequences of Russia's annexation of Crimea extend beyond concerns of land sovereignty and far into the waters of the Black Sea basin. When Russia seized Crimea in 2014, it acquired not just the Crimean landmass but also a maritime zone more than three times its size with the rights to underwater resources potentially worth trillions of dollars. Russia has started to re-shape its territorial sea and the 200-mile Exclusive Economic Zone (EEZ) in the northern Black Sea, putting Ukraine in an even more vulnerable state economically, militarily and politically. The Crimean crisis radically affects the legal situation on the Azov

Sea. Ukraine, which had full jurisdictional control over a majority of this area before annexation, has already lost over half of its coastal waters; the western part of the 200-mile EEZ of Ukraine also remains under full Russian control. Ukrainian ships have to cross through new Russian jurisdictional waters, where Russia controls any economic or research activity. In this regard, the study of legal possibilities for Ukraine to protect its rights in the coastal waters is appropriate and urgent issue of modern jurisprudence.

Overview of the relevant researches. Recent publications which highlighted the problem, appeared mostly in foreign editions and belong to such prominent International Law scholars like Professor Julian Ku, Brian McGarry, Peter Tseng and some others. In Ukraine, the problem was investigated by O.S. Keyer. Anyhow, in view of complexity of the problem, more researches might be needed to analyze the possibilities of International Law to solve it.

Article's thesis. Unlike the situation in the International Law, the legal status of annexed Black Sea waters is clearly defined by Ukrainian government. On 15 April 2014 the Ukrainian Parliament passed the Law of Ukraine «On Ensuring Civil Rights and Freedoms and the Legal Regime on Temporarily Occupied Territory of Ukraine». Specifically, the Law determines a legal regime of occupied territories as well as sets forth special procedures for the operation of governmental authorities. It defines 'occupied territory' as including the land territory of the Autonomous Republic of Crimea and the city of Sevastopol as well as their domestic waters; domestic waters and territorial sea of Ukraine adjacent to the coast of the Crimean peninsula; the territory of an adjacent area, exclusive economic zone and continental shelf along the coast of the Crimean peninsula subject to jurisdiction of Ukrainian bodies of state power in accordance with provisions of international law, the Constitution and laws of Ukraine; underwater space within the territorial sea; air space above these territories [1].

From the point of view of International Law the acquisition of territory by force is prohibited. Any state have struggled to identify a judicial or arbitral procedure to protect their rights following an unlawful attempted acquisition. With reference to the annexation of Crimea, but with a view to the wider possibilities for judicial or arbitral settlement of territorial questions, Ukraine may consider the mechanism of the Statute of the International Court of Justice and the mechanisms created by some international treaties.

Unfortunately Ukraine cannot use the possibility of appealing to the UN International Court of Justice (ICJ) regarding the annexation of Crimea by Russia. Any judicial settlement of disputes through the ICJ is based on the consent of the parties. But the bilateral agreements between Russia and Ukraine that could be interpreted to establish the jurisdiction of the ICJ in matters of contention between the two states do not explicitly invoke the ICJ. Therefore, it is highly unlikely that Russia would consent to appear in front of the court. Ukrainian officials have already sued Russia in the International Court of Justice on claims of financ-

ing terrorism and racial discrimination as provided by appropriate Conventions. This is the strategy Georgia tried after Russia's last foreign intervention, but the effort failed. Since Russia does not accept the International Court of Justice's general jurisdiction, Georgia instead charged Russia with the illegal use of force, and with violating the International Convention on the Elimination of all forms of Racial Discrimination, which Russia has ratified. The ICJ rejected jurisdiction in the case, however, because without Russia's pre-consent the ICJ could not decide claims about illegal force [2].

But regarding the annexed waters around Crimean peninsula, Ukraine can use the mechanism of the UN Convention of the Law of the Sea (UNCLOS). According to the Convention, «the coastal state has the exclusive right to explore, exploit, protect and manage the living and non-living resources, the sea bottom and the water column as well as to build and use artificial islands, installations and other constructions» [3]. Both Russia and Ukraine have specified arbitration under Annex VII of UNCLOS and at the end of 2016 Ukraine finally filed an arbitration claim against Russia under Annex VII of the Convention. Ukraine charges Russia with violating the UN Convention in the following ways: the seizure of fields with mineral reserves and illegal oil and gas on the continental shelf of Ukraine in the Black Sea; the unlawful seizure of power to regulate fish catch, unlawful fish catch and not allowing Ukrainian fishing companies to catch fish in the offshore zone near the Crimean peninsula; the construction of a gas pipeline, a power line and a bridge across the Kerch Strait without the consent of Ukraine [4].

The International Tribunal for the Law of the Sea is an independent judicial body established by Convention to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. On 22nd December 2016, the arbitral tribunal was constituted upon a claim of Ukraine against the Russian Federation. The fully constituted tribunal consists of five judges. Ukraine presented to the Arbitral Tribunal the evidences that Russia brutally violates its rights as the coastal state in maritime zones adjacent to the Autonomous Republic of Crimea in the Black Sea, Sea of Azov, and the Kerch Strait [4]. The arbitral tribunal will begin the hearing of the case *Ukraine v. Russian Federation* in April 2017. Ukraine seeks to end the Russian Federation's violations of UNCLOS and vindicate Ukraine's rights in the Black Sea, Sea of Azov, and Kerch Strait, including Ukraine's rights to the natural resources offshore Crimea which belong to the Ukrainian people.

Arbitral tribunal created by the UN International Tribunal for the Law of the Sea will announce their verdict no earlier than 2019 but no later than 2021. The arbitration will not deal with such issues as the annexation of Crimea by Russia and demarcation of the borders. The tribunal will consider a claim filed by Ukraine due to its inability to use own natural resources, inability to protect the Black Sea environment, inability to navigate

along the Kerch Strait, as well as for the violation by Russia of the technical regulations during the construction of the Kerch Bridge.

The validity of this claim, however, depends on a Ukrainian claim of sovereignty over Crimea. As territorial sovereignty disputes fall outside the scope of UNCLOS, the tribunal may have to determine whether it may exercise jurisdiction over this non-UNCLOS sovereignty claim. Under the jurisprudence of *Guyana v. Suriname*, the tribunal could arguably invoke Article 293(1) to exercise such jurisdiction. But there are real doubts as to whether UNCLOS tribunals should have the jurisdiction to settle such prominent territorial sovereignty disputes [5]. As continental shelf rights derive from sovereignty over adjoining land, a tribunal constituted in this matter would certainly consider whether a decision on Russia's seizure of offshore oil and gas resources would impermissibly prejudice the legality of Russia's annexation of Crimea. Maritime experts recommend Ukraine to accompany any initiation of arbitration with a request for provisional measures, which would be filed before ITLOS in Hamburg, in accordance with UNCLOS Article 290(5). However, this raises some concerns: Ukraine may be refusing to grant provisional measures because the case fails on jurisdictional grounds *prima facie* [6].

As result of Russia's annexation of Crimea, International Law faces complex questions ranging from protection of investors to building a bridge linking Crimea with Russia. The problem involves the legal status Azov Sea and Kerch Strait – the status of these waters is determined by a 2003 Agreement Ukraine and Russia on cooperation in use of the Sea of Azov and the Kerch Strait. The Agreement defines the Sea of Azov and the Kerch Strait as the internal waters of both countries and their status is determined by the domestic legislation of Russia and Ukraine [7]. The UN Convention largely leaves regulation of such issues to domestic legislation. Its provisions about the regulation of the straits (Part III) are limited only to those used for international navigation. Moreover, both Ukraine and Russia have made a number of declarations, which have significantly limited the application of the dispute resolution provisions of the Convention. Under international law construction of a bridge would definitely require the consent of Ukraine. However, Russia is likely to do it without any consent from Ukraine and the latter will be unable to initiate a dispute about in international courts without the consent of the former.

Maritime law experts have immediately drawn connections between the case *Ukraine v. Russian Federation* and the recently concluded by Arbitral tribunal the case on the claims of Philippines against China. For example, in both cases, a less powerful state is suing a permanent member of the U.N. Security Council before an UNCLOS Annex VII tribunal. In addition, in both cases, the respondent state is taking a hostile stance towards the proceedings. Furthermore, in both cases the tribunal's exercise of jurisdiction over the dispute is controversial because it arguably implicates issues of territorial sovereignty over which it does not have jurisdiction *ratione materiae* [8].

Despite similarities and connections between *Ukraine v. Russia* case and *Philippines v. China*, key

differences remain. Russia, unlike China, do not use the boycott of the arbitration process completely, agreed to the creation of arbitration and taken part in the selection of arbitrators and appointed judge from its side. It will be interesting to see if Russia responds at all to this arbitration, or whether they follow China's example and simply boycott the arbitration process completely but the fact that Russia has agreed to the creation of arbitration and a tribunal; the fact that they have taken part in the selection of arbitrators. Unfortunately for Ukraine, Russian will probably use tactic that China has done against the Philippines, it will invoke its declaration under Article 298 excluding disputes «relating to sea boundary delimitations» from the jurisdiction of the UNCLOS arbitral tribunal. So although Ukraine probably has a good claim under UNCLOS, and it has a good case for jurisdiction as well, and even if it wins its arbitration, it will probably not accomplish a great deal [9].

One more interesting case *Mauritius v. United Kingdom* can be used to evaluate Ukrainian chances in UNCLOS tribunal. In its claim Mauritius requests arbitral tribunal to declare that the United Kingdom violated the provisions of UNCLOS when establishing marine protection area up to the outer limit of the exclusive economic zone of the Chagos Archipelago. The Court interpreted these claims as rooted in a dispute over the sovereignty of the Archipelago and noted that it did not have jurisdiction over that issue. However, it held that «in declaring the MPA, the United Kingdom failed to give due regard to Mauritius's rights and declared that the United Kingdom had breached its obligations under the Convention [6].

To sum up, despite Ukrainian success in creation arbitration, the prospects of verdict is not so clear. First, Ukraine faces a greater jurisdiction problem as Article 288(1) of UNCLOS provides that UNCLOS tribunals «shall have jurisdiction over any dispute concerning the interpretation or application of this Convention.» [3]. As Ukraine has framed the dispute as one concerning rights in maritime zones adjacent to Crimea, there is little question that the dispute concerns the interpretation or application of provisions of UNCLOS. The issues of territorial sovereignty over Crimea do not concern the interpretation or application of UNCLOS and therefore fall outside the jurisdiction. The claim description sounds like it will be pretty similar to the approach pioneered by the Philippines in its claim against China. Ukraine should seek to avoid Russia's Article 298 declaration excluding jurisdiction relating to sea boundary delimitations by not asking the tribunal to rule on sea boundaries; Ukraine also should not ask the arbitral tribunal to declare that the annexation of Crimea is illegal. Rather, the focus will be on specific actions Russia has taken in the Crimea maritime zones, which Ukraine is going to assume is part of Ukraine's coastal waters.

Taking into account the substance of these cases, Ukraine can calculate its own risks in the Court. It would be clear that the principal dispute has always been about sovereignty over Crimea; under the «land dominates the sea» principle, Ukraine does not have the rights it claims in the maritime zones. As a result, in applying either approach, the tribunal would likely characterize the dispute as one con-

cerning territorial sovereignty, such that it would fall outside the tribunal's jurisdiction. Ukraine, however, may try to assert that there is no legitimate legal dispute concerning sovereignty over Crimea. After all, Russia violated the prohibition on the use of force and the principle of territorial integrity in annexing Crimea. Under this theory, Ukraine would argue that its sovereignty over Crimea is a factual matter, such that the only relevant legal dispute for the UNCLOS tribunal is whether Russia interfered with its rights in the maritime zones adjacent to Crimea. Nevertheless, it may not seem very convincing to argue that there is no legal dispute concerning sovereignty over Crimea [10].

Conclusions. The situation with illegal seizing of Crimea and adjacent waters clearly demonstrates that after 72 years the establishment of the United Nations and the International Court of Justice, International Law and peaceful dispute resolution still remain largely theoretical concepts. Through a preliminary analysis, the legitimacy of the Ukraine v. Russia proceedings is greater than that of the Philippines v. China proceedings, partly because Russia agreed to take part in arbitral tribunal, but the jurisdiction of the Ukraine v. Russia tribunal is less certain. In fact, occupation and annexation

of the Crimea leaves opened the issue of delimitation of the Strait of Kerch and Azov Sea in view of their status as inland waters of both countries. It would seem sensible for Ukraine to accompany any initiation of arbitration with a request for provisional measures, which would be filed in accordance with UNCLOS Article 290(5). Ukraine should avoid Russia's declaration on Article 298 of UN Convention excluding jurisdiction relating to sea boundary delimitations by not asking the tribunal to rule on sea boundaries. Ukraine does not seek to have the arbitral tribunal declare that the annexation of Crimea is illegal otherwise it may lead to rejection of claim. Although Ukraine probably has good chances under UNCLOS, but even if it wins its arbitration, Russia can just ignore it. The reality is that International Law has little to offer right now. Once again, Russia's military intervention and annexation of Ukrainian territory have shown that international maritime law has its own patches that need to be strengthened with effective legal mechanism. The case Ukraine v. Russian Federation will be a good test for international judiciary system in establishing the justice in international relations. The Proxy War will continue, now in the courthouse.

References:

1. Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України. Закон України від 15.04.2014 р. // Відомості Верховної Ради. – 2014. – № 26.
2. International Court of Justice / Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) [Електронний ресурс]. – Режим доступу: <http://www.icj-cij.org/docket/files/140/16099.pdf>
3. Конвенція ООН з морського права // Відомості Верховної Ради України. – 1999. – № 31. – Ст. 254.
4. The hearing of the case Ukraine v. Russian Federation under UNCLOS [Електронний ресурс]. – Режим доступу: <http://mfa.gov.ua/en/press-center/news/53422/>
5. Tzeng P. Jurisdiction and Applicable Law Under UNCLOS [Електронний ресурс] / Peter Tzeng <http://www.yalelawjournal.org/comment/jurisdiction-and-applicable-law-under-unclos/>.
6. McGarry B. The Courthouse Proxy Wars, Pt. II The Westphalian London Centre of International Law Practice [Електронний ресурс] / Brian McGarry. – Режим доступу: <http://thewestphalian.com/analysis/2016/02/26>
7. Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/643_205/
8. Ku Julian. Ukraine's UNCLOS Arbitration Claim Against Russia May Depend Upon Philippines-China Precedent [Електронний ресурс] / Julian Ku. – Режим доступу: <http://opiniojuris.org/2016/09/17/ukraines-unclos-arbitration-claim-against-russia-may-depend-upon-philippines-china-precedent/>
9. Ku Julian. As Ukraine Prepares to Take Russia to UNCLOS Arbitration Over Crimea, I Predict Russia's Likely Reaction [Електронний ресурс] / Julian Ku / – Режим доступу: <http://opiniojuris.org/2016/02/01/ukraine-prepares-to-take-russia-to-unclos-arbitration/>
10. Tzeng Peter. Ukraine v. Russia and Philippines v. China: A Few More Problems for Ukraine [Електронний ресурс] / Peter Tzeng / – Режим доступу: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2849897

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ВИКЛИКИ ДЛЯ МІЖНАРОДНОГО ПРАВА ПІСЛЯ АНЕКСІЇ КРИМУ

Анотація

Досліджені проблеми ефективності юридичних механізмів, які можуть бути використані Україною та міжнародним співтовариством у відповідь на анексію Криму Російською Федерацією. Доводиться необхідність використання всіх можливих у міжнародному праві шляхів для захисту прав України в прибережних водах Чорного та Азовського морів. Аналізуються можливості використання юридичних механізмів, передбаченого Конвенцією ООН з морського права. Зроблений наголос на уникненні помилок, які були допущені державами при розгляді аналогічних справ в міжнародних судових органах. Запропоновані шляхи удосконалення правової позиції України при розгляді скарги проти Російської Федерації в Трибуналі ООН з морського права.

Ключові слова: Міжнародна конвенція ООН з морського права, Міжнародний трибунал з морського права, анексія прибережних морських зон.

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ВЫЗОВЫ ДЛЯ МЕЖДУНАРОДНОГО ПРАВА ПОСЛЕ АННЕКСИИ КРЫМА

Аннотация

Исследованы проблемы эффективности юридических механизмов, которые могут быть использованы Украиной и международным сообществом в ответ на аннексию Крыма Российской Федерацией. Акцентируется внимание на необходимости использования всех возможных в международном праве путей для защиты прав Украины в прибрежных водах Черного и Азовского морей. Анализируются возможности использования юридического механизма, предусмотренного Конвенцией ООН по морскому праву. Сделан упор на избежании ошибок по опыту других стран, заявления которых рассматривал трибунал. Предложены пути усовершенствования правовых позиций Украины в трибунале ООН по морскому праву.

Ключевые слова: Международная конвенция ООН по морскому праву, Международный трибунал по морскому праву, аннексия прибрежных морских зон.