THE DELIMITATION OF UKRAINIAN MARITIME BOUNDARIES

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The delimitation of maritime space is among the most complicated problems in international law engaging vital economic, political, security, and other national interests and often gives rise to disputes. The Polish international lawyer, Janusz Symonides, pointed out that unresolved delimitation issues could prejudice good-neighborly relations and potentially lead to international conflicts.[1] Moreover, delimitation implicates related global issues regarding the development and use of the World Ocean which should be dealt by all nations in a comprehensive manner.

The essence and meaning of delimiting maritime boundaries lie in the fact that this helps to fix the boundaries of the territorial sovereignty of a State and its spatial (or functional) jurisdiction. Delimitation, meaning the identification of a State's

[1] *I. V. Dmytrychenko*, Принципи морської делімітації у визначенні кордонів України в Чорному та Азовському морях [Principles of Maritime Delimitation in the Determination of the Boundaries of Ukraine in the Black Sea and the Sea Azov], in V. N. Denisov (ed.), Взаємодія міжнародного права зовнішнім правом України [Interaction of International Law with the National Law of Ukraine] (2006), p. 375.

maritime and jurisdictional boundaries, creates a legal prerequisite for preventing potential damage to State interests.

The international law of the sea allows certain discretion to States in fixing their external maritime boundaries (both State boundaries and those that define the sphere of coastal functional sovereign rights) when there are no overlaps between the legal ownership rights of two or more States. When such overlaps exist, States determine their maritime boundaries in accordance with the 1982 United Nations Convention on the Law of the Sea, which establishes the breadth of certain maritime zones.

A similar interpretation and implementation of the rules which regulate the marking of maritime boundaries is a precondition for trust and cooperation between States. However, the progress of codification in this sphere shows that States tend to be cautious in their acceptance of general delimitation rules.

One may characterize the delimitation of maritime boundaries in two important respects. The first concerns fixing external maritime boundaries when these are defined on the basis of a legislative act which complies with the rules of international law relating only international waters and deep seabed beyond of these boundaries. In this case delimitation does not interfere directly with interests of any particular State, whereas wrongful actions during the delimitation process may violate interests of the entire international community. The second aspect concerns a situation where delimitation proves to be the division of maritime space where the legal title of two or more States overlap (neighboring countries adjacent or opposite).

The delimitation of maritime space between adjacent or opposite nations proceeds with special difficulty when it touches upon the material interests of coastal States and concerns the partition of natural resources (natural gas, oil, and others).

The legal provisions regarding the marking of the outer boundaries of territorial waters, an exclusive economic zone (EEZ), and the continental shelf do not interfere with the rules for the delimitation of maritime boundaries between States with adjacent or opposite coasts (this approach, in particular, is established by Article 76(10), 1982 Convention).

The following specific elements should be taken into consideration in the process of maritime boundary delimitation: unlike land boundaries, maritime boundaries may be simultaneously State boundaries which separate the internal waters of two or more States or outer boundaries of coastal State territorial waters, and non-State boundaries (continental shelf and EEZ). Maritime boundaries may be drawn unilaterally or by written agreement, depending upon the geographical relation of coastal States in relation to the sea (for instance, if neighboring States lay claim to the same sea area, the waters should be demarcated by written agreement).

Hence, demarcating maritime space (where State sovereignty or jurisdiction is asserted) between adjacent or opposite States is an important aspect of drawing maritime boundaries. In the context of the delimitation of maritime space between adjacent and opposite States, a partition of specific maritime areas is carried out under a certain agreement. Coming up with such an agreement is no easy feat.[1]

International legal doctrine and the case law of the International Court of Justice and international arbitrations qualify the following as principles of maritime delimi-

[1] *I. V. Dmytrychenko*, Принципи морської делімітації у визначенні кордонів України в Чорному та Азовському морях [Principles of Maritime Delimitation in the Determination of the Boundaries of Ukraine in the Black Sea and the Sea Azov] in V. N. Denisov (ed.), Взаємодія міжнародного права з зовнішнім правом України [Interaction of International Law with the National Law of Ukraine] (2006), p. 377.

tation: principle of taking into account special circumstances (for instance, the length of the coastline of each country, profile of the coastline, existence and location of islands, historical legal grounds, demographic reasons etc.); the principle of equidistance may (if deemed to be fair) be applied to draw a boundary line, each point of which is equidistant from those baselines used for establishing the breadth of each country's territorial waters; the proportionality principle is, for example, employed in establishing the formula that describes the ratio between continental shelf areas and the length of respective coastlines of nations; the principle that establishes that a country's islands are entitled to their own territorial waters, contiguous zone, continental shelf, and exclusive economic zone (Article 121, 1982 Convention). Application of the said principles to the delimitation process is aimed at delivering justified results for all the parties concerned. International legal doctrine is increasingly driven to call them equitable principles. However, the concept of equitable principles should not be applied in maritime delimitation without taking into account the circumstances of each particular situation.

An analysis of delimitation cases brought before the International Court of Justice (hereinafter: ICJ) and arbitrations shows that the case law of the ICJ and international arbitrations is homogenous in that it establishes the core rule of general international law regarding the delimitation of maritime space between neighboring littoral States. The rule provides that delimitation should in the form of an agreement based on fair principles that take into account all relevant circumstances with a view to delivering justified results.

This customary rule of international law was first applied in the decision of the ICJ dated 20 February 1969 on the delimitation of the continental shelf of the North Sea between the Federal Republic of Germany and Denmark, as well as between the Federal Republic of Germany and The Netherlands. The decision stressed that the core of delimitation rules lies in principles stemming from the Truman Proclamation of 28 September 1945, namely: «... the boundary shall be determined by the United States and by the State concerned in accordance with equitable principles».[1] The ICJ shared its opinion on negotiations between States, pointing out that «Parties must enter into negotiations with the intention to reach an agreement and not merely with a view to complete a formal negotiations process as a kind of preconditions that render automatic application of a certain delimitation method; thus, parties should engage in negotiations as to make them meaningful and avoid situations when one of the parties concerned defended its position as something which cannot be subject to change». In turn, the obligation to apply equitable principles includes the consideration of all circumstances of a particular case and subsequent employment of relevant delimitation method(s).

The Court also pointed out the aspects to be considered by parties during negotiations: general shape of parties' coastlines and presence of special or unusual features; physical and geological structure, natural resources of continental shelf's areas concerned as they are commonly known and easily verifiable; proportionality of certain reasonable extent, to be achieved as a result of delimitation carried out according to fair principles, between a continental shelf area that belongs to a littoral state and the length of its coastline measured in the overall direction of its coastline taking into

[1] *All the relevant* information on the case law of the ICJ may be found on the official web site of the United Nations: http://www.un.org/russian/icj/index.htm.

account real and possible future consequences that may influence other continental shelf delimitations between adjacent nations of the same region.

The ruling in the North Sea case had a profound impact on maritime delimitation principles and rules. This is especially true of the landmark conclusion made by the ICJ that delimitation of continental shelf between neighboring States should be carried out by way of the conclusion of an agreement in accordance with equitable principles and taking into account all relevant circumstances. This is a proof of the importance of the principle requiring an agreement in a delimitation process because through negotiations resulting in an agreement the States concerned use the most expedient principles and methods of delimitation, taking into account the relevant circumstances that may influence the eventual delimitation line. The consensual principle gives negotiating parties the freedom needed to come up with technical methods of delimitation. Mentioning «equitable principles» in the ICJ ruling was intended to discover specific features of the equitable principles and test their practical applicability to a particular delimitation process between littoral States.

Moreover, it has to be stressed out that in addition to equitable principles, the ICJ uses the principle of fairness. And the difference between the two categories is quite substantial. So when the former are clearly defined (the ruling dated 12 October 1984 of the Chamber established by the ICJ with a view to draw an all-purpose single maritime boundary between Canada and the United States in the Gulf of Maine refers as such to the following: the land defines the maritime formula; equipartition of overlapping zones in the absence of special circumstances, non-intrusion, to the maximum extent possible, of one nation's coastline's maritime projections into areas closest to other nation's coastline; avoidance of the «cut-off effect» regarding sea projections of coasts of concerned States or parts thereof; consequences which under certain circumstances might stem from unequal length of State coastlines in the delimitation zone) and are regarded as fair, the principle of fairness is a thing-in-itself and its substantiation as fair may end in an absurdity.

The ICJ confirmed the significance of geographical factors in the application of delimitation rules, particularly taking into account specific configuration of the coasts. This decision posed a problem for scholars and practitioners which stemmed from the conception of an all-purpose single maritime boundary designed to separate maritime zones with inherently different legal regimes all at once.[1]

This approach proves that in international legal doctrine there exists a certain development of general rules for drawing all-purpose single maritime boundaries for the delimitation of maritime zones with different legal regimes. Among examples of the use of such an approach are the award of an international arbitration tribunal dated 14 February 1985 regarding the delimitation of maritime space between Guinea and Guinea-Bissau which established an all-purpose single maritime boundary between their respective territorial waters, EEZs, and continental shelf; and the international arbitral award of 10 June 1992 in the case of maritime zone delimitation between Canada and France in the Atlantic Ocean south of the Canadian island and the French islands Saint Pierre and Miquelon.

The analysis of judicial decisions and arbitral awards proves that proportionality plays a certain role in fair delimitation.

[1] *L. Timtchenko*, Quo Vadis, Arcticum? The International Law Regime of the Arctic and Trends in its Development (Kharkiv, 1996), pp. 128–130.

The idea of proportionality is used to adjust boundaries drawn under the principle of equidistance when continental shelf areas of concerned States correlate in a proportion other than lengths of their coastlines. Therefore, one may conclude that given the absence in the 1982 Convention of clearly defined delimitation rules for continental shelf and exclusive economic zones (Articles 74 and 83), decisions of the ICJ and international arbitral awards on the delimitation of maritime space between adjacent or opposite States promote the further development of maritime delimitation rules, thus having a considerable impact on State practice.[1]

However, application of the proportionality principle together with the principle of fairness may, as construed by the ICJ, lead to not so coherent results which, alas, become test cases. For instance, the ICJ in its ruling dated 3 June 1985 in the case concerning the continental shelf between the Libyan Arab Jamahiriya and Malta pointed out that the Court «believes it to be fair not to consider the uninhibited island of Filfla in drawing the median line between Malta and Libya because it otherwise may lead to undesirable distortion of the line». Subsequently, this position of the ICJ on disregarding an uninhabited island would result in similar disregard for inhabited islands, such as the Snake Island, which significantly interferes with the interests of Ukraine. We shall dwell upon this below.

Given that the issue of delimitating Ukrainian boundaries is undeniably relevant, the State has taken steps to address it. For this purpose the Verkhovna Rada adopted the Law «On the Exclusive (Maritime) Economic Zone of Ukraine»,[2] which implemented the provisions of the 1982 Convention.

Notably, the Law defined (Article 2) the EEZ of Ukraine as a maritime zone 200 nautical miles in breadth adjacent to the outer limits of the territorial waters calculated from the same baselines as the territorial waters of Ukraine. The same provision stipulated that maritime zones around islands that belong to Ukraine are also included within its exclusive (maritime) economic zone. The delimitation of the exclusive (maritime) economic zone is carried out in compliance with Ukrainian legislation by way of entering into agreements with States having adjacent or opposite coastlines (in relation to the coastline of Ukraine) under principles and criteria recognized in international law with a view to reach a just resolution of an issue (Article 3). The aforementioned Article is based on the basic language of Article 74(1) of the 1982 Convention («Delimitation of the exclusive economic zone between States with opposite or adjacent coasts») which is regarded as a product of protracted negotiations and coordinating efforts by countries at the Third Law of the Sea Conference.

Article 5 of the Law «On the State Border of Ukraine» of 4 November 1991 established that the territorial waters of Ukraine comprise coastal waters 12 nautical miles wide calculated from the low-water line, true to the landmass that belongs to Ukraine, on the continent as well as islands, or from straight baselines that connect respective points. The geographical coordinates of these points are confirmed in the procedure established by the Cabinet of Ministers of Ukraine. In certain cases international treaties of Ukraine may establish another breadth of the territorial waters of Ukraine and, in the absence of such treaties — in accordance with generally-recognized principles and rules of international law.[3]

[1] Note 1 above, pp. 380–387.
[2] *Відомості* Верховної Ради України [Gazette of the Verkhovna Rada of Ukraine] (1995), № 21, item 152.
[3] *Відомості* Верховної Ради України [Gazette of the Verkhovna Rada of Ukraine] (1992), № 2, item 5.

Determining the legal grounds for the delimitation of Ukrainian maritime space in the aforementioned laws, namely principles and criteria generally-recognized in international law, shows that the international legal position of Ukraine should take into account not only provisions and rules contained in international agreements and conventions, but also customary rules of international law. It also has a practical dimension (keep the Black Sea in mind) as respective international conventions contain fundamental principles of the maritime space legal regime, including principles of its delimitation, but not all Black Sea countries are parties to such conventions (for example, Romania, which asserts territorial claims against Ukraine is not a party to the 1958 Geneva Convention on the Continental Shelf).

Geographically, the Ukrainian coastline in the Black Sea necessitates the determination of common maritime boundaries (delimitation of territorial waters) between Ukraine and Russia, and between Ukraine and Romania. Therefore, there is a need to delimit the continental shelf and the exclusive economic zone of Ukraine from the respective maritime areas of Russia and Romania, which in itself is a legal issue as difficult to resolve as the delimitation of State maritime boundaries.

Ukraine acts as a legal successor to the former Soviet Union as regards treaties on maritime boundaries between the USSR and Turkey, namely: the Agreement between the Government of the USSR and the Government of Turkish Republic on the Delimitation of the Continental Shelf between the USSR and Turkey in the Black Sea, dated 23 July 1978, as well as the 1987 arrangement between the USSR and Turkey on the delimitation of their respective exclusive economic zones in the Black Sea. In 1987 the USSR and Turkey by exchange of notes agreed that the maritime boundary of the continental shelf determined by the 1978 Agreement would also serve as the boundary of their exclusive economic zones.

That being said, there are legal grounds to treat a part of the delimitation line determined in the 1978 Agreement as the maritime boundary separating the continental shelf and exclusive (maritime) economic zone of Ukraine from the respective maritime zones of Turkey. Following this line of reasoning, the legal succession of Ukraine regarding the continental shelf and EEZ boundary was established by exchange of notes between Ukraine and Turkey.

The assertion that the delimitation of maritime boundaries between neighboring States is a difficult task may be substantiated by the positions of States with regard to the delimitation of contested maritime space. For example, for a long period Ukraine and Romania had reached a stalemate over the delimitation of maritime space in the western part of the Black Sea. The problem dated back to the 1960s, when the USSR and Romania had only started negations concerning the delimitation of the continental shelf. Snake Island, which was under the jurisdiction of the USSR, played a major role in those negotiations. The significance of this Island was in the center of discussions. Initially, Soviet negotiators pushed for giving Snake Island the full impact on the equidistant line of the border.

However, during the later stages of negotiations, the USSR indicated that in order to reach a compromise there was a possibility of a change in the Soviet position — namely, giving the Snake Island a limited role in the determination of the equidistant delimitation line. In turn, Romania had its initial stance during the course of negotiations unaltered: Snake Island should have no impact on the equidistant line of the border.

Romania believed that Snake Island is a rock and substantiated its position by referring to Article 121(3) of the 1982 Convention, which provided that «Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf».[1] The main argument for this treatment was the absence of water resources and the impossibility of sustaining life on the island without a sea link to the continent.

Romania has maintained its position during talks with Ukraine on the delimitation of the continental shelf and exclusive economic zones in the Black Sea (between 1998 and 2004 the parties held 24 rounds of negotiations). Those discussions proved the parties to be unable to agree on the impact of the Snake Island on the delimitation line.

An analysis of the geological aspects and morphological structure of Snake Island, as evidenced by documentation provided by experts of the State Geology Committee of Ukraine, prove that Snake Island is an integral part of a large tectonic block of the East European Craton, the submerged part of which forms the shelf in the North-Western part of the Black Sea.

The interpretation of Article 121(3) of the 1982 Convention, directly dependent on the question of Snake Island's geological nature, brought up the issue of the island's ability to support human habitation and standalone economic life (certain aspects of Snake Island's geological structure, such as the 10 meter quaternary deposits nappe that contains the soil level that supports animal and plant life, and the enormous (1 km) strata of Paleozoic sediments which may serve as an indication of the island's own possible underground water and mineral deposits) allow one to contend that Snake Island is able to support human habitation and standalone economic life.[2] As of today, about 80 people live on the 1.5 km^2 territory of Snake Island: personnel of the lighthouse that has been in operation since the nineteenth century, hydrographers, ichthyologists, geologists and other scientists, border patrol, their family members. In February 2007 the Verkhovna Rada of Ukraine adopted the decision to name the existing settlement — Bile.

The issue of sovereignty over the area around Snake Island became urgent for Romania in 2001, when a floating drilling rig of «Chornomornaftohaz» company discovered large hydrocarbon deposits 40 km south off the island. On 16 September 2004 Romania referred the matter of delimitation of the continental shelf and exclusive economic zones to the ICJ.

The first question emerges: why was this case brought before the ICJ? The formal grounds are clear: as mentioned in Clause 4(h) of the letter from Hennadii Udovenko, Minister of Foreign Affairs of Ukraine, dated 2 June 1997 to His Excellency Mr. Adrian Severin, Minister of Foreign Affairs of Romania, which serves as an Annex to the Treaty on Good Neighborliness and Cooperation between Ukraine and Romania of 2 June 1997: «If these negotiations fail to result in conclusion of the said Treaty within a reasonable timeframe (which, however, will not exceed two years from their start) the Government of Ukraine and the Government of Romania agree that the matter of delimitation of continental shelf and exclusive economic zones will be decided by the International Court of Justice at request of either of Contracting

[1] Note 1 above, pp. 386–387.
[2] *A. P. Bystrova*, «До питання про міжнародно-правове розмежування морських просторів у районі острова Зміїний» [On the Question of the International Legal Delimitation of Maritime Expanses in the Area of Zmiiny (Sneik) Island], Зовнішня торгівля: право і економіка [Foreign Trade: Law and Economy], no. 2 (2007), p. 77.

Parties subject to implementation of the Treaty on the Regime of the State Border between Ukraine and Romania. That being said, the International Court of Justice may consider the request on delimitation of continental shelf and exclusive economic zones before the implementation of the Treaty on the Regime of the State Border if it establishes that the delay of the treaty's implementation was caused by another Contracting Party ... Should You agree with the above said, I suggest treating this letter together with Your follow-up letter of the identical content as a Treaty between the Government of Ukraine and the Government of Romania».[1]

What were the true reasons behind making Ukraine face an inevitable court hearing in a way that subsequently denied Ukraine the possibility to defend ourselves against such a future development by at least postponing the court proceedings until better times? Perhaps Udovenko was absolutely certain of a victory at the ICJ. But then again, it is not clear what was the source of such confidence, because if there were no guarantees of a victory at the ICJ (and how could there be in such a complex situation?), the aforementioned actions of respective government officials may be regarded as being detrimental to the territorial integrity and economic security of the State.

On 3 February 2009, the ICJ issued its decision in the Case of Romania against Ukraine, stating that Snake Island cannot be regarded as a part of Ukraine's coastline when determining the median line during the delimitation of the continental shelf and an exclusive economic zone (see *Figure 1*).

Fig. 1. Romanian and Ukrainian versions of delimitation[2]

[1] The Treaty on Neighborliness and Cooperation between Ukraine and Romania of 2 June 1997: http://zakon0.rada.gov.ua/laws/show/642_003 (the official Verhovna Rada of Ukraine site).
[2] http://rus.newsr.ua/ukraine/03feb2009/ostriv.html.

The ICJ panel adjudicating on the matter comprised President Rosalyn Higgins, Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, and Skotnikov; Judges ad hoc Cot, Oxman; Registrar Couvreur.

The Court started its justification with the statement that from a legal point of view relevant coastlines can play two roles at the same time in the delimitation of the continental shelf and exclusive economic zone: «First of all, we need to define relevant coastlines in order to establish the essence of counterclaims regarding these zones. Secondly, the relevant coastlines should be established in order to verify during the third stage of delimitation process whether there is any disproportion in interrelation between the length of coastal zones of each State and the sea maritime zones that stretch beyond delimitation lines of each Party».

The ICJ pointed out that according to the treaty between the Parties, the entire Romanian coastline is the relevant coastline for delimitation purposes. That being said, the length of Romania's relevant coastline is approximately 248 km., whereas the length of the relevant Ukrainian coastline — 705 km.

The ICJ noted that its foremost task is to identify «the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines» (para. 127). Having thoroughly analyzed the specific features of all points submitted by the Parties as worthy to be considered in drawing the provisional equidistance line, the Court decided to go with Sacaline Peninsula, and the littoral endpoint of Sulina dyke on Romanian coast (para. 141), as well as Tsyhanka Island, Cape Tarkhankut and Cape Khersones — on the Ukrainian coastline (para. 148). The ICJ considered it inappropriate to select any base points on Serpent Island (para. 149).

The ICJ believed that under the principles of its jurisdiction it may on occasion decide not to take into account very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration (para. 185). Here we see that the conflict of norms between the 1982 Convention and precedent-setting norms of the ICJ was conclusively decided in favour of the latter. Although we see the precedent-setting nature of the ICJ case law in positive light, we believe that precedent should not prevail over the international treaty born out of the alignment of the positions of States which are the principal subjects of the international law. The result of such alignment recorded in the rules of the 1982 Convention and the ICJ, with all due respect to the latter, may not override the rules of the said international treaty, substantiating this with reference to the «principles of its jurisdiction».

The ICJ pointed out that all the areas subject to delimitation in this case are located in the exclusive economic zone and the continental shelf generated by the mainland coasts of the Parties and are, moreover, within 200 nautical miles of Ukraine's mainland coast. The ICJ observed that Serpent Island is situated approximately 20 nautical miles to the east of Ukraine's mainland coast in the area of the Danube delta. Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpent Island could not project further than the entitlements generated by Ukraine's mainland coast because of the southern limit of the delimitation area as identified by the ICJ. Any possible entitlements generated by Serpent Island

in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. The Court also noted that Ukraine itself, even though it considered Serpent Island to fall under Article 121(2) of the 1982 Convention, did not extend the relevant area beyond the limit generated by its mainland coast, as a consequence of the presence of Serpent Island in the area of delimitation. In the light of these factors, the Court concluded that the presence of Serpent Island did not call for an adjustment of the provisional equidistance line (para. 187). The ICJ recalled that a 12-nautical-mile territorial sea was attributed to Serpent Island pursuant to agreements between the Parties. Therefore, the ICJ stated that in the context of the present case, Serpent Island should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea.

In addition to the presence of Serpent Island in the area of delimitation, the ICJ considered five other factors: a possible mistake in the identification of the length of the coastlines (paras. 158–168); the closed nature of the Black Sea basin and the earlier delimitations that had been carried out previously (paras. 169–178); the conduct of the Parties (a concession for oil and gas extraction, fishing and coastal patrols) (paras. 189–198); interference with getting a result (paras. 199–201); and certain considerations of the Parties with regard to security issues (paras. 202–204), but decided to dismiss those factors.

The delimitation line established by the ICJ, with neither the littoral endpoint of Sulina dyke nor Serpent Island having been identified as the starting point, begins from Point 1 and stretches through a 12 nautical miles zone around the Serpent Island until the intersection point with the line that is equidistant from the adjacent coast lines of Romania and Ukraine; thereafter, until this point, the line is determined by the points on the opposite coasts of Romania and Ukraine. It is from this pivotal point that the delimitation line stretches along the line that is equidistant from the opposite coasts of Ukraine and Romania (para. 206). The ICJ comes to a conclusion that the delimitation line follows the equidistance line in a southerly direction until the point beyond which the interests of third States may be affected (para. 209).

In the final stage, the ICJ decided to check whether the delimitation line suggested by the ICJ did not result in significant disproportionality in the length of the relevant coastal lines and in the proportional allocation of the adjacent areas. Noting that the ratio of the respective coastal lengths for Romania and Ukraine, measured as described above, is approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1, the ICJ was not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration (para. 216).

In conformity with the judgment of the ICJ, 79.34% of the disputed Black Sea territories fell under Romanian jurisdiction. In accordance with the estimates offered by Romanian experts, these territories included about 12 million tons of oil and 70 billion cubic meters of natural gas. In particular, based on the judgment passed by the ICJ, title to 90% of the prospective oil and gas field was transferred to Romania in the Olympic geological structure (located 40 km south of the Serpent Island).[1] «Taking into consideration the Serpent Island would be tantamount to a legal revision of

[1] *O. Harina,* Процес «Румунія проти України»: справа про розмежування морських просторів між Україною та Румунію в Чорному морі» [Romania versus Ukraine Proceedings: Case of Delimitation of Maritime Spaces between Ukraine and Romania in the Black Sea], Юридичний авангард [Legal Vanguard], no. 1 (2001), p. 224.

geography», declared Rosalyn Higgins, President of the ICJ, when reading out the Court's judgment, although being perhaps aware of its arbitrariness.

Fig. 2. Delimitation map in conformity with the ICJ decision[1]

It is plain that the legal standpoint of Ukraine in this case was to have Serpent Island recognized as an isle (which, in line with Article 121(2) and Article 76 of the Convention, automatically envisions the allocation of the continental shelf to Ukraine) proved far from being perfect: Ukraine focused entirely on the provisions of positive law (specifically, the relevant articles of the 1982 Convention), and overlooked the ICJ case-law, failing to take this into proper consideration. That was obviously the wrong approach. If Ukraine took the case-law into account, instead of targeting all of its efforts exclusively on the solution of the problem of recognizing the island's status (the history of Serpent Island settlement, commercial operations there, and performance of geophysical work on its territory), the much broader scope of issues may have affected effectively the Court's adjudication and come out with a positive judgment. Namely: as indicated by the analyses of ICJ judgments, in the course of the Parties proving the validity of their claims, of special significance is an attempt to to prove the existence of an intenationally recognized practice which serves the purpose of proving the availability of grounds for such claims. It is common knowledge that under Article 38 of the Statute of the ICJ, when adjudicating cases pursuant to Article 38(1)(b), along with the other sources of international law, the ICJ applies «an international custom, as evidence of a general practice accepted as law».

[1] http://rus.newsr.ua/ukraine/03feb2009/ostriv.html.

Volodymyr Butkevych has pointed out that the existence of an established international custom, as a rule, is indicated by by three factors: (a) international practice (precedents); (b) *opinio juris sine necessatis*, that is, the opinion of States that a practice is legally binding; and (c) the time factor (the duration of its application).[1]

Shammasova included in her definition of the notion of «practice» both the actual actions of States and some other acts, including their official statements and declarations; practices may exist both in the form of actions and in the form of refraining from certain actions, applying this distinction to the full extent only to practices in the narrow sense of this word. A practice in the broad sense, on the basis of which the presence of *opinio juris* is ascertained (the recognition of a rule as a form of law), should, in all cases, include not only refraining from actions, but also certain positive actions. It is worth including in practices not only actions and statements of States in the international arena, but also domestic (intra-national) activities of their bodies, including lawmaking and judicial authorities.[2]

Regrettably, national law enforcers fail to pay sufficient attention to the practices of the ICJ, having specific reasons not to do so: under Article 38(d) of the Statute of the ICJ, the judgments of this judicial body may only be used as a subsidiary means when determining rules of law. However, there already exist signs of a trend to assign a precedential character to its judgments.

As had been emphasized by Sir Hersch Lauterpacht (and confirmed subsequently by Judge Shahabudden in his separate opinion in the case «Aerial Incident 3 July 1988, Iran v. USA»), «The Court is not bound by any one doctrine of a compulsory precedent, but it respects its understanding of law».[3] Lauterpacht then went on to make the point that modern international law is represented by the judgments of the ICJ and added that they are not binding upon States and the ICJ. However, no written resolution can prevent these judgments from stating what international law is, and no written rule can prevent the Court from viewing them as such.[4]

Initially, the ICJ itself opposed vigorously the idea of the precedential nature of its acts: for instance, it stated in its judgment of 26 May 1961 in the Case concerning the Preakh-Vikhear Temple (Cambodia v. Thailand) as follows: «The Court does not believe that its judgment passed in 1959[5] had the results as claimed by Thailand. That judgment is of no compulsory force to anyone but the Parties involved in that litigation». However, when substantiating its claims in the case on the land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria), the former referred to the previously considered case on the transient right to pass through the territory of India (Portugal v. India), saying that there were no reasons not to follow this precedent without running a risk of undermining the system of compulsory jurisdiction as provided by an optional clause, Nigeria countered this claim saying that the judgment had been passed with no precedent, that it was an obsolete and a one-off judgment, so

[1] *V. H. Butkevych, V. V. Mytsyk, and O. V. Zadorozhnyi* (eds.), Міжнародне право. Основи теорії: підручник [International Law. Foundations of Theory: Textbook] (2002), p. 121.
[2] *L. R. Shammasova*, Международно-правовой обычай в современном международном праве: автореф. дис. ... канд. юрид. наук : 12.00.10. [International Legal Custom in Contemporary International Law] (Kazan, 2006), p. 18.
[3] Quoted from: *O. Vodiannykov,* Наднаціональність в праві Європейського Союзу: Goetterdammerung Європи чи переосмислення права? [Supranationality in European Union Law: Goetterdammerung of Europe or Re-interpretation of Law?]. Site of the Center for European and Comparative Law: www.eclc.gov.ua/new/html/ukr/6/article_ecj_vodyannikov
[4] *D. H. Samkharadze*, «Источники современного международного права» [Sources of Contemporary International Law], Международное публичное и частное право [International Public and Private Law], no. 5 (2006), p. 13.
[5] *The case* involved an incident in air space on 27 July 1955, when the Bulgarian Air Defence Forces downed an aircraft of El Al Israel Airlines Ltd. *(Israel v. Bulgaria)*.

that under Article 59 of the Statute of the ICJ, it is necessarily a res judicata judgment, but exclusively for the Parties and exclusively for this particular case. In its judgment of 11 June 1998, the ICJ, reminding that its judgment in the case «The right of transit through Indian territory» had been confirmed in subsequent cases, pointed out that «indeed, as Nigeria claims, the Court's judgments, under Article 59 of the Statute, are binding only for the parties involved in the case and only for the relevant case. There is no way Nigeria may be bound by the Court's decisions in previous cases. The real question is whether there exist any grounds not to comply in this case with of the arguments and conclusions made in previous cases», having actually insisted on the binding nature of their previous judgments. Judge Vereshchagin speaks of the case-law of the ICJ in his dissenting opinion on the resolution in the case of 2 June 1999 dealing with the legitimacy of using force (Yugoslavia v. Belgium): «A refusal to take into account properly the intention of a State claiming that it recognizes the Court's jurisdiction, is also incompatible with the case-law of the Court ...», whereas Judge M. Krecha, in his dissenting opinion on the same resolution of the ICJ, speaks of its «consistent judicial practice», which, in principle, is synonymous with ICJ case-law.

Often States, going to the ICJ with their grievances, particularly cases of delimitation, ask the ICJ to establish the existence of a customary norm of international law applicable to the litigating parties, since one party believes no such norm exists, whereas the other party is certain that it does, and that the opposing party is violating this norm. When considering disputes between States, the ICJ has not only ruled simply on the existence of a customary norm, but has also formulated this. The most visible example in the case-law of ICJ regarding this matter is the case United Kingsom v. Norway on fisheries initiated by the United Kingdom against Norway on 28 September 1949.

The coastal zone of Norway that was the object of dispute has an unusual configuration. It is 1,500 km long in a direct line. All the coast is mountainous, with numerous fjords and bays, including a large number of adjacent small islands, isles, and reefs (some forming an archipelago known as skjaergaard, or «rocky bastion»), and it cannot serve, as the case is in practically all the other countries of the world, as a clear-cut dividing line beween land and sea. Due to its configuration, land juts out far into the sea, and the Norwegian coastline is in fact an external line encompassing all the land elements, which are considered to be a single whole. Along the coastal zone are located sandbanks, rich in fish. They have been used since time immemorial by the inhabitants of this territory: fishing has always been their core source of existence.

In earlier centuries English mariners had invaded the seas washing the Norwegian coastline. After vehement protests of the King of Norway in the early nineteenth century, they had refrained from those incursions for some 300 years. However, in 1906, British ships re-emerged in those terriotries. These were trawlers carrying more sophisticated and powerful equipment. Their appearance caused grave concern and apprehension in the local population. Norway took measures as to ensure the delineation of the boundaries of a zone where foreigners were not permitted to fish.

The number of incidents was on the increase. The Government of Norway passed an edict on 12 July 1935 establishing the boundaries of the exclusinve Norwegian fishing zone. The governments of the both countries conducted negotiations following the passage of the 1935 edict, but without success. A number of English trawlers were seized and impounded by Norway in 1948 and 1949. As a result, the Government of the United Kingdom filed a lawsuit with the ICJ.

The breadth of the Norwegian territorial sea was never questioned: the four-nautical-mile zone claimed by Norway had been recognized by the United Kingdom. The issue was whether or not the lines specified in the 1935 edict to delineate the Norwegian fishing zone were compliant with international law. It is from these lines, called «base» or «original», that the breadth of the territorial sea is calculated. The United Kingdom claimed those lines had not been drawn in accordance with international law.

Having considered the arguments provided by the United Kingdom, the ICJ concluded that the lines drawn in 1935 were indeed consistent with international law.

In its judgment, ICJ pointed out that the Norwegian decree of 1812 and a number of subsequent documents (edicts, reports, and diplomatic correspondence) testified to the fact that the method of direct original lines, as determined by the geographical circumstances, had already been firmly established in the Norwegian system and that this was confirmed by the continuous and long existing practices. The application of this system has not caused any objections on the part of other States. Even the United Kingdom had not challenged this for many years: it lodged an official and concisely formulated protest as late as 1933. However, having long and time-honored traditions of maritime dispute resolution, this country could not fail to be aware of the firmly established and well-recognized Norwegian practices in this respect. Therefore, tolerance expressed by the entire international community serves as an indication of the fact that this Norwegian system is not viewed as a violation of international law.

Hence, the ICJ recognized the existence of a customary norm regarding the application of direct baselines to measure the breadth of territorial waters and of special zones and formulated the criteria for the application of such lines.[1]

As we see, the ICJ applied the Norwegian edicts of 1812 and 1935, the official documents (edicts, reports, and diplomatic correspondence), that is, various normative acts that had regulated, one way or another, the regime of the disputed territory (i.e., they contained binding rules). Pursuant to the identification of sources of international law, all the above documents may be designated as «normative materials». It was this material that the ICJ relied upon to adopt a decision that confirmed the right of Norway to determine the boundaries of the fishing zone on the basis of the Edict of 12 July 1935, for it is common knowledge that the exercise of one party's rights is only possible when the other party performs its obligations.

One may conclude from the above that in order for Ukraine to shape an international legal custom regarding the right of utilizing the continental shelf around Serpent Island, it should have undertaken research on the continental shelf, prospected for and extracted natural resources (or at least taken steps and actions that could be considered to be serious intent to do so), as well as other measures pusuant to the above objective. It is worth mentioning the section of the ICJ judgment in the Romania v. Ukraine case, where the ICJ pointed out that «... Ukraine itself, even though it considered Serpent Island to fall under Article 121(2) of UNCLOS, did not extend the relevant area beyond the limit generated by its mainland coast, as a consequence of the presence of Serpents' Island in the area of delimitation»; that is, by its failure to act, Ukraine leaves no possibility for the ICJ to award the judgment in Ukraine's favor.

[1] *International* Court of Justice (ICJ). Reports of judgments, advisory opinions and orders, 1951. — pp. 141–142.

On the other hand, credit is due to the Government of Ukraine, which tried to perform certain steps in the right direction: on 8 October 1997, the Cabinet of Ministers of Ukraine adopted Decree No. 1114, «On Improving the Development of the Infrastructure and Economic Activities on Serpent Island and on the Continental Shelf», which provided to create on that island the first stage of an automated point for monitoring earthquakes and a computer center to process the results of such measurements; to perform geophysical works in the continental shelf zone adjacent to the island, and to prepare a feasibility study to install facilities to start prospective drilling for oil and gas.[1] On 31 May 2002 the Cabinet of Ministers adopted Decree No. 713 «On the Confirmation of the Comprehensive Program for Further Infrastructure Development and Economic Activities on Serpent Island and on the Continental Shelf».

The purpose of that Program was to create a proper environment for habitation and economic and other activities on the island. Its principal tasks were as follows: complete works related to documentation of the status of the island as an administrative-territorial unit; perform certain actions to achieve the following results: conduct the delimitation on the territory of the island; strengthen the protection of the State boundary and of the exclusive (maritime) economic zone of Ukraine; ensure a reliable communication and transport connection with the island; diversify economic and other activities on the island; ensure compliance with the nature protection regime of the island and of the continental shelf.[2]

The implementation period of the said Comprehensive Program, in accordance with the Decree of the Cabinet of Ministers of Ukraine, No. 1807, «On the Extension of the Timeframe for the Implementation of the Comprehensive Program for Further Infrastructure Development and Economic Activities on Serpent Island and on the Continental Shelf» of 27 December 2006, was extended through 31 December 2011.[3]

But all of this proved insufficient, because the establishment of an international custom implies consecutive, continuous and targeted actions and the recognition by other States of their legitimacy or consent to them in terms of their actions or lack thereof. Therefore, it is our understanding that it was hardly realistic to expect getting this consent from Romania. In view of the strategic interests of Ukraine, certain actions (even risky ones) should have been performed by Ukraine, although taking into account the legal position expressed in the ICJ judgment in the case on sovereignty over the Pulau-Kigitan and Pulau-Sipadan Islands (Indonesia / Malaysia) dated 17 December 2002, under which the Court «cannot take into consideration actions performed after the emergence date of a dispute between the parties, unless such actions are normal continuation of previous actions and are not committed seeking to improve the legal status of the party referring to said actions». It should be added that this eventuality as a possibility to protect the State's interests had been mentioned, just in case, in the letter sent by Udovychenko to the Minister of Foreign Affairs of Romania, which is an attachment to the Treaty on Good Neighbourliness and Co-operation between Ukraine and Romania, signed on 2 June 1997. It is for this reason that Article 4(f) of this Treaty provides that «until a decision has been reached with regard to the delimitation of the continental shelf, the Parties to this

[1] See http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1114-97-%EF (the official site of the Verkhovna Rada of Ukraine.
[2] *Офіційний* вісник України [Official Bulletin of Ukraine] (2002), № 23, item 1094.
[3] *Офіційний* вісник України [Official Bulletin of Ukraine] (2006), № 52, item 3506.

Treaty shall refrain from the exploitation of mineral resources in the delimitation zone, whose coordinates will be determined at the beginning of the negotiations based on the aforementioned principles. Moreover, the Parties to this Treaty may establish, with mutual consent, perimeters of certain spaces located in this zone whose resources will be jointly used».[1]

Ultimately, incomprehensible activism in filing the delimitation lawsuit with the ICJ, as well as the passive position and half measures when it came to protecting the interests of the State, resulted in the negative consequences for Ukraine in these proceedings.

Unfortunately, the docrine was also a mistake, since it provided that the delimitation line of the maritime space between Ukraine and Romania depends exceptionally on the determination of the status of Serpent Island. «This is why one of the key tasks of the Ukrainian side in the ICJ is to prove that Serpent Island is an island suitable for the habitation of people and for their economic activities».[2] In other words, the estabishment of the status of Serpent Island comes first.

Second, if one looks from another angle at the above substantiation of the ICJ judgment in the continental shelf case (The Lybian Arabian Jamakhiriya v. Malta) of 3 June 1985 regarding the refusal to take into consideration the Philfola Island, one may see that the Court indeed does not take into account this uncharted island for delimitation purposes, but not on the grounds specified in the 1982 Convention: the Court does not even focus its attention on special features of that island in terms of its being suitable for human habitation or for independent economic activities, it founds its decision on the fact that «otherwise, this may result in unnecessary violations of proportionality in the location of the equidistant (median) line». Had the experts who protected the interests of Ukraine paid attention to ICJ practice regarding similar cases, they would have been able to draw the relevant conclusions and would have understood that they should not rely solely on the «island» status of Serpent Island; instead, they should have make use all the opportunities provided by the analysis of ICJ case-law.

Therefore, despite the official standpoint on the winning position of Ukraine in this case against Romania, the authors beg to differ. They agree with Denkov and Selik, who emphasize the following point: One way or another, Ukraine lost in this conflict. The seemingly single positive fallout is that the Serpent Island has been recognized irrevocably as being in the ownership of Ukraine is actually not a positive result. Because, in fact, Ukraine has lost the valuable deposits of energy resources, which are so scant now. Ukraine lost not only economically, but also in the diplomatic arena...».[3]

In the opinion of Reznikov, the Hague Court, although it was expected to resolve the issue of the island and put a full stop to further disputes, adopted a rather arbitrary judgment which merely eases the situation temporarily. The oil and gas fields

[1] Договір про добросусідство і співробітництво між Україною та Румунією від 2 червня 1997 р. // Офіційний сайт Верховної Ради України [Treaty on Good Neighbourliness and Co-operation between Ukraine and Romania dated 2 June 1997] (See: http:// zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=642_003&fpage=1&text=%F1%F3%E4&x=12&y=8.

[2] Quoted from *O. I. Belova,* Міжнародно-правові аспекти державної морської політики України та юридичні проблеми її реалізації в сучасних умовах [International Legal Aspects of State Maritime Policy of Ukraine and Legal Problems of its Implementation in Contemporary Conditions] (2008), p. 12.

[3] Qouted from *M. I. Reznikov*, Україно-румунський конфлікт навколо острова Зміїний. Ретроспективний аналіз [Ukraine and Romania Conflict around Serpent Island. A Retrospective Analysis], Вісник Київського міжнародного університету [Herald of Kyiv International University], № 9 (2009), p. 241.

around the island are located so close one to another that this will unavoidably lead to conflict situations.[1]

Therefore, the economy of Ukraine is now experiencing the impact of the judgment of the ICJ in this case.

Given the above, Ukraine needs to take a more balanced viewpoint which would take into account all the specific circumstances and practice of the ICJ in the negotiations with the Russian Federation with regard to the delimitation of its maritime space in the northeastern part of the Black Sea.

[1] Qouted from *M. I. Reznikov*, Україно-румунський конфлікт навколо острова Зміїний. Ретроспективний аналіз [Ukraine and Romania Conflict around Serpent Island. A Retrospective Analysis], Вісник Київського міжнародного університету [Herald of Kyiv International University], № 9 (2009), p. 241.