The ITPCM

International Commentary

Vol. XI no. 37
December 2014

INTERNATIONAL DISPUTE RESOLUTION TECHNIQUES

EMERGING TRENDS AND CHALLENGES

The ITPCM
International Commentary

Administrative Director
Francesco Ceccarelli

Scientific Director
Andrea de Guttry

Editorial Committee
A. de Guttry; *Full professor of Public International Law*
S. Venier; *PHD Candidate, SSSUP*
D. Venturi; *PHD Candidate, SSSUP*
R. Marangio; *PHD Candidate, SSSUP*

Contributors to this issue
Giulio Tiberio Marostica, Chiara Marconi,
Francesca Monaco, Riccardo Luporini

Art Director
Sara Nannipieri

Photo by
Paris Moni, Jan Jochor, Intersos,
Francesco Veronesi, Ninara, Franco Emilio Risso

ISSN. 2239-7949

Scuola Superiore
Sant'Anna
di Studi Universitari e di Perfezionamento

International Training Programme
for Conflict Management

International Commentary

Vol. XI no. 37 December 2014 ISSN. 2239-7949

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THE ITPCM TOWARDS ITS 20TH ANNIVERSARY...

Andrea de Guttry
Full Professor of Public International Law & Director, International Training Programme for Conflict Management, Scuola Superiore Sant'Anna

Dear friends of the ITPCM,
I am very pleased to send to all of you our warmest Season's Greetings and our best wishes for a Happy New Year.

I am very happy and pleased to remind all of you that in 2015 ITPCM will celebrate its 20th anniversary...
The ITCPM was founded in 1995 in response to an appeal of the then UN Secretary General who was facing a major problem related to the difficulty to find civilian personnel properly trained to serve in the new generations of Peace-keeping and Peace-building Operations. In those years the number of UN PKOs was increasing and their mandate was becoming more and more complex involving significant civilian aspects: the need to have civilian experts able to perform professionally the new tasks assigned to the PKOs was dramatically urgent. From 1995 to now we have been running hundreds of training Courses worldwide, very often in close cooperation with the UN and its specialized Agencies, the EU, OSCE, the AU and other relevant international and national actors. In the meantime we have continued to be heavily involved in several research projects and programmes which allowed us not only to bring into the classroom the most recent outcomes of ongoing scientific investigations, but as well to enrich and influence the debate in the international community concerning various aspects related to the deployment of personnel in PKOs. Let me quote, at this regard, our researches concerning the use of force in international relations, International Humanitarian Law, International Human Rights Law, International Disaster Response Law, the Duty of Care of International Organisations towards their personnel sent on mission in critical risk areas, etc.

The next issue of the ITPCM Commentary will illustrate in a more detailed manner the activities we carried out in these 20 years and the results achieved.
I am happy to anticipate to all of you that we will organise, in May 2015, a major ITPCM Happy Birthday event to celebrate this important moment: you all are invited to attend. You will find soon more details of this event on our website: http://www.itpcm.dirpolis.sssup.it/. We hope to see all of you in Pisa in May 2015...

This issue of our ITPCM Newsletter is divided into two parts.

The first is devoted to emerging trends and challenges in internation-

UN

al dispute resolution and management techniques. There are four very interesting contributions devoted, respectively, to:
- the innovative approach to deal in a comprehensive manner with the Conflict in DRC;
- the recent challenges posed in Latin America related to Non-compliance with International Judgments;
- the decision of Croatia and Serbia to submit to the International Court of Justice their reciprocal genocide suits;
- the Italian Constitutional Court judgment n. 238/2014 which restricts, in its domestic jurisdiction, the applicability of the rule of State immunity in circumstances involving crimes against humanity and war crimes, and its impact on the existing international rules.

In the second part of the ITPCM Newsletter you will find additional info on new training courses which we are planning to deliver in 2015: you will notice that we expanding the topics of these courses and trying to make them more and more focused on the specific needs of those serving in international field operations. Besides the traditional Courses (such as the PK and PB Sumer Course) we will organize a brand Master on Election Administration and Policy (MEPA) as well as 5 Hostile Environment Awareness Training Courses (all of them are ENTRi Certified) which the ITPCM runs in close cooperation with the Italian Carabinieri.

As the next issue of our Newsletter is due to appear before Easter 2015, we would to warmly invite all of you to send us short contributions about the activities they are carrying out or about specific issues they are dealing with: these contribution will make this Newsletter more appealing and vivid.

I wish to all of you and your Families our warmest Season's Greetings

Contributions

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MUCH ADO ABOUT NOTHING

WHY THE ICJ WILL MOST PROBABLY RULE THAT GENOCIDE WAS NOT COMMITTED IN SERBIA AND CROATIA'S RECIPROCAL SUIT

Giulio Tiberio Marostica
International Studies and Transnational Governance Program
Graduate Student, Scuola Superiore Sant'Anna

Summary

This article analyses Croatia and Serbia's reciprocal genocide suits at the International Court of Justice (ICJ). It explains why the Court will most likely find that genocide has not occurred in either cases; but it also shows on which grounds the Court may rule for the opposite. The conclusions illustrate the parties' interests in the case.

Key Words

Serbia, Croatia, ICJ, genocide, ethnic cleansing.

In July 1999, Croatia filed an application to the International Court of Justice (ICJ) against the Federal Republic of Yugoslavia (FRY, now the Republic of Serbia) on the basis of Article 9 of the 'Convention on the Prevention and Punishment of the Crime of Genocide'[1]. In the application, Croatia claimed that the FRY had violated the Convention by committing genocide during the conflict occurred in the ex-Yugoslavia in the 1990s. In 2009, after the Court found it had jurisdiction over the case, Serbia filed its counter-memorial, where, *inter alia*, it accused Croatia of exactly the same crime.
The ruling of this case is expected soon, which will put an end to this somehow absurd and paradoxical affair. As a matter of fact, different commentators[2] deem that genocide was not committed in either cases, and that the Court will confirm this with a high degree of certainty; a fact the two countries are perfectly aware of[3].
This article analyses this reciprocal suit, trying to explain why a ruling that genocide was not committed is almost sure[4]. It also provides an insight on the less plausible opposite ruling. To do this, it will strongly rely on findings upheld by the ICJ in its 2007 judgment of the 'Bosnia & Herzegovina vs. Serbia'[5] case, as well as on sentences of the International Criminal Tribunal for the former Yugoslavia (ICTY) relating to the crime of genocide.
In the first half of the 1990s, the Yugoslav State was torn apart by violent conflicts among the nations that composed it. While some republics were unilaterally declaring independence, others were trying to preserve their ethnic homogeneity, by uniting the territories inhabited by their same ethnicity at any cost. For instance, the self-proclaimed 'Republic of Serbian Krajina', largely inhabited by Serbs, established its authority in the Knin region, a territory located across the newly independent Croatian and Bosnian states, wishing to rejoin with the rest of the Serbian population in the FRY. The war that ensued was terribly cruel. The parties fought with all means, expelling or eliminating the opposing ethnic groups that were living in the claimed territories. This practice of 'ethnic cleansing'[6], i.e. to render an area ethnically homogeneous, was particularly widespread and conducted by all the parties. The peak of such acts was observed in Srebrenica, were Serbian forces slaughtered more than 8,000 Bosnian-muslims in few days.
In 2004, the ICTY ruled that the atrocities perpetrated in Srebrenica amounted to genocide,[7] i.e. they were carried out 'with the intent to destroy the Bosnian-muslims in whole or in part'.[8] Three years later, the ICJ confirmed these observations in the 'Bosnia & Herzegovina vs. Serbia' case. The Court reaffirmed that genocide had been committed in Srebrenica; although it failed to establish any responsibility for the Serbian state, except the failure to prevent the crime[9].

The United Nations General Assembly (UNGA) first defined the crime of genocide in the aftermath of the Second World War, as 'a denial of the right of existence of entire human groups' that 'shocks the conscience of mankind'.[10] Then, in 1948, the UNGA adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951. The Convention formally binds the parties to 'prevent' and 'punish' genocide in the case of its occurrence, whereas the prohibition to commit genocide has since then become a peremptory norm of international law accepted by all states.
According to Article 2 of the Convention, an act qualifies as genocide when committed 'with the intent to destroy in whole or in part a national, ethnical, racial or religious group'. Two critical elements are therefore necessary for a genocide to occur: one objective – the 'act'- and one subjective – the 'intent'. Considering the first element, Article 2 provides a list of the five acts that can amount to genocide. These are: killing members of the group, causing serious bodily or mental harm to its members, deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another one. Therefore, for the Convention to apply, it is necessary that the acts committed fall within one of these categories.
With regard to the subjective element, however, it becomes more difficult to establish it. The simple intent to commit one of the genocidal acts listed by the Convention is not enough to consider

1 UNITED NATIONS (1948) *Convention on the Prevention and Punishment of the Crime of Genocide.* [Online] Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf [Accessed: 11 November 2014].

2 Peter Tomka (18 Nov 2008) Separate Opinion. [Online] Available at: http://www.icj-cij.org/docket/files/118/14901.pdf [Accessed: 10 November 2014]

3 MILANOVIC, M. (3 Mar 2014) ICJ opens hearings in Croatia v. Serbia. *Blog of the European Journal of International Law.* [Online] Available at: http://www.ejiltalk.org/icj-opens-hearings-in-croatia-v-serbia/ [Accessed: 11 November 2014].

4 T.J. (11 Mar 2014) Croatia v Serbia. The Economist. [Online] Available at: http://www.economist.com/blogs/easternapproaches/2014/03/international-court-justice [Accessed: 3 November 2014].

5 ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro. [Online] Available at: http://www.icj-cij.org/docket/files/91/13685.pdf [Accessed: 10 November 2014]

6 UNSG. (24 May 1994) Letter from the Secretary General to the President of the Security Council, including the Annex 'Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)'. [Online] Available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Accessed: 10 November 2014].

7 ICTY. (2004) Krstić (IT-98-33) *'Srebrenica-Drina Corps'.* [Online] Available at: http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [Accessed: 10 November 2014].

8 UNITED NATIONS (1948) *Convention on the Prevention and Punishment of the Crime of Genocide.* [Online] Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf [Accessed: 11 November 2014].

9 ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro. [Online] Available at: http://www.icj-cij.org/docket/files/91/13685.pdf [Accessed: 10 November 2014]

10 UNGA. (1946) Resolution 1946 96 (I). [Online] Available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement [Accessed: 26 November 2014].

that act as amounting to genocide. Rather, it must be established that a *dolus specialis* is in place, i.e. a real genocidal intent to destroy a group in whole or in part. To prove this *dolus specialis,* there must be clear evidence of the existence of such an intent, namely a general plan or the systematic manner in which the perpetration was carried out. This subjective element is the key factor that distinguishes the act of genocide from mass killings and other full-scale atrocities against a group. As the ICJ observed in 'Bosnia & Herzegovina vs. Serbia', 'it is not enough that the members of a group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent'. Instead, an actual genocidal intent must be established and be carefully 'distinguished from other reasons or motives the perpetrator may have' (ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2004)[11]. As one would expect, establishing this distinction is no simple task.

For this reason, some scholars have stated with a high degree of certainty that the ICJ in this case will find that genocide did not occur[12]. The argument is based first on the conviction that none of the crimes perpetrated during the Serbian-Croat conflict correspond to the acts prohibited by Article 2 of the Convention. Second, it considers the lack of evidence that the *mens rea* requirement (or the so called *dolus specialis*) was actually present in those crimes. In other words, there is no evidence of any genocidal intent, by means, for instance, of a general plan or the systematic character of the perpetration, for any act committed by the parties that may fall within the categories listed in Article 2. In order to better understand this claim, it is necessary to go through the facts that the parties reciprocally contend as amounting to genocide.

Firstly, concerning the allegation against Croatia, there is only one circumstance in which Serbia claims that genocide had been committed, namely in the case of 'Operation Storm'. This was a large-scale operation carried out by the Croatian army in summer 1995 against the Republic of Serbian Krajina, with the aim to free the occupied Croatian territories. Serbia contended that the forced removal of civilians of Serb nationality that followed the operation amounted to genocide. In fact, around 200,000 people were forced to leave, triggering a major refugee crisis. However, despite the magnitude and gravity of this episode, the ICJ would hardly find it as constituting a form of genocide. As a matter of fact, the Court, relying on the findings of the ICTY,[13] observed in 'Bosnia & Herzegovina Vs. Serbia' that 'deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group' (ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2004)[14]. Therefore, the Court concluded, it cannot be considered as a form of genocide. Besides, the intent of Operation Storm was clearly to regain control of an area under enemy's occupation, which has to be distinguished from a genocidal intent to destroy a group in whole or in part. As a final remark, the Croatian officials that conducted the operation were never indicted for genocide by the ICTY, let alone convicted[15]. Moreover, considering that the ICJ has always strongly relied on the findings of The Hague's *ad hoc* Tribunal for its observations, it is extremely unlikely that it will change its approach for this case.

Secondly, with regard to the charges brought against Serbia, there are three circumstances in which Croatia argues that genocide was committed, one in each of the battlefields where the parties fought: Southern Dalmatia and the city of Dubrovnik, Eastern Slavonia and the city of Vukovar, and the Croatian territories of the Republic of Serbian Krajina. In the first case, the Serbian offensive in Southern Dalmatia and the siege of Dubrovnik were carried out from September 1991 and May 1992, but by the end of 1992 Croatian forces retook the area. According to the 'Final Report of the Commission of Experts' established by the United Nations Security Council (UNSC) Resolution 780[16], between 82 and 88 civilians were killed, and around 15,000 refugees were displaced in the period until December 1992. Clearly then, the claim that genocide was perpetrated is rather weak. Neither the military operation can correspond to any of the acts of genocide of the Convention, nor can the number of casualties suggest that a genocidal intent was in place at that point in time.

Similarly, in Eastern Slavonia and the siege of Vukovar, despite different warcrimes and crimes against humanity that were undeniably perpetrated there[17], it is also extremely unlikely that the Court would establish that a genocide was committed in this case. First of all, in consideration of the fact that the intent of the Serbs, as in the Croatian recapture of Krajina, was to occupy the territories inhabited by their minority, meaning that there was no primary genocidal purpose. Second, the massacres committed after the fall of Vukovar, like the massacre of Ovč ara, ought more likely to be considered as unsystematic and undisciplined reprisals, rather than killings aimed at destroying the opposing group in whole or in part.

Finally, the facts occurred in the territories of the Republic of the Serbian Krajina, can be considered the most difficult issue to analyse for the Court's judges. During the whole conflict, the Republic's authorities of the Knin region pursued a discriminatory policy against the Croat and Bosnian-Muslim groups, mainly by means of forced displacement, unlawful executions and other similar crimes, with the intent of 'ethnic cleansing'[18]. This made the Prosecutor of the ICTY to charge some of these authorities with allegations of genocide and complicity in genocide in the first instance. How-

[11] ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro. [Online] p. 82-83. Available at: http://www.icj-cij.org/docket/files/91/13685.pdf [Accessed: 10 November 2014].

[12] See for example: MILANOVIC, M. (3 Mar 2014) ICJ opens hearings in Croatia v. Serbia. *Blog of the European Journal of International Law.* [Online] Available at: http://www.ejiltalk.org/icj-opens-hearings-in-croatia-v-serbia/ [Accessed: 11 November 2014].

[13] ICTY. (31 July 2003) Stakić (IT-97-24-T). [Online] Available at: http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf [Accessed: 10 November 2014].

[14] ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro. [Online] p. 82-83. Available at: http://www.icj-cij.org/docket/files/91/13685.pdf [Accessed: 10 November 2014].

[15] ICTY. (16 November 2012) Gotovina et al. (IT-06-90) *'Operation Storm'*. [Online] Available at: http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf [Accessed: 12 November 2014].

[16] UNSG. (24 May 1994) Letter from the Secretary General to the President of the Security Council, including the Annex 'Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)'. [Online] Available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Accessed: 10 November 2014].

[17] See for example: ICTY. (22 Mar 2012) Dokmanović (IT-95-13a) *'Vukovar Hospital'.* [Online] Available at: http://www.icty.org/x/cases/dokmanovic/ind/en/dokmanovic_960326_indictment_en.pdf [Accessed 12 November 2012].

[18] See for example: ICTY. (3 Apr 2007) Brđanin (IT-99-36) *'Krajina'.* [Online] Available at: http://www.icty.org/case/brdanin/4 [Accessed 12 November 2012].

ever, the Tribunal never confirmed these charges.[19] In addition, all the main allegations against the authorities of the 'Kraijna's Republic' concerned facts committed within the territory of Bosnia & Herzegovina, of which the ICJ has no jurisdiction for the current proceedings. In any case, the ICJ adjudicated on the facts committed in the Bosnian territory when it entertained the litigation 'Bosnia & Herzegovina vs. Serbia'. There, it confirmed the view of the ICTY, reaffirming that the acts committed within that territory did not constitute a form of genocide[20]. It is evident that it is highly unlikely that the ICJ will come to different conclusions in the Croatia vs. Serbia case, since the facts committed by the Kraijna's officials within the Croatian territory were of the same kind of the acts committed in the Bosnian one.

However, for the purpose of this article it is important to analyse the reasons why some of the Serbian authorities were accused by the ICTY's Prosecutor of genocide and complicity in genocide for the acts mentioned above, which clearly constituted forms of 'ethnic cleansing'. As a matter of fact, this analysis provides an insight to understand the very low probability that the ICJ may find that genocide had actually been committed in this case. In its application, Croatia contended, *inter alia*, that 'Serbia is liable for 'ethnic cleansing', a form of genocide which resulted in large numbers of Croatian citizens being displaced, killed, tortured, or illegally detained' (ICJ, Application Instituting Proceedings, Croatia v. Yugoslavia, 1999)[21]. Likewise Serbia, in its counter-memorial, argued that 'if the Court is inclined to accept the claim by Croatia that genocide took place in the armed conflict in its territory, the clearest and the most convincing case of genocide was actually Operation Storm'. According to Serbia, the evacuation of Croatian citizens of Serb ethnicity in the Republic of Serbian Krajina that followed the operation amounted to 'a second round of 'ethnic cleansing', in violation of the

Genocide Convention' (ICJ, Counter-memorial of Serbia, Croatia v. Serbia, 2009)[22]. The stance adopted by both parties, that genocide was perpetrated by means of 'ethnic cleansing', needs to be interpreted as an attempt to broaden the concept of genocide, in order to induce the Court to find genocide where it actually did not occur.

Despite this, some evidence actually supports the 'ethnic cleansing' thesis, as can be observed from the abovementioned UN Final Report. The Report defines 'ethnic cleansing' as 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area' (United Nations Secretariat General UNSG, Letter from the Secretary General to the President of the Security Council, 4 May 1994)[23]. Moreover, it affirms that this practice has been carried out 'so systematically' that it strongly appears to be 'the product of a policy conducted by omission' through the parties' consistent failure to prevent 'the commission of such crimes and to prosecute and punish the perpetrators' (UNSG, Letter from the Secretary General to the President of the Security Council, 4 May 1994)[24]. Further, the Report concludes saying that the acts through which 'ethnic cleansing' has been carried out could also 'fall within the meaning of the Genocide Convention' (UNSG, Letter from the Secretary General to the President of the Security Council, 4 May 1994)[25]. Therefore, on the basis of this and other similar sources, should the Court accept the view that 'ethnic cleansing' is a form of genocide under the 1948 Convention, the case would be resolved with a double genocide verdict.

As a matter of fact, however, the ICJ had already expressed an opinion on this matter in 'Bosnia & Herzegovina Vs. Serbia'. In that judgment, relying on the observations of the ICTY[26], the Court ob-

[19] ICTY. (3 Apr 2007) Brđanin (IT-99-36) *'Krajina'.* [Online] Available at: http://www.icty.org/case/brdanin/4 [Accessed 12 November 2012].

[20] ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro. [Online] p. 82-83. Available at: http://www.icj-cij.org/docket/files/91/13685.pdf [Accessed: 10 November 2014].

[21] ICJ. (1999) Croatia v. Yugoslavia. *Appli-cation Instituting Proceedings.* [Online] p. 2. Available at: http://www.icj-cij.org/docket/files/118/7125.pdf [Accessed: 10 November 2014].

[22] ICJ. (December 2009) Croatia v. Serbia. *Counter-memorial submitted by the Republic of Serbia, Volume I.* [Online] p. 18. Available at: http://www.icj-cij.org/docket/files/118/18188.pdf [Accessed: 10 November 2014].

[23] UNSG. (24 May 1994) Letter from the Secretary General to the President of the Security Council, including the Annex 'Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)'. [Online] p.33. Available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Accessed: 10 November 2014].

[24] UNSG. (24 May 1994) Letter from the Secretary General to the President of the Security Council, including the Annex 'Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)'. [Online] p.1-2. Available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Accessed: 10 November 2014].

25 UNSG. (24 May 1994) Letter from the Secretary General to the President of the Security Council, including the Annex 'Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)'. [Online] p.33. Available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Accessed: 10 November 2014].

[26] ICTY. (2 August 2001) Krstic', (IT-98-33-T), *'Serbia-Drina Corps'.* [Online] Available at:

served that as long as the acts constituting 'ethnic cleansing' are such as to be contrary to the acts of Article 2 of the Convention, and carried out with the necessary specific intent (*dolus specialis*), they can actually correspond to genocide in the meaning of the Convention.
However, the Court concluded in that case that the acts of 'ethnic cleansing' imputed to Serbia did not constitute a form of genocide as contemplated in the Convention, and that they lacked the requisite specific intent to destroy a group in whole or in part, unless for the case of Srebrenica. Nevertheless, Srebrenica was a unique case of planned and systematic mass killings throughout the whole Yugoslav war between Serbia, Bosnia and Croatia. In particular, nothing comparable to it happened in the conflict between Serbia and Croatia.
Therefore, it is extremely unlikely that the Court will find in this litigation that genocide has actually been committed. In fact, this ruling implies that the ICJ will use a different methodological approach than the one used in 'Bosnia & Herzegovina vs. Serbia', i.e. that it will decide that 'ethnic cleansing' in general does actually constitute a form of genocide in the meaning of the Convention. This view is also supported by two other arguments. Firstly, in the litigation between Serbia and Bosnia, the Court noted that 'ethnic cleansing' in general was not a form of genocide within the meaning of the Convention, since the proposal to include this practice in the definition of genocide was not accepted in the drafting process[27]. Secondly, because the Court pronounced the judgment of that case only 7 years ago, and with a majority of 13 to 2.
Some may say that eight of the 15 judges that adjudicated the case in 2007 have changed, and therefore the predictability of a coherent judgment cannot be completely certain. But this is a somewhat political consideration that would most likely not affect the ruling. In fact, the legal and methodological praxis of the Court are much more important predictors of its decisions, than the composition it is made of. However, another political consideration with more far-reaching implications is the President of the ICJ's separate opinion to the 2007 judgment, which gently urged the parties to discontinue the case[28]. This in fact suggests that it is quite unlikely that the Court might establish something unpredictable or unexpected like that genocide was committed.

In conclusion, a genocide ruling by the ICJ would be an extremely unlikely scenario; and the two parties' governments cannot be unaware of that[29]. This then raises the question why the parties did not solve the dispute politically and withdraw their applications to the ICJ, which are costing them millions in legal fees.
The answer could very well be that the political cost would be much higher than the economic one. As such, the two countries have preferred to retain the status quo: with a reciprocal accusation of the same crime, accusations that they both know will not be established. There have actually been some attempts to solve the dispute through diplomatic means, but have all eventually failed[30] because of political calculations of internal character. Therefore, Serbia and Croatia have been standing a pointless trial for more than ten years, clogging up the work of the ICJ, only for the purpose of adhering to public opinion, as it will be now explained. The incumbent government of Croatia, strongly opposed by the nationalists, found it more convenient to keep the situation as it is, than to drop the genocide claim. Instead, Serbia, which government has a nationalist background, has utilised the trial to its benefit, pleasing the radical proportion of public opinion. Both States know that should the ICJ establish that genocide was not committed, all the responsibility will fall back to the judges. In fact, the Court's judgment will not contribute to changing the view of public opinion, deep-seated in its beliefs, and traditionally skeptical towards the work of international justice. Nationalistic narratives and propaganda will remain in the two countries, as they have remained since the end of the war; but at least this time the governments will be relieved of any responsibility.
As Gregory Stanton pointed out, genocide is a process that develops in ten stages, 'denial' being the last one[31]. Arguably, the genocide stigma is a burden too heavy for a country to bear, as some recent statements of the Serbian President confirm[32]. In this case instead, there are reciprocal assertions of genocides that have never occurred, like in a theatre of the absurd. Then perhaps, drama is the best we can get out of all this affair.

http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [Accessed: 10 November 2014].

27 ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro, pag. 123. [Online] Available at: http://www.icj-cij.org/docket/files/91/13685.pdf [Accessed: 10 November 2014].

28 ICJ. (18 Nov 2008) Bosnia and Herzegovina v. Serbia and Montenegro, Separate Opinion of Judge Tomka. [Online] Available at: http://www.icj-cij.org/docket/files/118/14901.pdf [Accessed: 12 November 2014].

29 MILANOVIC, M. (3 Mar 2014) ICJ opens hearings in Croatia v. Serbia. *Blog of the European Journal of International Law*. [Online] Available at: http://www.ejiltalk.org/icj-opens-hearings-in-croatia-v-serbia/ [Accessed: 11 November 2014].

30 RISTIC, M. (24 Feb 2014) Serbia, Croatia fail to drop genocide lawsuits. *Balkan Transitional Justice, BIRN*. [Online] Available at: http://www.balkaninsight.com/en/article/serbia-croatia-pledge-to-leave-the-past-behind [Accessed: 3 December 2014].

31 STANTON, G. (1996) The ten stages of genocide. *Genocide watch*. [Online] Available at: http://genocidewatch.org/genocide/tenstagesofgenocide.html [Accessed: 3 December 2014].

32 See for example: Al Jazeera. (3 Jun 2012) Serb President denies Srebrenica 'genocide'. *Al*

Bibliography

Al Jazeera. (3 Jun 2012) Serb President denies Srebrenica 'genocide'.
[Online] Available at: http://www.aljazeera.com/news/europe/2012/06/201262161913498413.html
[Accessed: 3 November 2014].

MILANOVIC, M. (2006) State Responsibility fot Genocide. The European Journal of International Law Vol. 17 no.3

MILANOVIC, M. (3 Mar 2014) ICJ opens hearings in Croatia v. Serbia. Blog of the European Journal of International Law.
[Online] Available at: http://www.ejiltalk.org/icj-opens-hearings-in-croatia-v-serbia/
[Accessed: 11 November 2014].

ICJ. (1999) Croatia v. Yugoslavia. Application Instituting Proceedings.
[Online] Available at: http://www.icj-cij.org/docket/files/118/7125.pdf
[Accessed: 10 November 2014].

ICJ. (2007) Bosnia and Herzegovina v. Serbia and Montenegro. Final Judgment
[Online] Available at: http://www.icj-cij.org/docket/files/91/13685.pdf
[Accessed: 10 November 2014].

ICJ. (18 Nov 2008) Croatia v. Serbia, Separate Opinion of Judge Tomka.
[Online] Available at: http://www.icj-cij.org/docket/files/118/14901.pdf
[Accessed: 12 November 2014].

ICJ. (2009) Croatia v. Serbia. Counter-memorial submitted by the Republic of Serbia.
[Online] Available at: http://www.icj-cij.org/docket/files/118/18188.pdf
[Accessed: 10 November 2014].

ICTY. (2 August 2001) Krstic',(IT-98-33-T), 'Serbia-Drina Corps'.
[Online] Available at: http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf
[Accessed: 10 November 2014].

RISTIC, M. (24 Feb 2014) Serbia, Croatia fail to drop genocide lawsuits. Balkan Transitional Justice, BIRN.
[Online] Available at: http://www.balkaninsight.com/en/article/serbia-croatia-pledge-to-leave-the-past-behind [Accessed: 3 December 2014].

STANTON, G. (1996) The ten stages of genocide. Genocide watch.
[Online] Available at: http://genocidewatch.org/genocide/tenstagesofgenocide.html
[Accessed: 3 December 2014].

UNITED NATIONS. (1948) Convention on the Prevention and Punishment of the Crime of Genocide.
[Online] Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf
[Accessed: 11 November 2014].

UNSG. (24 May 1994) Letter from the Secretary General to the President of the Security Council. [Online] Available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf
[Accessed: 10 November 2014].

Second World War

Germany

Nazism

Italy

crimes against humanity

Defence

war crimes

State Immunity

International Law

legislative measure

fundamental right

Second World War

Italian Constitutional Court

crimes against humanity

Defence

Human right

ITALY AND THE IMMUNITY DOCTRINE

IMPLICATIONS OF ITALIAN CONSTITUTIONAL COURT JUDGMENT n. 238

Chiara Marconi
International Studies and Transnational Governance Program
Graduate Student, Scuola Superiore Sant'Anna

Summary

This article provides a brief contextualisation of the Italian Constitutional Court judgment n. 238/2014 and its implications at the international level. By restricting, in its domestic jurisdiction, the applicability of the rule of State immunity in circumstances involving crimes against humanity and war crimes, Italy aimed at assuring the implementation of the fundamental right of access to justice. Is there any possibility that this ruling could be considered as the first step towards a new customary rule?

Keywords

State Immunity; Germany; Italy; Italian Constitutional Court; Nazism.

Introduction

On 22 October 2014, the Italian Constitutional Court made history when it delivered judgment No. 238. For the very first time, a Constitutional Court of a State party to the International Court of Justice (ICJ), ruled clearly against an ICJ sentence.

The Constitutional Court, headed by President Judge Tesauro, ruled that the legislative measure through which Italy has aligned itself with its international obligations arising from the ICJ judgment of 2012 in the case *Germany v-Italy* is unconstitutional. It also judged that the 1957 Ratification Law of the adherence of Italy to the United Nations (UN) Charter, insofar as it required obedience to the ICJ's decision, was against the Italian Constitution.
This ground-breaking Constitutional Court's ruling followed the 2012 ICJ judgment concerning the case *Germany v. Italy (Greece intervening*[1]*)*. In this case, Germany claimed that Italy violated its jurisdictional immunity by allowing claims concerning reparation of Italian victims of Nazism to be brought before national courts. The ICJ ruled in favour of Germany.

The Constitutional Court's striking move is the last attempt for Italian judges to implement the right to justice for its citizens, regardless of international law and customary rules such as State Immunity. Experts and scholars are now left with a huge arena for comments and criticisms, but ultimately, a response from Germany is what spectators are waiting for. This legal melodrama is thus anything but settled. This article aims to address one of the major issues regarding this case — the consequences of the Constitutional Court ruling at the international level. To do this, it will analyse firstly the relation between immunity and crimes against humanity and secondly the relation between immunity and the right to justice. Provisional conclusions will be drawn as whether the decision by the Constitutional Court can pave the way to a new customary rule regarding State immunity.

A brief outline of the case before the ICJ

Before providing an analysis of the judgment of the Italian Constitutional Court, a brief outline of events of what occurred between Germany and Italy is necessary. On 23 December 2008 the Federal Republic of Germany filed an application to the ICJ instituting proceedings against the Italian Republic[2]. Germany accused Italian courts of failing to respect the jurisdictional immunity of Germany, thus violating International Law. The breach occurred when claims against Germany were allowed to be brought before Italian civil courts. These claims concerned reparation for injuries suffered as a consequence of crimes committed by the Nazis in Italy during the Second World War. The Italian rebuttal relies on three main points[3]. Firstly, Italy

[1] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.* Available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=143&p3=4.

[2] *Ibidem.*

[3] *Jurisdictional Immunities of the State*

claimed that the acts committed by the German Reich constituted serious violation of International Humanitarian Law, namely war crimes and crimes against humanity. Secondly, Italy maintained that the violated rules of International Law amounted to *jus cogens* rules, thus non-derogable rules. Thirdly, Italy argued that the exercise of jurisdiction by its courts was to be considered as a matter of last resort, since the claimants had been denied all other forms of redress.
In brief, Italy attempted to claim the possibility to limit State's immunity on the basis of the nature and circumstances of the acts. Such acts, as war crimes and crimes against humanity, amounted to grave violation of *jus cogens.* Therefore, no immunity could be invoked by the perpetrators of the crimes.
For the purpose of the present paper, it is important to provide a definition of State immunity. The International Law Commission (ILC) concluded in 1980 that the rules of State immunity are customary law, 'solidly rooted in the current practice of States'[4]. Article 5 of the UN Convention on Jurisdictional Immunities of States and their Property states: '*A State enjoys immunity in respect of itself and its property, from the jurisdiction of the court of other States subject to the provision of the present convention*'[5].

Thus, State immunity is a customary rule unanimously recognised as based on the traditional principle of '*par in parem non habet iudicum*': sovereign States cannot be brought before the courts of other States.
Italy alleged that immunity cannot be invoked for acts committed by the armed forces of a State during an armed conflict. Italy maintained that 'immunity to *acta jure imperii*[6] does not extend to torts or crimes occasioning death, personal injury or damage to property committed on the territory of the forum State'.
On February 2012 the ICJ dismissed these arguments and ruled that Italian courts were indeed denying Germany's immunity, thus amounting to a breach of customary International Law. In doing so, the Court disregarded not only Germany's admission of responsibility for the acts committed during World War II, but also the severity of such acts, which represented grave violations of human rights.
By recognising immunity to Germany, the ICJ turned a blind eye on the fact that Italian citizens, who were victims of Nazi crimes, cannot implement their right to access to justice. With this judgment, the ICJ dealt with the longstanding struggle of balancing between State immunity and the protection of human rights. Courts should be the guardians of the protection of human rights. However, at the same time, courts are to implement the existing law and customary rules. Thus, according to the ICJ, the law has to be implemented also when it is detrimental to the protection of human rights. In short, in the eyes of the ICJ and International Law, State immunity prevails over human rights.

Italy's Reaction

The Italian Republic had no choice but to accept the decision of the ICJ, despite this meaning that Italian judges had to deny their own citizens the right to justice. In 2013, the Italian Parliament adopted Law 5/2013 to comply with the ICJ decision and ratified the UN Convention on Jurisdictional Immunities of States. By adopting law 5/2013, through which Italy ratified the accession to the UN Convention on Jurisdictional Immunities of States and their Property Italian courts had no longer jurisdiction over compensation requests for war crimes committed by Germany between 1943 and 1945.
At this point, although the case appeared settled on the surface, the fire was, however, still burning under the ashes. Italian judges were uneasy with the idea of complying with the ICJ judgment, which led to the recourse to the Constitutional Court for a question of constitutionality. Under article 134 of the Italian Constitution, the Constitutional Court is entitled to rule over the constitutional legitimacy of Italian laws. It is defined as the judicial review power of the Constitutional Court. Thus, any law that conflict with the constitution, according to the Italian legal hierarchy, is to be considered inapplicable.
The case gained new momentum with the Constitutional Court's decision of 22 October 2014. The Court of Florence raised a question of constitution-

(Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, para. 80-108.
(nda) Acta jure imperii are activities of a governmental or public nature carried out by a foreign State or one of its subdivisions.

[4] Available at http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1980_v1_e.pdf.

[5] United Nations Convention on Jurisdictional Immunities of States and their Property. Available at: https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf.

[6] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.*

ality before the CC, calling into question the compatibility of the Italian Law 5/2013 with Article 24 of the Constitution, which protects the right of access to justice. The Constitutional Court's ruling had three implications. Firstly, it declared that Article 3of Law 5/2013, which referred to the explicit adaptation mechanism to the 2012 ICJ rulings, is in breach of the Italian Constitution. . Secondly, the Court also declared constitutionally unlawful the 1957 Italian Law of ratification of the UN Charter 'only to the extent in which it obliges Italian Courts to comply with the judgment of the International Court of Justice of 3 February2012'[7]. Finally, the Court affirmed that the customary law on State immunity clashes with basic principles of the Italian legal system and this renders domestic reception impossible.

This ground-breaking judgment delivered by the Constitutional Court resorted to domestic law to legally justify its non-compliance with the ICJ ruling. This has very important implications, because it essentially means that in certain circumstances, national courts could disregard international rules through domestic law. However, the legal analysis of this judgment cannot be univocal. As a matter of fact, the legality of this issue depends on the perspective adopted. On the one hand, this decision could be analysed in light of the existing principles of International Law. On the other hand, this case could also be viewed as a turning point, as a first step towards the creation of a new customary rule, as many commentators[8] have suggested.

In this latter sense, the judgment would break free of all existing principles and categories, and rather set the foundations for new ones.

Considering the *new practice for a new customary* path is not without risks. Nevertheless, many scholars[9] commenting on the Constitutional Court ruling have adopted this view due to Italy's past record of reframing the immunity doctrine. At the beginning of the 20th Century, along with Belgium Courts, Italy's jurisprudence managed to restrict the principle of immunity only to cases where the State acted within its powers of public authority (*acta jure imperii)*[10]. This view has also been substantiated by Professor F. Fontanelli in 2014[11]. He pointed out that if ordinary judges felt entitled to challenge the fairness of international customs at the beginning of the past century, nowadays the Constitutional Court would not hesitate to do the same, since respect for the fundamental rights of individuals is now guaranteed and required by the Constitution[12].

Consequently, considering that Italy is one of the predominant actors in defining the immunity doctrine, the Constitutional Court decision n. 238 can be seen as a step forward in establishing further restrictions to the principle of immunity. However, in this case the distinction would not be based on *acta jure imperii* versus *acta jure gestionis*[13], but rather on the relationship between immunity and the protection of fundamental human rights.

To what extent do rules of immunity apply with respect to Grave Violations of International Law?

The issue at stake is a very important and controversial one. For the past decades, lawmakers, scholars, the ILC, national and international courts have addressed this relevant topic. In this respect, it seemed like the 2012 ICJ ruling could finally put an end to the controversy: immunity could be invoked with respect to war crimes, even when those violations were *jure im-*

7 Judgment n. 238 of the Italian Constitutional Court, 22 October 2014. Available at: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238.

8 See: PIN, A. (2012) Tearing Down Sovereign Immunity's Fence- The Italian Constitutional Court, the International Court of Justice, and the German War Crimes. *Opinio Juris.* (ONLINE). Available at: http://opiniojuris.org/2014/11/19/guest-post-tearing-sovereign-immunitys-fence-italian-constitutional-court-international-court-justice-german-war-crimes/.

9 See: GRADONI, L (2014) Corte Costituzionale e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile. *Sidi Blog.* (ONLINE). Available at: http://www.sidi-isil.org/sidiblog/?p=1101.
See: SCISO E. (2011) Italian Judges Point of view on Foreign States' Immunity. *Vanderbilt Journal of Transnational law.* Vol. 44:1201. P. 1201.

10 The restriction is based on the distinction between *acta jure imperii* and *acta juree gestionis.* The latter refers to acts committed by the State acting as a private entity.

11 Fontanelli, F. (2014) I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court. *VerfBlog* (Online). Available form: http://www.verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/#.VHcwV4d5Le6 (Accessed: 3rd November 2014).

12 Article 2 of the Italian Constitution. Available at: http://www.governo.it/Governo/Costituzione/principi.html.

13 See footnote 3.

perii. With this ruling, the ICJ acted in the fullness of its power, as the supreme arbiter of International Law, interpreting the customary rules on immunity.
However, with the Constitutional Court ruling it seems that Italy is leaning more towards adopting the perspective that the judgment is to been as a turning point, thus reigniting this controversy.
The relation between State immunity and human rights, with respect to this case, must be addressed on two different levels. Firstly it is necessary to investigate the relationship between the immunity doctrine and the right to access to justice. Secondly, the relationship between the principle of immunity and grave breaches of crimes against humanity, due to the prominence of the International Law of Human Rights, shall be taken into account.

Immunity and Right of Access to Justice

The relation between State immunity and the right of access to justice is the focal point of the case. Italy's position is built around the necessity of granting this fundamental right to its citizens.
Starting from the assumption that the realisation of justice should be the ultimate goal of every judicial system, the issue here is to understand whether it is fair for State immunity to operate as a bar to jurisdiction in circumstances concerning international crimes. More specifically, the threshold of the gravity of the crimes committed should remove any bar to jurisdiction.
In the reasoning of the Constitutional Court it is found that any international rule that conflicts with inalienable human rights recognised by the Italian Constitution cannot be received in the domestic legal system. Article 24 of the Italian Constitution provides that '*Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defence is an inviolable right at every stage and instance of legal proceeding.*' The Constitutional Court found that granting the immunity to Germany would represent a disproportionate violation of Article 24.
Thus, the Court deems that the tension between State immunity and the right to access to justice is to be resolved in favour of the latter, particularly in cases of international crimes. Therefore, the rule on State immunity has been reshaped by the Italian jurisprudence such that it includes an exception for crimes against humanity and war crimes in the Italian legal system.

Immunity and crimes against humanity

In the analysis of this case it is fundamental to bear in mind that the central principles arising from this legal dispute are the Principle of Humanity and the Principle of Human Dignity. Law and ethics go ineluctably together, and for this reason, many have found the ICJ's affirmation of State immunity, under the circumstances of grave violations of international law, to be incorrect and an impediment to the advancement of human rights law[14].
Considering the role played by the judiciary in bringing innovations, it is useful here to take into account the dissenting opinions of two of the 15 judges of the ICJ, who took part to the 2012 ruling.
Judge Cançado Trindade's dissent was articulated over numerous points, which all led to strong conclusions regarding the immunity doctrine. The main point of his argument is that '*jus cogens* stands above the prerogative or privilege of State immunity'[15]. Judge Cançado argued that States could not hide behind the shield of sovereign immunities as the cover-up for grave international crimes would be accompanied with impunity of the perpetrators. Accordingly, State immunities cannot be invoked for *delicti imperii,* such as massacres of civilians in situations of defencelessness. The Judge's assertion was very strong: 'It is immaterial whether the harmful act in grave breach of human rights was a governmental one, or a private one with the acquiescence of the State. State immunity does not stand in the domain of redress for grave violations of the fundamental rights of human person'[16].
Judge Abdulqawi A. Yusuf, in his dissenting opinion, recalled again that State immunity is undergoing a process of limitation as International Law is evolving into a system that also protects the rights of individuals vis-à-vis the State. Nevertheless, he still believes that State Immunity 'is as full of holes as Swiss cheese[17]', highlighting the fact that its coverage is not well defined for many circumstances.
The opinions of the two judges are only the tip of the iceberg. A big slice of the public opinion at the international level tends to agree with the arguments put forward by the two judges.
As a matter of fact the dichotomy utilised by the Constitutional Court in its judgment 238 is the one of 'immunity versus fundamental right of access to justice'. The result, however, affects another dichotomy, that is 'immunity versus crimes against humanity'. The result is a restriction of State immunity, and its implications are far reaching as regards to human rights.

Creation of a new customary rule?

The consideration made above brings to the discussion over the possibility of the creation of a new customary rule, which restricts the rules on immunity. Since Nazi forces have committed crimes in many different countries, it could be very possible that other domestic courts like France and Poland, could indeed adopt the same approach in time to come. The debate on 'where the Constitutional Court judgment will lead' is very much alive, with scholars[18] siding both in favour and against the possibility of an impact on customary international law.
On the one hand, commentators[19]who

[14] BAKIRCIOGLU, O. (2012) '*Germany v Italy*, the Triumph of Sovereign Immunity over Human Rights Law', International Human Rights Law Review, 1, p. 95.

[15] *Jurisdictional Immunities of the State (Germany v. Italya: Greeceintervening), Judgment, I.C.J. Reports 2012*, p. 179.

[16] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, Judge Cançado Dissenting Opinion, *p. 179.*

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, Judge Yusuf Dissenting Opinion, p. 291.

[18] Se: against: FONTANELLI, F. (2014) I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court. *VerfBlog*(Online). Available form: http://www.verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/#.VHcwV4d5Le6 (Accessed: 3rd November 2014).
In favour: GRADONI, L (2014) Corte Costituzionale e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile. *Sidi Blog.* (ONLINE). Available at: http://www.sidi-isil.org/sidiblog/?p=1101.

[19] See: GRADONI, L (2014) Corte Costituzionale e Corte internazionale di giustizia in rot-

welcomed the Constitutional Court decision based their views on the growing centrality of human rights in the International Law system. The right to access to justice is among the fundamental principles of law in every democratic system of our times[20].Consequently, some scholars argued that the ICJ should have expected certain consequences for issuing a ruling that, for the first time, was clearly against human rights.
Academics such as Gradoni (2014)[21], consider the behaviour of the Constitutional Court as a clear manifestation of *animus inducendi consuetudinem,* i.e. the aim to induce the formation of a new customary norm in the international community. As such, the Constitutional Court ruling is seen as a continuation of the Italian judiciary tradition of restricting State immunity.
The rules on State immunity and the entitlement of individuals to reparations for international crimes committed by State agents are undergoing some transformations, as pointed out by Judge Yusuf. In his view, an exception to State immunity is emerging, which is based on the widely-held *opinion juris* that the realisation of certain basic human rights[22] can limit immunity.
Thus, it can be seen why many have welcomed the brave ruling of the Constitutional Court.
The process of creation of a new custom is a complex one, which requires both state practice and *opinion juris.* It is a process that usually takes quite some time. Still, it is a process that has to start somewhere. The commentators who welcomed positively judgment 238 consider it exactly as the first step in this process.
On the other hand, many scholars do not think that the Italian judgment will have an impact at the international level.
As a matter of fact, the Constitutional Court itself had explicitly stated that its aim was not to change the existing customary rules.
So far, Italy has not gained much support from the international community.

Conclusion

Some[23] suggest that the final outcome might be that, despite the good intentions, proponents of the denial of State immunity in cases of international crimes, might eventually achieve some results, but will mostly not affect any real changes..
Others, instead, suggest that a complete change in strategy is needed. In cases involving a tension between immunity and human rights, the solution should be found outside the courts and particularly through diplomatic means. For example, in order to assure reparation for victims, States could sign an agreement. This approach would overcome the current impasse in International Law.
To conclude, with judgment 238, the Constitutional Court placed itself in direct opposition with the ICJ. However, it is not up to the ICJ to change customary rules. Rather, it is a task that the international society should be responsible for.
The international community is now at a crossroad: siding with Italy or leaving her as the lonely soldier fighting for the recognition of the protection of human rights at the international level.
Nevertheless, it seems very likely that the international community will be facing the 'immunity versus right to access to justice' dilemma for many years to come.

ta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile. *Sidi Blog.* (ONLINE). Available at: http://www.sidi-isil.org/sidiblog/?p=1101.

[20] MESSINEO, F (2014) Italian Constitutional Court Judgment 238/2014 Declares Customary International Law on State Immunity inapplicable in the Italian legal order as far as War Crimes and Crimes against humanity are concerned. *Questioni di Diritto Internationale* (ONLINE). Available from: http://www.qil-qdi.org/summary-prepared-by-the-editorial-board-of-qil-qil-will-devote-in-the-following-weeks-a-zoom-out-to-the-legal-issues-arising-from-the-italian-constitutional-court-no-2382014/.

[21] GRADONI, L (2014) Corte Costituzionale e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile. *Sidi Blog.* (ONLINE). Available at: http://www.sidi-isil.org/sidiblog/?p=1101.

[22] Such as the right to an effective remedy.

[23] See: O'KEEFE, R. (2011). State Immunity and Human Rights: Head and Walls, Hearts and Minds. *Vanderbilt Journal of Transnational Law.* P. 47.

Bibliography

CARBONE, S. M. et al. (2002) *Istituzioni di DirittoInternazionale.* Turin: Giappichelli Editore.

FONTANELLI, F. (2014) I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court. *VerfBlog*(Online). Available form: http://www.verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/#.VHcwV4d5Le6 (Accessed: 3rd November 2014).

TAMS, C. (2014) Let the Games Continue: Immunity for War Crimes before the Italian Constitutional Court. *Ejil: Talk!* (Online). Available from: http://www.ejiltalk.org/let-the-games-continue-immunity-for-war-crimes-before-the-italian-supreme-court/ (Accessed: 1st November 2014).

Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012, p. 99. Available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=143&p3=4.

Judgment n. 238 of the Italian Constitutional Court, 22 October 2014. Available at: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238.

A FRAMEWORK OF HOPE?

The Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region

Francesca Monaco
Political Science and International Relations Graduate Student Scuola Superiore Sant'Anna

Summary

After a brief contextualisation of the situation in the Democratic Republic of Congo (DRC), the article analyses the content of the Peace Security and Cooperation (PSC) Framework in order to assess its importance as an innovative pattern of conflict resolution in conflict-ridden regions where transnational actors are involved, as in the Great Lakes region. Indeed, with its three-levels structure, the PSC Framework requires a serious commitment of the national authorities as well as of the states of the region and of the international community to the peace process. A similar comprehensive approach may be the key to prevent the formation of transnational military groups in regional permissive environments and to avoid violence in situations of regional or sub-regional instability.

Key words

Peace Security and Cooperation Framework, Democratic Republic of the Congo, Great Lakes region, transnational armed groups.

Introduction

The Democratic Republic of Congo (DRC) has continued to suffer from recurring cycles of conflicts since its independence in 1960. After a new escalation of violence in the Kivu provinces in 2012, an innovative measure has been taken to address 'the root causes of conflict'[1]. The Peace, Security and Cooperation (PSC) Framework for the DRC and the Region, signed by the governments of the DRC, Angola, Republic of Congo, South Africa, Tanzania, Uganda, Central African Republic (CAR), Burundi, Rwanda, South Sudan and Zambia on 27 February 2013, with its multi-level structure, develops a comprehensive approach for a long-standing solution to the conflict. Despite the initial enthusiasm showed by the African Union (AU) Special Envoy of the Secretary-General for the Great Lakes Region of Africa, Mary Robinson, who referred to the PSC Framework as 'an avenue of hope for the people of the region to build stability'[2], the plan is open to criticisms. After a brief contextualisation, this article examines the content of the PSC Framework and assesses its importance as a first step towards a new understanding of conflicts involving transnational actors.

Historical Background

The Kivu provinces, in the Eastern part of the DRC, are characterised by the activity of various Congolese and foreign military groups. As reported by the United Nations (UN) Secretary General to the Security Council on 23 May 2012[3], the situation in the Kivu provinces deteriorated between January and May 2012, with fighting involving the Mayi-Mayi Forces de défense congolaise (FDC), the Forces Armées de la République Démocratique du Congo (FARDC), the Forces démocratiques de libération du Rwanda (FDLR), the Alliance des patriotes pour un Congo libre et souverain (APCLS), the Ugandan Allied Democratic Front (ADF)/National Army for the Liberation of Uganda (NALU) and the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO)[4].

[1] AU Peace and Security. Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region, Addis Ababa, 24 February 2013. [Online], available at: http://www.peaceau.org/uploads/scanned-on-24022013-125543.pdf.

[2] Office of the Special Envoy of the Secretary-General for the Great Lakes Region of Africa, A Framework Of Hope: The Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region, March 2013, [Online], available at: http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/SESG%20Great%20Lakes%20Framework%20of%20Hope.pdf.

[3] Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, S/2012/355, 23 May 2012. [Online], available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/337/89/PDF/N1233789.pdf?OpenElement.

[4] The original mandate of the mission was es-

The security in the provinces became even more volatile in April, when some elements of the former Congrès national pour la défense du peuple (CNDP) and Patriotes résistants congolais (PARECO), who had been integrated into the FARDC after the agreement of 23 March 2009[5], began to desert from the FARDC in North and South Kivu[6]. On 6 May the creation of the Mouvement du 23 mars (M23) was announced by the deserters. In the aftermath of the mutiny, Congolese and foreign armed groups intensified their attacks, reinforced and broaden their control on some portions of the territory. The humanitarian situation collapsed and the number of internally displaced persons rose from 1.7 million at the beginning of 2012 to 2.24 million[7]. In June the Government of the DRC denounced the support provided by Rwanda to the M23. The addendum to the interim report of the Group of Experts on the DRC submitted to the Security Council Committee on 26 June provided evidences of the fact that Rwanda violated the arms embargo and the sanctions regime through the 'provision of material and financial support to armed groups operating in the eastern Democratic Republic of the Congo'[8], in particular to the M23. The Rwanda government rebutted the findings of the Group. Between July and October 2012 four extraordinary summits of the Heads of State and Government of the International Conference on the Great Lakes Region (ICGLR)[9] were held. In those occasions the Heads of State condemned the actions of the M23 and any support to armed groups destabilising the region and outlined a 'multi-pronged approach'[10] to resolve the crisis, including 'the enlargement of the Joint Verification Mechanism to all Conference members'[11] and 'the deployment, with United Nations and African Union support, of a neutral international force to eradicate the M23, the FDLR and other armed groups and to secure border areas'[12]. At its meeting of 19 October the Security Council welcomed these initiatives, called for the UN Secretary-General to continue his good offices and reaffirmed its 'strong commitment to the sovereignty, independence, unity and territorial integrity of the DRC and emphasized the need to respect fully the principle of non-interference, good neighbourliness and regional cooperation'[13].

On 20 November 2012 the M23 entered in the city of Goma, the capital of the North Kivu province. The same day the UN Security Council adopted Resolution 2076(2012)[14], which condemned the actions of the M23 and requested the Secretary-General to report in the following days, in coordination with the ICGLR and the AU, on the allegations of external support to the M23. Particular emphasis was given to the importance of the continuation of the efforts of the ICGLR, the Southern African Development Community (SADC) and the AU to 'resolve the conflict and find a durable political solution'[15] and of the coordination between States of the region and international organisations. In addition, the Security Council underlined the 'primary responsibility of the Government of the DRC to reinforce State authority and governance in Eastern DRC, including through effective security sector reform'[16]. As far as MONUSCO was concerned, the UN Security Council expressed its intention to 'keep the mandate of MONUSCO under review'[17]. On 2 December the M23 withdrew from Goma, following the widespread international condemnation and the prospect of talks hosted by the Chair of the ICGLR. Indeed, at their fifth extraordinary summit on 24 November, the Heads of State and Government of the ICGLR appealed to the Government of the DRC to address the M23's legitimate grievances -and asked the M23 to stop its military activities. Subsequently, a dialogue between delegations of the Government of the DRC and the M23 was launched on 9 December under the mediation of Crispus Kiyonga, Minister for Defence of Uganda. On 16 January, after having settled a disagreement about the declaration of a formal ceasefire, the Government of the DRC and the M23 formally adopted the agenda of the talks in Kampala. The engagement of the states of the region and of other international actors like the ICGR and the UN was crucial for the resumption of the peace talks between the DRC government and the M23 and for their successful end.

The PSC Framework

The escalation of violence caused by the M23 mutiny forced the international community to reconsider its efforts to secure peace and stability in the region. Indeed, the tools used in the past 'succeeded in addressing the immediate manifestations of the crises, but not the core reasons for their eruption'[18]. On

tablished by Security Council Resolution 1925 of 28 May 2010, as an extension of the mandate of the previous United Nations Mission in the Democratic Republic of Congo (MONUC).

[5] Peace agreement between the Government and le Congrès national pour la défense du peuple (CNDP).

[6] Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, S/2012/355, 23 May 2012. [Online], available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/337/89/PDF/N1233789.pdf?OpenElement.

[7] Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, S/2012/838, 14 November 2012. [Online], available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_838.pdf.

[8] Letter dated 26 June 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2012/348/Add.1, 27 June 2012. [Online], available at:http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202012%20348%20ADD%201.pdf.

[9] The International Conference on the Great Lakes Region (ICGLR) is an inter-governmental organization of the countries in the African Great Lakes Region composed of twelve member states, namely: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia.

[10] Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, S/2012/838, 14 November 2012. Cit.

11 Ibidem.

[12] Ibidem.

[13] Statement by the President of the Security Council, S/PRST/2012/22, 19 October 2012. [Online], available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2012_22.pdf.

14 UN Security Council, Resolution 2076/2012, 20 November 2012, S/RES/2076 (2012). [Online], available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2076.pdf.

[15] Ivi, para 15.

[16] Ivi, para 17.

[17] Ivi, para 9.

[18] Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region, S/2013/119, 27 February 2013, p. 2. [Online], available at: http://www.securitycouncilreport.org/atf/

the contrary, the PSC Framework for the Democratic Republic of Congo and the Region was addressed as 'a window of opportunity to address the root causes of conflict and put an end to the recurring cycles of violence'[19]. The structure of the PSC Framework is peculiar: it involves actions at the national level to address the tasks of State-building, at the regional level to address the concerns and the interests of the states of the Great Lake region, and at the international level to support the development of the initiatives undertaken.

The Framework established two oversight mechanisms, a national and a regional one, known as the '11+4' mechanism. The national oversight mechanism, led by the President of the DRC and supported by the UN, AU, World Bank, African Development Bank and other bilateral and multilateral partners of the DRC, shall 'accompany and oversee the implementation of the national commitments for reform'[20]. The regional oversight mechanism, instead, shall 'review progress in the implementation of the regional commitments'[21]. It involves as guarantors the leaders of the DRC, Angola, Burundi, the Central African Republic, the Congo, Rwanda, South Africa, South Sudan, Uganda, the United Republic of Tanzania and Zambia, and the Secretary-General of the UN, the Chairperson of the AU, the Chairperson of the SADC and the Chairperson of the ICGLR. The '11+4' mechanism shall be 'supported by and closely linked to'[22] the AU, the ICGLR, the SADC and to other international partners as the European Union (EU), Belgium, France, the United Kingdom and the United States of America.

At the national level, considering the underlying problems at the basis of the recurring cycles of violence in the DRC (e.g., the Government's lack of accountability, its limited capacity to exert full authority over its territory and to provide basic services and security to the population), the PSC Framework requires that the Government adopts some governance and structural reforms in order to overcome these weaknesses. In particular, the Framework establishes for the DRC Government a commitment 'to consolidate state authority, particularly in eastern DRC' and 'to continue and deepen security sector reform'[23], that are necessary due to the lack of a professional and accountable army. In addition, the Government has 'to make progress with regard to decentralization'[24] and 'to further structural reform of Government institutions'[25] to compensate the lack of effective governance, especially at the provincial level. The DRC Government is also demanded 'to further economic development'[26], a crucial condition for a country where 71 per cent of the population lives in extreme poverty. Finally, the Government is expected 'to further the agenda of reconciliation, tolerance and democratization'[27] in order to complete a peaceful transition to a functional democratic system and to achieve long-term stability in the DRC.

At the regional level, the Framework addresses 'the legitimate concerns and interests of all the neighbours of the DRC'[28]. First of all, the countries of the region have an obligation 'not to interfere in the internal affairs of neighbouring countries; to neither tolerate nor provide assistance or support of any kind to armed groups; to respect the sovereignty and territorial integrity of neighbouring countries; to respect the legitimate concerns and interests of neighbouring countries, in particular regarding security matters; to neither harbour nor provide protection of any kind to persons accused of war crimes, crimes against humanity, acts of genocide or crimes of aggression, or persons falling under the United Nations sanctions regime; and to facilitate the administration of justice through judicial cooperation within the region'[29]. The Framework reaffirmed these principles of international law because their violation contributed to the escalation of violence in 2012. In particular, as already mention, there were evidences of the fact that in 2012 Rwanda violated the arms embargo and the sanctions regime imposed by the UN Security Council. Rwanda was also suspected of protecting Bosco Ntaganda, one of the leaders of the M23, after that the International Criminal Court (ICC) had issued an arrest warrant in 2006 for war crimes. Secondly, according to the Framework the countries of the region shall 'strengthen regional cooperation, including deepening economic integration with special consideration for the exploitation of natural resources'[30]. Indeed, as highlighted by the UN Secretary General, all armed groups have engaged in the illegal exploitation of mineral and natural resources in the eastern part of the DRC, and the benefits derived from this activity finance the acquisition of illicit weapons. Therefore, the states of the region should enhance their cooperation to end these illicit cross-borders trafficking. In addition, economic integration stimulate the regional development through the facilitation of cross-border trade and the improvement of regional infrastructures for energy, transport and communication.[31]

At the international level, the international community shall support with the 'appropriate means'[32] the achievement of a long-term sustainability in the DRC and the implementation of the Protocols of the Pact on Security, Stability and Development in the Great Lakes region, and it 'shall work towards the revitalization of the Economic Community of the Great Lakes Countries (CEPGL)'[33]. The international community is also called for the appointment of a United Nations Special Envoy and a 'strategic review'[34] of MONUSCO to strengthen its support to the DRC Government.

cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_119.pdf.

19 AU Peace and Security. Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region, Addis Ababa, 24 February 2013, p.1. [Online], available at:http://www.peaceau.org/uploads/scanned-on-24022013-125543.pdf.

20 Ibidem.

21 Ibidem.

22 Ibidem.

23 Ibidem.

24 Ibidem.

25 Ibidem.

26 Ibidem.

27 Ibidem.

28 Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region, S/2013/119, 27 February 2013. cit.

29 AU Peace and Security. Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region, Addis Ababa, 24 February 2013. cit.

30 Ibidem.

31 Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region, S/2013/119, 27 February 2013. cit.

32 AU Peace and Security. Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region, Addis Ababa, 24 February 2013. cit.

33 Ibidem.

34 Ibidem.

Balancing positive and negative aspects

The analysis conducted above shows that the PSC presents both positive and negative aspects. Due to its inclusiveness and the burden-sharing approach fostered among three levels (national, regional and international), the PSC Framework could be seen as the starting point for a closer cooperation among the countries of the region, and as the key to ensure long-term stability in the Great Lakes region. As already mentioned, the volatile situation in this region is caused by the presence of transnational military groups fighting each other in order to establish their control over a portion of territory. Since these military groups have been often assisted, helped or equipped by one or more countries of the region, a serious commitment to cooperate is fundamental to avoid violence. Without any external economic and logistic support the military groups would be severely weakened. In addition, the state-building reforms in the DRC and the initiatives for a closer economic cooperation in the region foster the creation of a favourable environment for a lasting reconciliation.

Unfortunately, the PSC Framework includes only general guidelines and not a detailed list of provisions to be implemented. This vagueness may be the result of an excessive multilateralism. Since the Framework involves 11 states signatories, some international and regional organizations (the UN, the AU, the ICGLR, the SADC, EU) and other international partners (Belgium, France, the United Kingdom and the United States), a vague formulation of the commitments was necessary to avoid any disappointment. Moreover, the Framework multilateralism is characterised by a top-down focus: actors of the local civil society (e.g. customary authorities, NGOs and civil society groups) that are crucial to the process of democratisation and reconciliation are totally ignored. In addition, the armed groups were not included in the talks or in the final plan. As a consequence, the signature of the Framework did not imply the end of the violence (for example, two rival factions of the M23 clashed violently in North Kivu on the day the Framework

was signed). Finally, the implementation of the Framework is undermined by the fact that only the national mechanism has the power to oversee the fulfilment of the national commitments, therefore its implementation is largely at discretion of the DRC Government.

Aftermath

The Framework was welcomed enthusiastically by the international community, which properly fulfils its commitments. First of all, on 18 March 2013, the UN Secretary General appointed Mary Robinson as Special Envoy of the SG for the Great Lakes region of Africa. Mrs. Robinson's mandate focused on 'leading, coordinating and assessing the implementation of national and regional commitments under the PSC Framework.'[35] Then, with resolution 2098/2013 the Security Council decided that MONUSCO 'shall include an Intervention Brigade'[36], whose objective is 'contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities.'[37] The 'continued presence'[38] of the International Brigade depends on 'whether the DRC [...] has made sufficient progress in implementing its commitments under the PSC Framework'[39].

As far as the regional level is concerned, the Rwanda government honoured its promises disarming and detaining 600 combatants of the M23 that had cross the border in March. On 26 May the first meeting of the '11+ 4' oversight mechanism was held, in which the leaders reaffirmed their commitments and endorsed the establishment of a Technical Support Committee to develop a detailed plan with benchmarks and follow-up measures. The plan was adopted by the regional oversight mechanism in its second meeting on 23 September 2013. However, although the expectations arisen from the political and diplomatic initiatives inspired by the Framework, the UN Secretary-General acknowledged in June 2013 that 'the situation remains tense, with episodes of deadly fighting indicative of its continuing volatility'[40]. Indeed, major fighting erupted between the FARDC and the M23 in summer 2013 and the security and humanitarian situation in eastern DRC deteriorated. Eventually, after prolonged negotiations facilitated by several regional actors, on 12 December 2013 the DRC Government and the M23 signed the Nairobi Declarations announcing the conclusions of the Kampala Dialogue and the end of the hostilities[41].

At the national level the Government of the DRC 'made some encouraging progress in implementing its national commitments'[42], including a law for restructuring the National Electoral Commission, a series of laws on decentralization and an action plan for the security and justice sectors reforms.

In his last report to the SC, in September 2014, the Secretary-General recognised that 'although some progress has been achieved in the implementation of the Framework[...], several obstacles continue to obstruct its full implementation. On the political and security fronts, while the general security situation in eastern Democratic Republic of the Congo has generally improved, lack of trust between neighbouring countries, the activities of several armed groups and slow progress in the implementation of the Nairobi Declarations continue to threaten long-term stability in eastern DRC and undermine bilateral relations between some countries in the region.'[43]

Conclusion

Despite the flaws in the conception of the plan and the shortcomings in its implementation, the PSC Framework for the DRC and the Region marks a crucial step towards a new understanding of conflicts involving transnational actors. The PSC Framework, indeed, considers responsible for the peaceful settlement not only the state where most of the fights occurred, but also the neighbouring countries. As depicted in this article, the cycles of violence in the DRC are the result of a regional permissive environment that encourages the formation of military groups. Therefore, the commitment of all the countries of the region to the peace process is fundamental to ensure the end of the violence. The PSC Framework is not only a 'window of hope' for the Great Lakes region, but also for all those situations of regional or sub-regional instability where transnational actors are involved and where a similar pattern of conflict resolution may be followed.

[35] UN Security Council, Resolution 2098/2013, 28 March 2013, S/RES/2098 (2013), [Online], available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2098(2013).

[36] Ibidem.

[37] Ibidem.

[38] Ibidem.

[39] Ibidem.

[40] Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region, S/2013/387, 28 June 2013. [Online], available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_387.pdf.

[41] Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region, S/2013/773, 23 December 2013. [Online], available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_773.pdf.

[42] Ibidem.

[43] Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region, S/2014/697, 24 September 2014. [Online], available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_697.pdf.

NON-COMPLIANCE WITH INTERNATIONAL JUDGMENTS:

RECENT TRENDS IN LATIN AMERICA

Riccardo Luporini
International Studies and Transnational Governance Program
Graduate Student, Scuola Superiore Sant'Anna

Summary

The article analyses the far-reaching consequences of the ICJ judgment of 19 November 2012 on *Territorial and Maritime Dispute* case between Colombia and Nicaragua. By taking this recent case as reference, the article aims at introducing the issue of the non-compliance with international judgments. Colombia emphatically rejected and openly defied the ICJ ruling. Here it is argued that this Colombian irreverent attitude may induce other Latin American judgment debtor-states to adopt an analogous divergent behaviour in the foreseeable future, compromising the positive trend that the ICJ is experiencing in Latin America.

Key Words

Non-compliance – International Court of Justice (ICJ) - Territorial and maritime disputes - Colombia - Nicaragua

Introduction

Slightly more than half a century ago, States were allowed to 'legally' resort to the use of force for settling their controversies. Since then, substantial progress has undeniably been achieved in the international legal system of dispute resolution. Following the creation of the United Nations (UN) system and the total ban of the use of force in 1945, States have both reinforced traditional means and designed new and innovative mechanisms for solving their disputes. Since the end of the Cold War, States have increasingly resorted to judicial means of dispute resolution, as shown by the growing case-load of the International Court of Justice (ICJ) and other international tribunals. In addition, referring disputes to international tribunals has emerged as a common trend among developing countries. In particular, it appears that the ICJ, after the well-known *Nicaragua case* and pre-eminently in this latest decade, gained broad consensus among Latin American countries[1]. Thus, they have progressively turned to the ICJ as an authoritative tribunal to settle very sensitive territorial and maritime disputes (see Figure 1).
Unfortunately, this widespread trust in the ICJ did not prevent Colombia from emphatically rejecting the ICJ judgment of 19 November 2012 on *Territorial and Maritime Dispute* case, brought before the Court by Nicaragua[2]. Not only has Colombia fiercely contested the validity of the judgment but it has also withdrawn from the American Treaty of Pacific Settlement of 1948 (Pact of Bogotá)[3]. This article argues that this open and blatant defiance by Colombia may induce other Latin American judgment debtor-states to adopt the same irreverent attitude in the future. This would compromise the positive trend that the ICJ is experiencing in Latin America.

Nicaragua v. Colombia case: a long dispute, a contested judgment

On 6 December 2001, Nicaragua submitted an application to the ICJ insti-

[1] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), Provisional Measures*, ICJ Rep. 1984, p. 169; *Jurisdiction and Admissibility*, ICJ Rep 1984, p. 392; *Merits*, ICJ Rep. 1986, p. 14.

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment*, ICJ Rep. 2012, p. 624.

[3] Signed by the independent republics of America on 30 April 1948, with the main purpose of imposing on the parties a general obligation to settle their disputes by peaceful means. Under Art. 31 of the Treaty, the parties conferred to the ICJ the jurisdiction to decide on all the disputes of juridical nature that arise among them. The Pact of Bogotá is a pillar of the legal framework of the Organization of American States (OAS). Today, 14 out of 35 OAS member states are parties to the Pact. Before Colombia, just El Salvador denounced the Pact, on 24 November 1973.

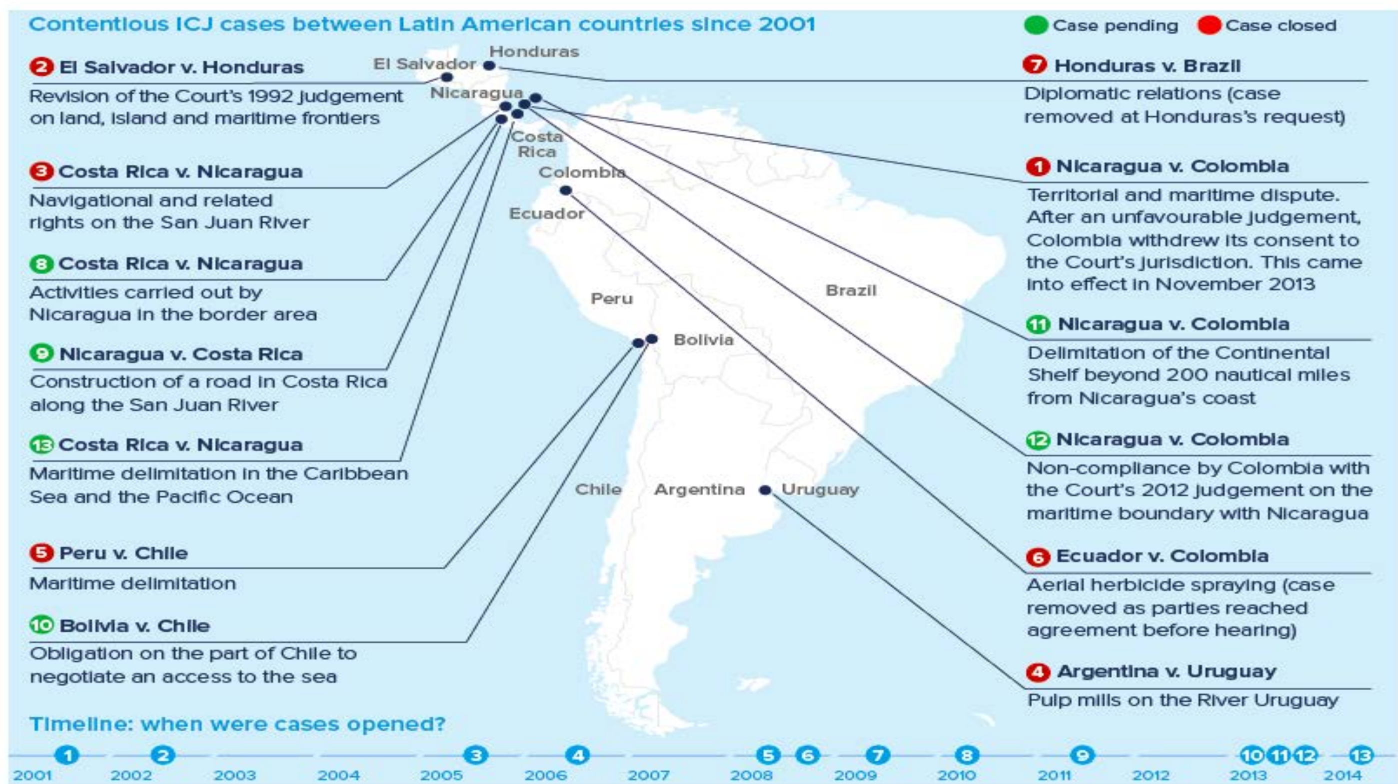

Figure 1. ICJ growing case-load in Latin America since 2001.
Source: Oxford analytica, http://www.oxan.com/Default.aspx

tuting proceedings against Colombia[4]. Nicaragua claimed for the sovereignty over the archipelago of San Andrés and other seven small islands in the Western Caribbean Sea, thus demanding the determination of its maritime areas and boundaries with Colombia[5]. According to Nicaragua, Colombia had unilaterally fixed a maritime delimitation that did not respect the criteria established in the UN Convention on the Law of the Sea of 1982 (UNCLOS), and widely accepted as international customary law.

The proceedings lasted 11 years; the ICJ delivered its judgment on 19 November 2012[6]. Basing its decision principally on an analysis of the effective exercise of territorial jurisdiction in the post-colonial period, the Court unanimously decided that Colombia enjoys sovereignty over the San Andrés archipelago and the other small islands. Then, the Court used a multi-stage methodology to decide on the entitlements over the overlapping zone between Nicaraguan within-200-miles continental shelf and Colombian islands waters.[7] After having established a 12 miles territorial sea for Colombian islands, the ICJ drew a provisional median line and, considering the mere application of the equidistance principle inappropriate for the case, it applied a weighting ratio and adjusted the line further, ending in a simplified weighted line favouring Nicaragua. In sum, Nicaragua obtained from the ICJ ruling about 38,600 square miles of sea, rich of fish and other natural resources (see Figure 2).

On the same day in which the judgment was issued, the Colombian authorities vehemently rejected the ruling and denigrated the Court itself. President Santos declared: 'All of these are really omissions, errors, excesses, inconsistencies that we cannot accept. Taking into account the above, Colombia – represented by its Head of State – emphatically rejects that aspect of the judgment rendered by the Court today' [8]. Similarly, the Colombian Foreign Minister Angela Holguín labeled the ICJ as 'enemy', stating that it 'did not base its decision on

[4] Application Instituting Proceedings, *Territorial and Maritime Dispute (Nicaragua v. Colombia),* ICJ Rep. 2012, p. 630.

[5] The seven islands are Alburquerque Cays, Bajo Nuevo, East-Southeast Cays, Quitasueno, Roncador, Serrana, and Serranilla. After the independence from Spain in the 19th century, Colombia and Nicaragua ratified a Treaty in 1928 to settle their dispute on the sovereignty over these islands. However, the Treaty was denounced as null and void by Nicaragua in 1980.

[6] For a brief insight into the ICJ Judgment, See: BEKKER, P. (2013), 'The World Court Awards Sovereignty Over Several Islands in the Caribbean Sea to Colombia and Fixes a Single Maritime Boundary between Colombia and Nicaragua', *ASIL Insights*, [Online], 17(3). Available at: http://www.asil.org/insights/volume/17/issue/3/world-court-awards-sovereignty-over-several-islands-caribbean-sea. [Accessed: 10 November 2014].

[7] The multi-stage methodology utilised by the Court is composed of: the establishment of a equidistance/median line, by reference to apposite base points (Stage 1); the examination of the line in the light of equitable factors (Stage 2); the application of a final proportionality check (Stage 3). The ICJ left the delimitation of the beyond-200-miles continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) established under the UNCLOS, to which Nicaragua is a party.

[8] 'Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice"' 19 November 2012, [Online]. Available at: http://wsp.presidencia.gov.co/Prensa/2012 Noviembre/Paginas/20121119_02.aspx. [Accessed: 22 November 2014]. See also: COLOMBIA REPORTS (2012), 'ICJ ruling on San Andrés a 'serious judgment error' : Santos', [Online]. Available at: http://colombiareports.co/icj-ruling-on-san-andres-a-serious-judgment-error-santos/ [Accessed: 22 November 2014].

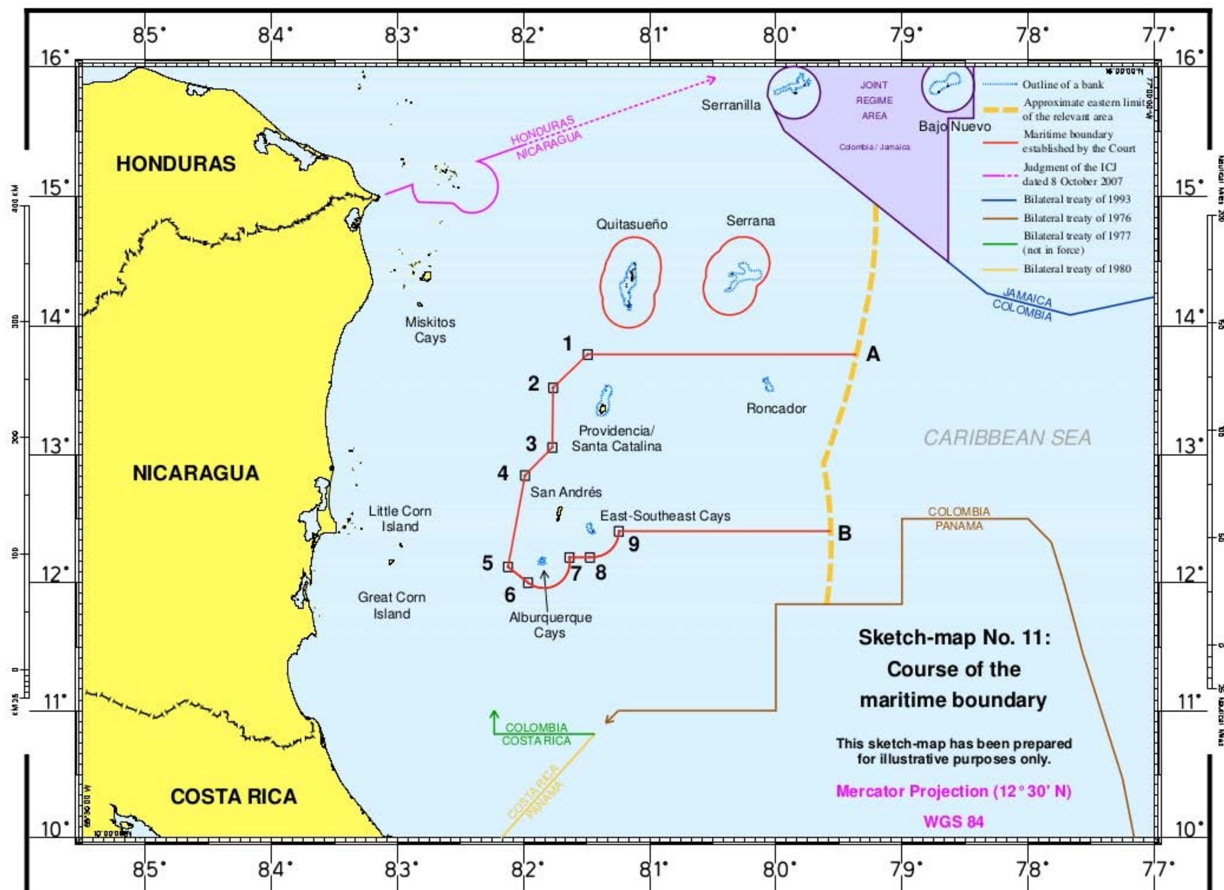

Figure 1. Course of the Maritime Boundary, Territorial and Maritime Dispute (Nicaragua v. Colombia)
Source: ICJ Rep. 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgement, p. 62.

the law'[9]. In addition, on 28 November 2012, President Santos formally denounced the Pact of Bogotá, in order to exclude the ICJ jurisdiction from issues concerning Colombian sovereignty and avoid other territorial claims by neighbouring States[10]. Notwithstanding, since the withdrawal would have become effective only one year after the denunciation, Nicaragua seized the opportunity to bring again Colombia before the Court prior to the deadline on 28 November 2013.

The day after: Colombia's non-compliance and Nicaragua's further aspirations

Thus, Colombia decided to behave in flagrant defiance of the ICJ judgment. Not only had President Santos openly declared his reluctance to comply with the ruling and denounced the Pact of Bogotá, but he also progressively increased the presence of Colombian warships in the contested waters, in such a way to guarantee Colombian alleged sovereignty and protect the fishing rights of the inhabitants of San Andrés and Providencia[11].

In the two years following the issuing of the judgment, Colombia has been advancing four main arguments to justify its non-compliant behavior. Yet they do not appear convincing and conclusive under international law, as none of them can impair Colombia international liability[12].

First, Colombia has repeatedly invoked its domestic law as evidence for its unfeasibility to comply with the ICJ judgment. Colombia has claimed that, according to its Constitution, the boundaries of the country can be re-drawn only through an international treaty approved by the Congress[13].

Second, Colombia has clearly highlighted the possible risks to the maritime security of the area posed by a switch in the

[9] EL NUEVO HERALD (2012), 'The Colombian Foreign Minister Calls The Hague an Enemy', [Online]. Available at: http://www.elnuevoherald.com/2012/11/27/1353049/cancillercolombiana-califica.html [Accessed: 22 November 2014].

[10] See Letter from Colombia to Secretary-General of the Organization of American States dated 27 November 2012, GACIJ, No. 79357. See also BBC NEWS (2012), 'Colombia pulls out of International Court over Nicaragua', [Online], Available at: http://www.bbc.co.uk/news/world-latin-america-20533659 [Accessed: 22 November 2014].

[11] EL ESPECTADOR (2012), 'Pescar en aguas disputadas con Nicaragua', [Online]. Available at: http://www.elespectador.com/noticias/nacional/pescar-aguas-disputadas-nicaragua-galeria-518790 [Accessed: 15 November 2014].

[12] For an insight into the main arguments provided by Colombia, See GOBIERNO DE COLOMBIA (2013), 'Conoce el abecé de la estrategia del Gobierno frente al fallo de la CIJ', [Online], Available at: http://www.urnadecristal.gov.co/gestion-gobierno/san-andres-colombia-fallo-inaplicable-haya [Accessed: 20 October 2014].

[13] Art. 101 of the 1991 Colombian Constitution states: 'The borders identified in the form provided for by this Constitution may be modified only by treaties approved by the Congress and duly ratified by the President of the Republic.'

jurisdiction over the contested waters. It has been argued that the presence of traffickers and drug-runners in the West Caribbean Sea might increase as a consequence of this transfer of control from the Latin American largest navy to one of the smallest ones[14].

The third argument concerns the responsibility for the protection of the UNESCO 'Seaflower Biosphere Reserve', which includes the archipelago of San Andrés, Providencia and Santa Catalina. Since its establishment in 2000, this UNESCO 'Biosphere Reserve' has been subject to the jurisdiction of Colombia. However, it partially lies within the contested waters. Therefore, in November 2013 the UNESCO, acknowledging the ICJ judgment, identified part of the reserve as belonging to Nicaragua and invited the two countries to cooperate in the protection of the site and explore the possibility of creating a trans-boundary reserve[15]. Colombia vehemently opposed this proposal, recalling that the settlement of international disputes is not a field of UNESCO competence, and declared its willingness to protect the reserve under its own unique responsibility.

Fourth and last argument, Colombian authorities have denounced the economic issues underlying the ICJ judgment. In June 2013, Nicaraguan Assembly approved a multi-millionaire plan by a Honk Kong group for the construction of an inter-oceanic canal cutting across Nicaragua. The construction of this canal has been taken as evidence of the strong Chinese interest in the area and the President of the Colombian Senate, Roy Barreras, denounced the presence of a Chinese judge among the members of the Court dealing with this case as an additional reason to reject the judgment[16].

While Colombia behaved in open defiance with the ICJ judgment, Nicaragua was driving its aspirations forward at international level. Nicaragua initially sought to expand its continental shelf beyond the 200-nautical-miles limit from the baselines[17]. On 24 June 2013, Nicaragua submitted its final information to the Commission on the Limits of the Continental Shelf (CLCS), in which it is illustrated how its continental margins extend more than 200 nautical miles, up to partly overlap with an area lying within the 200 nautical miles of Colombian coasts[18]. Colombia strongly opposed these Nicaraguan claims at the CLCS, pointing out that they seriously affect its sovereign rights on maritime areas, as they emerge from customary international law of the sea[19]. As a consequence, Nicaragua brought back Colombia before the ICJ, in order to see its continental shelf beyond the 200-nautical-miles limit finally delimited[20].

In addition, on 27 November 2013, Nicaragua filed a further application to the ICJ against Colombia with regard to alleged violations of its sovereign rights and maritime spaces. In this latest application, Nicaragua claims against Colombia for its non-compliance with the previous ICJ judgment and its threat of the use of force in violation of Nicaraguan rights and customary international law[21].

The impasse in the Western Caribbean Sea: harmful consequences and possible ways out

The open non-compliance of Colombia with the ICJ judgment resulted in an inextricable impasse that may have serious implications for the whole Latin America region. Besides endangering the maintenance of peace and security in the area, the defiant behaviour of Colombia and, in particular, the Colombia denunciation of the Pact of Bogotá might induce other Latin American judgment debtor-states to take analogous actions in the near future.

Within this context, the recent *Maritime Dispute case*, concerning the delimitation of the EEZ between Peru and Chile, may be instructive[22]. On 27 January 2014, the ICJ delivered its final judgment on the case and awarded the control of approximately 20,000 square kilometres of former Chilean waters to Peru. In the light of this ruling, major Chilean authorities have vehemently criticised the ICJ and pressed the then-President Piñera to seriously consider the Chile withdrawal from the Pact of Bogotá[23]. After

[14] To this concern, it is interesting to notice that Nicaragua military expenditures correspond to less than 1% of Colombian ones, which are bigger than Nicaragua entire GDP. On the maritime security issue, See: ROGERS, T. (2012) 'Caribbean Crisis: Can Nicaragua Navigate Waters It Won From Colombia? Pulitzer Center on Crisis Reporting'. [Online] 28th November. Available at: http://world.time.com/2012/11/28/caribbean-crisis-can-nicaragua-navigate-waters-it-won-from-colombia/. [Accessed: 10 November 2014].

[15] See UNESCO, MAB Programme, International Coordinating Council, Twenty-sixth session, SC-14/CONF.226/14, [Online] 17th April 2014. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC-14-CONF-226-14Information_on_Seaflower-eng-rev.pdf [Accessed: 15 November 2014]. See also: YouTube, UNESCO reconoce que Reserva de Biósfera Sea Flower pertenece a Nicaragua, José Miguel Fonseca con la información, [Online]. Available at: https://www.youtube.com/watch?v=IflymY590ps. [Accessed: 15 November 2014].

[16] For a brief insight into the Nicaraguan Canal, See: DAVIDOVIC, S. (2014) China creates new trade route through Nicaragua canal. Global Risk Insights. [Online] Available at: http://globalriskinsights.com/2014/11/china-creates-new-trade-route-through-nicaraguan-canal/ [Accessed: 15 November 2014]. For the declarations of President of the Colombian Senate, Roy Barreras See: ELTIEMPO.COM (2013), Congreso no cambiará límites maritimos del país: Roy Barreras, [Online]. Available at: http://www.eltiempo.com/archivo/documento/CMS-12869722 [Accessed: 15 November 2014].

[17] The single maritime boundary between the continental shelf and the exclusive economic zones of Nicaragua and Colombia within the 200-nautical-mile limit from the Nicaraguan baselines was defined by the ICJ in paragraph 251 of its Judgment of 19 November 2012 in *Territorial and Maritime Dispute* (Nicaragua v.Colombia).

[18] For Nicaragua final information to the CLCS, See: CLCS, Submissions to the Commission, Nicaragua Executive Summary, June 2013, Available at: http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm [Accessed: 15 November 2014].

[19] See: Note Verbale from the Permanent Mission of Colombia to the United Nations Secretary General, UN doc. A/67/852, 2 May 2013.

[20] Application Instituting Proceedings, *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v. Colombia),* 16 September 2013.

[21] Application Instituting Proceedings, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* 26 November 2013.

[22] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. General List 2014, No. 137.*

[23] Among the others, the deputies Iván Moreira (UDI), Patricio Melero (UDI) and Jorge Tarud (PPD) urged President Piñera to withdraw from the Pact of Bogotá. Chile Foreign Minister Heraldo Muñoz put also the Pact into question. As a result, the then-Pesident Piñera opened the debate and asked for an official report on the pros and cons of a withdrawal from the Pact. See: LASEGUNDAOnline (2014), Fuertes críticas de parlamentarios: "Aquí Chile no ha ganado nada... hemos perdido", [Online]. Available at: http://www.lasegunda.com/Noticias/Politica/2014/01/910056/fuertes-criticas-de-parlamentarios-aqui-chile-no-ha-ganado-nada-hemos-perdido [Accessed: 10 November 2014];

Source: El Tiempo, 14 december 2014.

the Presidential elections in November 2013 and the establishment of the new Bachelet government in March 2014, however, a more cautious line has been privileged and all evidence suggests that Chile has frozen its withdrawal[24]. Nevertheless, at the current state of affairs, a further change of hearth appears still possible[25].

Accordingly, it is worth pointing out that the divergent practice started by Colombia might still affect the positive trend that ICJ was experiencing in Latin America. In other words, Latin American countries could progressively lose their trust in the ICJ and reduce their resort to judicial means of dispute settlement, undermining the resolution of persisting and long-standing controversies in the region. A progressive decrease in tension and a definitive resolution of the dispute between Colombia and Nicaragua appears the main path to follow in order to oppose this eventual harmful domino effect. How could a way-out from the current impasse be found? To date, with two new pending cases, the ICJ still appears to be the main international actor involved in the contention. However, it would be rather incorrect to charge the ICJ with the responsibility of dealing with cases of non-compliance, given that the UN Security Council (UNSC) has been asked to carry out this task under the UN framework. According to Article 94(2) of the Charter of the United Nations, the UNSC 'may...make recommendations or decide upon measures to be taken to give effect to the judgment'. Nevertheless, the UNSC never adopted these kinds of measures, mainly because its own enormous discretionary power and very political nature prevent it from taking action in such a sensitive field[26]. Moreover, the UNSC does not even appear the appropriate body to deal with this specific case, as Nicaragua is well conscious that a direct UNSC involvement would have significantly increased tension and erased any possibility of reaching an agreement with Colombia.

Rather than the UNSC, the Organization of American States (OAS), with its elaborate structure, might be the suitable regional body to deal with this dispute. However, bearing in mind that the OAS legal framework for the settlement of disputes eventually lays on the Pact of Bogotá, the definitive withdrawal of Colombia prevented this regional body from playing any effective role in this controversy.

In the end, diplomatic means of dispute settlement stand as the most suitable path to follow. Although Colombia has repeatedly stated that the stipulation of an agreement with Nicaragua would be the only conceivable means to solve the dispute, it has persistently avoided direct bilateral negotiations with Nicaragua. For this reason, a diplomatic intervention of a third party might be the proper key to persuade Colombia and Nicaragua to talk and unlock the impasse. Up to this point, neither neighbouring countries nor other more powerful and influential states have stepped forward to mediate in the dispute. Thus, we just have to wait for who will make the needed breakthrough.

Concluding Observations

Cases of non-compliance give rise to a wide variety of problems on the international scenario. Every case of non-compliance has profound implications not only for the bilateral relations of the parties to the dispute, but also for the international community as a whole. The reliability of judicial mechanisms of dispute resolution is undoubtedly betrayed; the international system comes out inherently weakened. This is something that the international community must avoid by increasing the effectiveness of its tools. As a matter of fact, there is still a long way to go.

LASEGUNDAOnline (2014), Heraldo Muñoz se abre a debatir retiro de Chile de Pacto de Bogotá: 'Es una discusión legítima', [Online]. Available at: http://www.lasegunda.com/Noticias/Politica/2014/01/910324/munoz-se-abre-a-debatir-retiro-de-chile-de-pacto-de-bogota-es-una-discusion-legitima [Accessed 10 November 2014]; LASEGUNDAOnline (2014),Presidente Pidió Informe de Pros y Contras Ante Retiro de Pacto de Bogotá, [Online]. Available at: http://www.lasegunda.com/Noticias/Politica/2014/02/913578/presidente-pidio-informe-de-pros-y-contras-ante-retiro-de-pacto-de-bogota [Accessed: 10 November 2014].

24 Bachelet stated that currently she is not considering a withdrawal from the Pact, but she also added that the issue should be debated with seriousness and accuracy in the future. See: SoyChile (2014), "Hoy dia no tengo considerado salirme del Pacto de Bogotá", dijo Michelle Bachelet, [Online]. Available at: http://www.soychile.cl/Santiago/Politica/2014/03/12/236064/Bachelet-ni-tiene-contemplado-salirse-del-Pacto-de-Bogota.aspx [Accessed: 15 November 2014].

25 After the delivery of the ICJ judgment on *Maritime dispute case*, new contentions between Chile and Peru have emerged. These contentions mainly regard territorial borders and, specifically, the so-called 'Triangulo Terrestre' (Land Triangle). See: BBCMundo (2014), Que es el triangulo terrestre que vuelve a enfrentar a Peru y Chile, [Online]. Available at: http://www.bbc.co.uk/mundo/noticias/2014/08/140821_mapa_triangulo_terrestre_polemica_ac [Accessed: 15 November 2014]. In addition, Chile is still involved in a further case pending before the ICJ, after that Bolivia instituted proceedings against Chile in April 2013, claiming for an access to the Pacific Ocean. See: Application Instituting Proceedings, *Obligate to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 24 April 2013, [Online]. Available at: http://www.icj-cij.org/docket/files/153/17338.pdf [Accessed: 15 November 2014].

26 See: LLAMZON A., (2008), Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, *EJIL*, 18(5), pp. 815-852.

References

ICJ Rep. 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment; Application Instituting Proceedings, p.624.

ICJ (16 September 2013), *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v. Colombia)*,Application Instituting Proceedings.

ICJ (27 November 2013), *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Application Instituting Proceedings.

CLCS (24 June 2013), Submissions to the Commission, Nicaragua Executive Summary, [Online], Available at: http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm [Accessed: 15 November 2014].

UNSG (2 May 2013), Note Verbale from the Permanent Mission of Colombia, UN doc. A/67/852.

UNESCO (17 April 2014), International Coordinating Council, Twenty-sixth session, SC-14/CONF.226/14, [Online] Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC-14-CONF-226-14-Information_on_Seaflower-eng-rev.pdf [Accessed: 15 November 2014].

OAS Secretary-General (27 November 2012), Letter from Colombia to Secretary-General of the Organization of American States, GACIJ, No. 79357.

Colombian Constitutional Court (2 May 2014), Comunicado No. 15, (2014), Expediente D-9852 AC-Sentencia C-269/14, [Online]. Available at: www.corteconstitucional.gov.co [Accessed: November 16 2014].

BEKKER, P. (2013) The World Court Awards Sovereignty Over Several Islands in the Caribbean Sea to Colombia and Fixes a Single Maritime Boundary between Colombia and Nicaragua, *ASIL Insights*. [Online], 17(3). Available at: http://www.asil.org/insights/volume/17/issue/3/world-court-awards-sovereignty-over-several-islands-caribbean-sea. [Accessed: 10 November 2014].

DAVIDOVIC, S. (2014) China creates new trade route through Nicaragua canal. Global Risk Insights. [Online] Available at: http://globalriskinsights.com/2014/11/china-creates-new-trade-route-through-nicaraguan-canal/ [Accessed: 15 November 2014].

LLAMZON A., (2008), Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, *The European Journal of International Law*, 18(5), pp. 815-852.

ROGERS, T. (2012) Caribbean Crisis: Can Nicaragua Navigate Waters It Won From Colombia? Pulitzer Center on Crisis Reporting. [Online] 28th November. Available at: http://world.time.com/2012/11/28/caribbean-crisis-can-nicaragua-navigate-waters-it-won-from-colombia/. [Accessed: November 10 2014].

Next Events & Trainings

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Trainings/Education	When	Where	Application Deadline	Info & Contacts
MEPA Master in Electoral Policy & Administration	2 March 2015 Spring 2016	Pisa Italy	January 15, 2015	www.mepa.sssup.it mepa@sssup.it
The Master of Arts in Human Rights and Conflict Management	January 2015 Spring 2016	Pisa Italy		www.humanrights.sssup.it humanrights@sssup.it
International Training Course: (Golden Opportunity) Introduction To Peace building & Peace Support Operations for the Civilian Personnel	February 1-5 2015	Hargeisa Somaliland	January 12, 2015	http://huniversity.net ipcs.2012@gmail.com
Hostile Environment Awareness Training Course	HEAT Course I-2015: March 2-6, 2015 HEAT Course II 2015: May 4-8, 2015 HEAT Course III 2015: October 5-9, 2015 HEAT Course IV 2015: November 9-13, 2015	Leghorn Italy	(a) by February 9, 2015 for the Heat Course I-2015 at www.sssup.it/heat2015 I/application (b) by April 13, 2015 for the Heat Course II-2015 at www.sssup.it/heat2015-II/application (c) by September 14, 2015 for the Heat Course III-2015 at www.sssup.it/heat2015-III/application (d) by October 19, 2015 for the Heat Course IV-2015 at www.sssup.it/heat2015-IV/application	www.itpcm.sssup.it heat@sssup.it http://www.itpcm.dirpolis.sssup.it/heat/
Pre-deployment Course for CSDP Missions Staff	March 17-20, 2015	Brussels Belgium	Not open for application	www.itpcm.sssup.it itpcm@sssup.it
Introduzione al Diritto dell'arte e dei Beni Culturali	April 16-17-18 2015	Pisa Italy	March 23, 2015	www.itpcm.sssup.it f.faldella@sssup.it
Health systems through conflict and recovery	April 13-24 2015	Pisa Italy	March 19, 2015	www.itpcm.sssup.it hscr@sssup.it HYPERLINK "http://www.hscr.sssup.it" www.hscr.sssup.it
Eurosservatori - STOs Training	April 20-24 2015	Pisa Italy	March 2, 2015	www.itpcm.sssup.it eurosservatori@sssup.it
Corso avanzato di Diritto dell'Arte e dei Beni Culturali	May 7-8-9, 2015	Pisa Italy	April 16, 2015	www.itpcm.sssup.it f.faldella@sssup.it
The Civilian Personnel of Peacekeeping & Peacebuilding Operations & of Political Missions	June 29-July 10 2015	Pisa Italy	May 4, 2015	www.itpcm.sssup.it itpcm@sssup.it
Training Course for Field Officers Working on Human Rights	July 2-10, 2015	Pisa Italy		www.itpcm.sssup.it http://www.entriforccm.eu/ ma.bartolini@sssup.it

HOSTILE ENVIRONMENT AWARENESS TRAINING

Background

Hostile environment awareness plays an important role in the effectiveness and impact of crisis management missions; it is also a chief responsibility that each seconding or contracting actor has vis-à-vis its deployed personnel ("duty of care"), so as to further address the issue of their protection while operating in high risk operational theaters. Hostile environment awareness is essential to coping with internal and external security threats on the ground and is conducive to: a) enhancing the resilience of personnel when working in hazardous environments; b) increasing the understanding of proactive security and of basic field measures; c) providing personnel with the basic tools and techniques needed to avoid potentially dangerous situations or to cope adequately with actual endangering ones in the field. This course has been designed and developed jointly by the Scuola Superiore Sant'Anna and the Carabinieri Corps General Headquarters, precisely with the aim to address such needs.

ENTRi Certification

This is the first HEAT course to have obtained the "C3MC" label which proves that the Course is coherent with the minimum standards requested by ENTRi/EU*. Through the certification process, ENTRi aims at ensuring harmonisation of training standards among training providers working on civilian crisis management training.

Target group

The target group for this training is EU and Member States personnel working or likely to be deployed in low/middle/high risk missions, who have preferably already attended a general introductory course on crisis management operations or gained relevant experience in international field operations.

Training Objectives & Modules

HEAT is an intensive 40-hours course that aims at training personnel of EU Missions and of Member States to deal with risk-associated and emergency/critical situations. The course addresses their security and safety needs when deployed in hostile environments – including "high" and "critical" risk mission areas – a preparation that, at EU and Member States level, is likely to become a compulsory pre-condition prior to deployment, in accordance with the "duty-ofcare" principles. The training is expected to improve participants' understanding of the best behavioural requirements when working as team members/leaders of international field operations, irrespective of their national or professional background. The two primary objectives are: 1. To improve participants' awareness of multiple threats while providing them with the necessary knowledge and skills to effectively deal with such threats; 2. To rehearse and practice safety and security procedures according to threats typology. The Course content is clustered in **five modules**: EU personnel deployed in hostile environments; Situational training exercise (STx); Medical training: health maintenance on mission; Orientation, communications & 4-wheel drive; Field training exercise (FTx).

Application Deadline

(a) by February 9, 2015 for the Heat Course I-2015 at www.sssup.it/heat2015-I/application
(b) by April 13, 2015 for the Heat Course II-2015 at www.sssup.it/heat2015-II/application
(c) by September 14, 2015 for the Heat Course III-2015 at www.sssup.it/heat2015-III/application
(d) by October 19, 2015 for the Heat Course IV-2015 at www.sssup.it/heat2015-IV/application

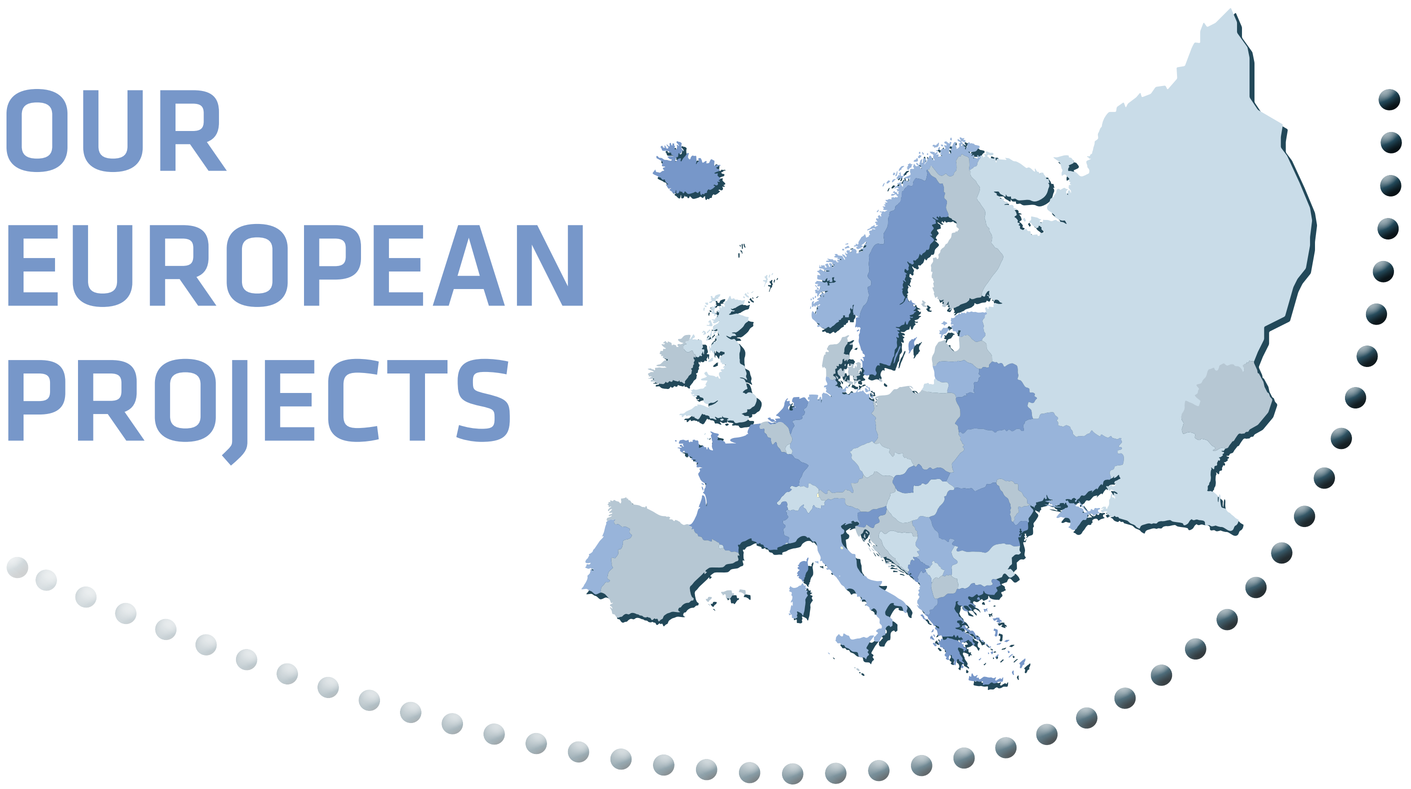
Fee

The fee is € 950.00 and includes tuition, full board at the basic facilities (shared rooms, breakfast not included) of the 1st Carabinieri Paratrooper Regiment "Tuscania", Livorno (LI) -Italy, reference material and public liability insurance. Those opting for independent solutions will be provided with a list of possible accommodations next to the training premises.

Further Info

heat@sssup.it; tel. +39 050 882655

OUR EUROPEAN PROJECTS



CBRN – (Chemical, Biological, Radiological and Nuclear) Integrated Response Italy

Strengthening CBRN-response in Europe by enhancing on-site cooperation between safety and security organisations: an Italian pilot. This 2 year project, started in May 2013 and ending with a final conference in April 2015, is funded by the European Commission (DG HOME) under the Programme "Prevention of and Fight Against Crime" (ISEC). It aims at implementing the European Union CBRN Action Plan in Italy and more specifically the coordinated and integrated actions of first responders and law enforcement agencies in a CBRN security incident. The project has already developed a Mapping Report, 2 Table-Top Exercises and a Gap Analysis Report. Moreover, it will deliver CBRN response guidelines to be integrated into existing Host Nation Support Guidelines and an outline of training curricula on 'CBRN security incidents' for Italian law enforcement agencies and first responders.
More information at www.cbrn-response.eu

PROMOTE - Promoting and Validating Key Competences in Mobility and Traineeship in Europe

The project funded by the European Commission under the Programme Erasmus+, Knowledge Alliance counts 16 European partners, will start in February 2015 and will last 2 years. It aims at promoting and validating social, personal and organisational key competences such as entrepreneurship, civic competences and learning to learn with the help of an innovative, self-directed learning approach at the interface of higher education and business. PROMOTE will develop and pilot an approach based on a long term partnership of academia, business and educational partners from all over Europe. The traineeships will involve students from 7 universities and will be carried out in businesses or enterprises in different EU member-states. The project will focus on assessing the social and personal key competences, to give evidence of their development in the learning activity, to connect them to existing certification systems and to offer a European wide validation approach.

EVoCS - The evolving concept of security: A critical evaluation across four dimensions

In November 2014, two deliverables contributed by researchers from Dirpolis were issued within EVoCS, a 18 months Research Project funded by the European Commission through its FP7 Program. EvoCS deals with the evolving concept of security and has a focus on the European Union and its close neighbours. It aims at providing a holistic view on the complex and somewhat diffuse concept of security by evaluating it across four dimensions: core values, perceptions of security, areas of security and time. The project also explores the ethical values and fundamental rights issues related to the concept of security. The deliverables presented in November deal with, respectively: the analytical framework and the methodology to be employed by Project's researchers for the determination of the evolving concepts of security in Europe; and the collection of the ethical, privacy and data protection clearances to carry out research involving human participants.
For more information about the project, please see http://evocs-project.eu/.

The ITPCM

Staff members & Contacts

Director

Prof. Andrea de Guttry
deguttry@sssup.it

Peace Keeping Branch

Rossella Altamura
Project Officer
ro.altamura@sssup.it

Matteo Bartolini
Project Officer
ma.bartolini@sssup.it

Annalisa Creta
Research Fellow
a.creta@sssup.it

Emanuele Sommario
Assistant Professor
esommar@sssup.it

International Disasters Response Branch

Matteo Bonfanti
Research Fellow
m.bonfanti@sssup.it

Francesca Capone
Research Fellow
f.capone@sssup.it

Enrica Pautasso
Project Manager
e.pautasso@sssup.it

Francesca Vietti
Research Fellow
f.vietti@sssup.it

Decentralised Cooperation Branch

Annarosa Mezzasalma
Project Officer
a.mezzasalma@sssup.it

Luisa Nardi
Project Officer
l.nardi@sssup.it

Serena Rossignoli
Project Officer
s.rossignoli@sssup.it

Address

Via Cardinale Maffi, 27
56127 Pisa - ITALY
tel: +39 050 882685
fax: +39 050 882665

International Training Programme
for Conflict Management

itpcm@sssup.it – www.itpcm.sssup.it