

## CONFLICTING DECLARATIONS UNDER THE HAGUE SERVICE CONVENTION AMID THE RUSSO-UKRAINIAN WAR: DILEMMAS AND PRELIMINARY SOLUTIONS

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### ABSTRACT

*The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters has increasingly been used by its member states to demonstrate their territorial claims, including in the Falklands dispute and the Israel-Palestine conflict. This has now arisen in the Russo-Ukrainian war, as conflicting declarations have been formulated by eight states under the Convention. This Essay analyzes the legal dilemmas brought by these declarations and proposes preliminary solutions.*

### I. INTRODUCTION

The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention (HSC)) establishes a global mechanism for service of process among its seventy-nine member states.<sup>1</sup> Built on the 1905 and 1954 Hague Conventions on Civil Procedure, the HSC aims to simplify, standardize, and improve cross-border service of process.<sup>2</sup> Under the HSC, the main channel of service is a Central Authority designated by each member state.<sup>3</sup> It also provides other channels, such as service conducted through diplomatic or consular agents,<sup>4</sup> post,<sup>5</sup> judicial officers, or other competent persons.<sup>6</sup> Member states widely recognize that the HSC must be followed in all cases where the *lex fori* provides that a judicial document should be served abroad.<sup>7</sup>

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<sup>1</sup> Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 UST 361, 658 UNTS 163 [hereinafter HSC]; HSC Status Table, at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>; Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAWYER 55 (1990).

<sup>2</sup> HSC, *supra* note 1, pmb1; *Water Splash, Inc. v. Tara Menon*, 137 S. Ct. 1504, 1505 (2017); *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

<sup>3</sup> *Schlunk*, *supra* note 2, at 700 (considering the Central Authority is the primary innovation of HSC); HSC, *supra* note 1, Arts. 2–6.

<sup>4</sup> HSC, *supra* note 1, Art. 8.

<sup>5</sup> *Id.* Art. 10(a); *Water Splash*, *supra* note 2.

<sup>6</sup> HSC, *supra* note 1, Art. 10(b)(c).

<sup>7</sup> For the non-mandatory but exclusive nature of the HSC, see Article 1. See also *Schlunk*, *supra* note 2, at 700–08; *Segers and Rufa BV v. Mabanafit GmbH*, 28 ILM 1584, 1585 (1989); DAVID McCLEAN, INTERNATIONAL

In February 2014, the Russian Federation occupied the Autonomous Republic of Crimea and its capital city, Sevastopol, and began exercising effective control over certain districts of the Donetsk and Luhansk oblasts of Ukraine (hereinafter, the “Occupied Areas”). In October 2015, Ukraine took steps to preserve its territorial claims over the Occupied Areas by filing a declaration (hereinafter, “Ukraine’s Declaration on Crimea”) under the HSC. Ukraine’s Declaration on Crimea states that, as a result of Russia’s occupation, implementing the HSC in the Occupied Areas is limited (and unguaranteed), that the procedure for service and relevant communication is determined by the Central Authority of Ukraine, and that documents or requests issued by the Russian and related illegal Authorities in the Occupied Areas are null and void and have no legal effect.<sup>8</sup> Notably, Ukraine formulated similar declarations in seven other conventions administered by the Hague Conference on Private International Law (HCCH).<sup>9</sup> In July 2016, Russia declared (hereinafter, “Russia’s Declaration on Crimea”) that Ukraine’s Declaration on Crimea is based on “a bad faith and incorrect presentation and interpretation of facts and law” under the HSC and other HCCH Conventions.<sup>10</sup>

Thus far, Poland, Lithuania, Finland, Estonia, Germany, and Latvia have each made declarations supporting Ukraine’s and announcing that they will not engage in any direct communication or interaction with the Authorities in the Occupied Areas and will not accept any documents or requests emanating from such Authorities or through the Russian Authorities.<sup>11</sup> However, the majority of the HCCH member states, including the United States, have not responded to the Russian or the Ukrainian Declarations. The declarations fit awkwardly under the terms of the HSC, which is designated as a private law and procedural instrument. It is unclear whether the HSC even permits these kinds of declarations. Although extensive literature exists regarding the HSC and the Russo-Ukrainian war,<sup>12</sup> little has been written about the HSC in the context of territorial disputes. States are using the HSC more

COOPERATION IN CIVIL AND CRIMINAL MATTERS 47 (2d ed. 2002); HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION 12–17 (2016).

<sup>8</sup> Ukraine, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=426&disp=resdn>.

<sup>9</sup> The seven other conventions are the: Convention on Civil Procedure (1954); Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961); Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970); Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973); Convention on the Civil Aspects of International Child Abduction (1980); Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996); and Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007). These seven conventions plus the HSC are collectively referred to hereinafter as the “Eight HCCH Conventions.”

<sup>10</sup> Russia, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=418&disp=resdn>. Russia has made similar declarations under other HCCH Conventions where Ukraine has made a Declaration on Crimea, but only where it is a member state to that HCCH Convention. Russia is not a party to the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973) and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007). For the other six HCCH Conventions where Ukraine has made the Declaration on Crimea, Russia has made such a declaration. *See, e.g.*, Russia, Convention on Civil Procedure (1954) Declaration, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=250&disp=resdn>.

<sup>11</sup> *See, e.g.*, Poland, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=415&disp=resdn>.

<sup>12</sup> For scholarship on the HSC, see, e.g., L. Andrew Cooper, *International Service of Process by Mail Under the Hague Service Convention*, 13 MICH. J. INT’L L. 698 (1992). For scholarship on the Russo-Ukrainian war, see, e.g.,

frequently to make claims about territorial sovereignty. As one example, Argentina formulated a declaration rejecting the UK's extension of the HSC to the Falkland Islands (Islas Malvinas) and dependencies.<sup>13</sup> Perhaps because the Falklands war was much smaller in scale compared to the Russo-Ukrainian war, conflicting declarations were only made under one other HCCH convention and no member states have formulated declarations in support of either Argentina or the UK.<sup>14</sup> Another example is Israel's declaration under the HSC opposing service by post<sup>15</sup> and requiring that documents intended for residents of the Palestinian Authority be forwarded through the Israeli Directorate of Courts.<sup>16</sup> Although the Palestinian Authority has continuously rejected Israeli governance of the contested territory, it is not a member state and cannot express its view of the Israeli declaration under the HSC.

The conflicting Declarations on Crimea also implicate the so-called "Namibia Exception." The term comes from the International Court of Justice's Advisory Opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)* case.<sup>17</sup> The exception provides that the non-recognition of a state's administration of a territory due to its violation of international law should not result in depriving the people of that territory of any advantages derived from international cooperation.<sup>18</sup> In particular, even if the official acts of the invading state are invalid, "this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory."<sup>19</sup> Existing scholarship has explored whether the Namibia Exception applies to the recognition and enforcement of civil judgments rendered by courts controlled by a non-recognized government.<sup>20</sup> However, scholars have not analyzed the circumstances under which a court of a third country may use the Central Authority controlled by a non-recognized government to conduct service under the HSC pursuant to the Namibia Exception. Suppose that a plaintiff in a Chinese court serves a defendant in Crimea through the Russian Central Authority or authorities controlled by Russia. The Chinese court renders a judgment in favor of the plaintiff. If the judgment debtor has assets in the United States and the judgment creditor applies to a U.S. court to enforce the

Elena Chachko & Katerina Linos, *International Law After Ukraine: Introduction to the Symposium*, 116 AJIL UNBOUND 124 (2022).

<sup>13</sup> Argentina, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=389&disp=resdn>.

<sup>14</sup> Conflicting declarations on the Falkland Islands are also made under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970); unlike providing no response in the HSC, the UK objected to Argentina's declaration here, see <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=484&disp=resdn>. See John Norton Moore, *The Inter-American System Snarls in Falklands War*, 76 AJIL 830, 830–31 (1982).

<sup>15</sup> Israel, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=405&disp=resdn>.

<sup>16</sup> Israel, Central Authority & Practical Information, at <https://www.hcch.net/en/states/authorities/details3/?aid=260>.

<sup>17</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 ICJ Rep. 16 (June 21).

<sup>18</sup> *Id.* at 125.

<sup>19</sup> *Id.*

<sup>20</sup> *E.g.*, YAËL RONEN, *TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW* 82 (2011).

Chinese judgment, could the U.S. court decline to enforce the judgment solely because the Chinese court did not comply with the Ukraine Declaration under the HSC?

This Essay analyzes the legal dilemmas arising from the conflicting Declarations on Crimea under the HSC and proposes preliminary solutions. It proceeds as follows: Part Two explores the lack of authority in the HSC itself for states' Declarations on Crimea. Part Three argues that: (1) the Declarations on Crimea are permissible under the HSC according to the Vienna Convention on the Law of Treaties (VCLT);<sup>21</sup> (2) the HSC Special Commission should issue recommendations to assist its member states in addressing the conflicting Declarations; (3) service of process conducted by the Russian Central Authority and local authorities in the Occupied Areas should be covered by the Namibia Exception. Part Four concludes.

## II. LEGAL DILEMMAS FOR THE HSC

The Declarations on Crimea formulated by Russia, Ukraine, and other countries do not state the HSC provision pursuant to which they are formulated, nor do they specify the provisions whose legal effect they purport to exclude or modify.<sup>22</sup> The following Section argues that no provision of HSC provides a legal basis for the Declarations on Crimea.

### *A. Provisions for the Designation and Function of a Central Authority*

Articles 21(a) and 31(e) of the HSC allow states to make declarations for the designation and function of their Central Authorities.<sup>23</sup> A typical declaration generally provides information such as the name, location, function, and contact information of a Central Authority.<sup>24</sup> In 2022, Ukraine formulated a declaration describing the difficulty in fulfilling its obligation to serve foreign proceedings throughout its territory due to the Russo-Ukrainian War (hereinafter, the "2022 Declaration").<sup>25</sup> Considering its contents, the Declaration may be considered an update on the functions and status of the Ukrainian Central Authority pursuant to Articles 21(a) and 31(e) of the HSC.

Ukraine's Declaration on Crimea noted the Ukrainian Central Authority's inability to serve process in Crimea. This aspect of the Declaration on Crimea resembles the 2022 Declaration, which is arguably permitted by the provisions relating to the designation and function of the Central Authority. However, Ukraine's Declaration on Crimea also claims that documents or requests made by Russia or a related authority in the Occupied Areas are null and void. The invalidity of service conducted by the Russian Central Authority

<sup>21</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

<sup>22</sup> For example, besides the Declaration on Crimea, Ukraine also made three other declarations in 2001, 2004, and 2022. The HCCH website indicates that Ukraine's declarations are based on Articles 8, 10, 15, and 16 of the Convention. The 2001 declaration explicitly relied on Article 8 (service through diplomatic or consular agents), Article 10 (post and other alternative methods of service), Article 15 (giving judgment when no certificate of service has been received), and Article 16 (judgments against a defendant who has not appeared). The Ukrainian 2004 declaration restated its opposition to Article 10. In contrast, neither the 2022 Declaration nor the Declaration on Crimea indicates which provision serves as its legal basis.

<sup>23</sup> The designation and function of the Central Authority are regulated by HSC Articles 2–18, 21a, and 31e.

<sup>24</sup> See, e.g., United States, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=428&disp=resdn>.

<sup>25</sup> HSC 2022 Declaration, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=426&disp=resdn>.

does not directly relate to the designation or function of the Ukrainian Central Authority or other channels of service under HSC Articles 2–17.<sup>26</sup> It is also likely beyond the scope of HSC Article 18, which allows each member state to designate other Authorities (in addition to the Central Authority) and determine their competence. Both the “ordinary meaning to be given to the terms of [the HSC] in their context” and the subsequent practice in the application of Article 18 by its member states<sup>27</sup> support this conclusion.

First, Article 18 authorizes each member state to determine the competence of other authorities *designated* by the state. The Russian Central Authority or the local authorities in the Occupied Areas are not *designated* by Ukraine; therefore, Ukraine cannot rely on Article 18 to determine their competence and invalidate the service documents or requests issued by them. Second, the subsequent practice consistently shows that “other authorities” are authorities within the (quasi-)constitutional system of the member state that designates them.<sup>28</sup> For example, China designates other authorities in Hong Kong and Macao Special Administrative Regions in addition to the Central Authority in Mainland China.<sup>29</sup> Australia designates nine other authorities in its states, territories, and the federal jurisdiction.<sup>30</sup> Third, a counterargument may be that Russia’s invasion violated Ukraine’s sovereignty so Ukraine can invoke Article 18 and claim that Russia and relevant local authorities are illegal and that the documents or requests issued by them for service of process in the Occupied Areas are void. Ukraine’s territorial sovereignty over the Occupied Areas is, however, an incidental question<sup>31</sup> to the validity of the documents or requests issued by Russia and the relevant local authorities. Importantly, the HSC does not contain a compromissory clause. This distinguishes it from treaties such as the United Nations Convention on the Law of the Sea under which, in some circumstances, tribunals can determine incidental questions “when those issues must be determined in order for the . . . tribunal to be able to rule on the relevant claims.”<sup>32</sup> Further, the *travaux préparatoires* do not support the view that the drafters of the HSC intended to apply Article 18 to determine sovereignty disputes. Therefore, Ukraine’s invalidation of the service documents or requests issued by Russian and the relevant local authorities in the Occupied Areas goes beyond the scope of HSC Article 18.

The same is true for Russia’s Declaration on Crimea. Russia’s Declaration is a response to Ukraine’s Declaration on Crimea, and it rejects any challenge to the “objective status” of the Occupied Areas.<sup>33</sup> It does not explicitly relate to the designation or function of the Russian Central Authority. Admittedly, the sovereignty of Crimea will directly affect the function of the Ukrainian or Russian Central Authority. However, the HSC aims to facilitate service of

<sup>26</sup> See HSC, *supra* note 1, Arts. 2–17.

<sup>27</sup> VCLT, *supra* note 21, Art. 31; *Schlunk*, *supra* note 2, at 700; *Société Nationale Industrielle Aéronautique v. United States District Court*, 482 U.S. 522, 534 (1987).

<sup>28</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 7, at 42.

<sup>29</sup> China, Central Authority & Practical Information, at <https://www.hcch.net/en/states/authorities/details3/?aid=243>.

<sup>30</sup> Australia, Other Authorities (Art. 18), at <https://www.hcch.net/en/states/authorities/details3/?aid=879>.

<sup>31</sup> See MARTIN DAVIES, ANDREW BELL, PAUL LE GAY BRERETON & MICHAEL DOUGLAS, *NYGH’S CONFLICT OF LAWS IN AUSTRALIA* 398 (10th ed. 2020).

<sup>32</sup> Callista Harris, *Incidental Determinations in Proceedings Under Compromissory Clauses*, 70 INT’L & COMP. L. Q. 417, 446 (2021).

<sup>33</sup> Russia, HSC Declaration/Reservation/Notification, at <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=418&disp=resdn>.

process and is not designed as a forum to resolve territorial conflicts.<sup>34</sup> Applying VCLT Article 31(1), the ordinary meanings of the designation and function of the Central Authority under HSC Articles 2–6 are unlikely to be construed to allow a member state to invalidate service conducted by another member state due to their territorial disputes.<sup>35</sup> Nor can Ukraine’s and Russia’s Declarations on Crimea alter any obligations or rights underlying provisions for the Central Authority of the Convention.

### B. Provision for Dependent Territories

Article 29 allows a state to extend the application of the HSC to territories “for the international relations of which [the declaring state] is responsible”<sup>36</sup> The meaning of this language is not clear. Article 56(1) of the European Convention on Human Rights (ECHR) includes a similar phrase: “the territories for whose international relations [the declaring state] is responsible.”<sup>37</sup> Article 56(1) is the so-called “colonial clause,” which prevents the automatic application of the ECHR to non-metropolitan territories and empowers a metropolitan state to declare its application.<sup>38</sup> In 1961, the European Commission extended Article 56(1) to “dependent territories irrespective of domestic legal status.”<sup>39</sup> The concept of “dependent territories” has been defined almost by exclusive deference to a member state’s unilateral Article 56(1) declaration.<sup>40</sup> In *Quark Fishing Ltd. v. United Kingdom*, for example, Protocol No. 1 was held inapplicable to a fishing vessel under a Falklands flag because the UK declaration only extended the ECHR, not Protocol No. 1, to South Georgia and the South Sandwich Islands (collectively, SGSSI) that belonged to Falkland Islands Dependencies.<sup>41</sup>

However, this deferential approach should not apply to the phrase “for the international relations of which [the declaring state] is responsible” under the HSC. Argentina is not a member state of the ECHR and the European Court of Human Rights in *Quark Fishing* relied on the fact that there is “no dispute as to the status of the SGSSI as a territory for whose international relations the United Kingdom is responsible within the meaning of art 56.”<sup>42</sup> As an HSC member state, however, Argentina declared its opposition to the UK’s extension of the HSC to the Falkland Islands and SGSSI.<sup>43</sup> In doing so, Argentina relied upon the UN resolution that noted a dispute of sovereignty existed between the two states.<sup>44</sup>

<sup>34</sup> HSC, *supra* note 1, pmb1.

<sup>35</sup> VCLT, *supra* note 21, Art. 31(1); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 426–28 (2009).

<sup>36</sup> HSC, *supra* note 1, Art. 29.

<sup>37</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 005 [hereinafter ECHR]. The Convention has been amended several times, most recently in 2010.

<sup>38</sup> Karel Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe*, 12 INT’L & COMP. L. Q. 1206, 1207 (1963).

<sup>39</sup> Barbara Miltner, *Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons*, 33 MICH. J. INT’L L. 693, 703 (2012).

<sup>40</sup> *E.g.*, X v. United Kingdom, App. No. 8873/80, 28 Eur. Comm’n H.R. Dec. & Rep. 99, 104–05 (1982); *Gillow v. United Kingdom*, App. No. 9063/80, 109 Eur. Ct. H.R. (ser. A) 21 (1986).

<sup>41</sup> *Quark Fishing Ltd. v. United Kingdom*, (2006) 22 Butterworths Human Rights Cases 568.

<sup>42</sup> *Id.*

<sup>43</sup> See Argentina, HSC Declaration/Reservation/Notification, *supra* note 13.

<sup>44</sup> *E.g.*, GA Res. 2065(XX) (Dec. 16, 1965); UN Press Release, Special Committee on Decolonization Approves 18 Draft Resolutions, as It Concludes 2021 Substantive Session (June 24, 2021), at <https://www.un.org/press/en/>

Moreover, the ECHR has been applied to cases beyond the colonial context where a state has effective control of a territory or state-agent authority over persons in a foreign territory resulting from lawful or unlawful military actions.<sup>45</sup> This is, however, through ECHR Article 1, which applies to everyone within the jurisdiction of a member state.<sup>46</sup> A comparable provision does not exist in the HSC. Because the legal relationship between HSC Article 29 and international law on the occupation or succession of territories remains unclear, Article 29 may not serve as a legal basis for the Declarations on Crimea.

### C. Provisions Allowing the Negotiation of Other Conventions and Denunciation

HSC Article 25 allows member states to make bilateral or international conventions on service. Article 25 may provide a legal basis for the respective declarations formulated by Poland, Lithuania, Finland, Estonia, Germany, and Latvia if these states and Ukraine intend to conclude a new international convention regarding service in Crimea. However, simply making declarations in support of Ukraine does not suggest that they will conclude a convention. Their declarations aim to clarify their position that they will engage only with the Ukraine Central Authority for service in the Occupied Areas.<sup>47</sup> Therefore, it is unconvincing to conclude that the declarations of these states are formulated pursuant to HSC Article 25.

Moreover, declarations on Crimea formulated by these states are not founded on HSC Article 30 which allows a member state to make a denunciation limited to certain of the territories to which the Convention applies.<sup>48</sup> This is because the texts of these states' declarations show that they hope the HSC keeps applicable to the Occupied Areas but is through the Ukraine Central Authority instead of Russia's.

## III. PROPOSED SOLUTIONS

The HSC should be interpreted according to VCLT and international custom "as evidence of a general practice accepted as law."<sup>49</sup> The VCLT and the Guide to Practice on Reservations to Treaties adopted by the International Law Commission divide declarations formulated by a state under a treaty into reservations and interpretative declarations.<sup>50</sup> HSC Article 31 is a notification provision, which is vague and cannot be considered to be enumerating permissible categories of reservations.<sup>51</sup> Putting validity aside, the Declarations on Crimea should be presumptively permissible. This is because a reservation is intended to exclude or modify the legal effect of certain provisions of a treaty, while an interpretative declaration is purported to specify or clarify their meaning or scope.<sup>52</sup> Since reservations are generally permissible unless

[2021/gacol3347.doc.htm#\\_ftn1](https://www.unhcr.org/refugees/2021/gacol3347.doc.htm#_ftn1) (recent UN Special Committee resolution requesting peaceful resolution between Argentina and the UK).

<sup>45</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, paras. 65–70.

<sup>46</sup> *Al-Skeini v. UK*, App. No. 55721/07, 53 Eur. H.R. Rep. 18, para. 136 (2011).

<sup>47</sup> See, e.g., Poland, HSC Declaration/Reservation/Notification, *supra* note 11.

<sup>48</sup> See HSC, *supra* note 1, Art. 30.

<sup>49</sup> Statute of the International Court of Justice, Art. 38.1.b, Apr. 18, 1946, UST 993, 33 UNTS 993; see Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487 (2019).

<sup>50</sup> Guide to Practice on Reservations to Treaties 2011, 2(2) Y.B. Int'l L. Comm'n 26, UN Doc. A/CN.4/SER.A/2011/Add.1, pt. 2 (2011) [hereinafter Guide to Practice].

<sup>51</sup> Cf. General Act of Arbitration, Art. 39, 93 LNTS 343 (1928).

<sup>52</sup> Guide to Practice, *supra* note 50, Arts. 1.1–1.2.

an exception under the VCLT is triggered, interpretative declarations should also be presumptively permissible.<sup>53</sup>

Nevertheless, even if the HSC allows such declarations, it is unclear what legal effects they have—specifically, whether it is unclear whether HSC member states that have not formulated declarations can each decide how to deal with the conflicting Declarations or whether the HSC Special Commission must provide a recommendation for its member states.<sup>54</sup> It is also unclear whether the courts of states that are politically aligned with Ukraine would automatically recognize only the Ukrainian Central Authority for service in the Occupied Areas under the HSC. The following Section will answer these questions in turn.

### A. *Legal Effect of the Declarations*

The legal effect of the Declarations on Crimea depends on whether they are reservations or interpretative declarations, which in turn relies on “the legal effect that its author purports to produce.”<sup>55</sup> The test focuses both on the subjective intentions of the declarant and on the objective legal effect of the declaration.<sup>56</sup> The emphasis should be on the latter<sup>57</sup> and the former merely aims to ascertain the original intention of the declarant.<sup>58</sup> While not determinative, the language of the statement may indicate its purported legal effect.<sup>59</sup>

For the following reasons, the Declarations on Crimea are best understood to be interpretative declarations rather than reservations. First, the question of territorial application is not part of the functioning *ratione materiae* of the HSC.<sup>60</sup> The subject matter of the Convention is service rather than the delimitation of territories, establishment of zones to conserve the living resources of the sea, or the prohibition of hazardous waste in certain parts of the high seas, etc.<sup>61</sup> HSC Article 29 allows member states to determine the territorial application of the Convention, suggesting that the Convention does not require its application to be extended to the entire territory of a member state. Put differently, the application of the Convention to the entire territory of a member state is not an essential condition to a member state’s consent to the Convention.<sup>62</sup> Therefore, HSC Article 29 is different from Article 6 of the North Atlantic Treaty<sup>63</sup> and Article 8 of the Southeast Asia Collective Defense Treaty, for example.<sup>64</sup> The latter two treaty provisions provide “treaty areas” to be the entire territories of

<sup>53</sup> VCLT, *supra* note 21, Art. 19; OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 281–89 (2d ed. 2018).

<sup>54</sup> The Special Commission is composed of experts designated by members states to discuss issues with the practical operation of the Convention. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 7, at 37.

<sup>55</sup> Guide to Practice, *supra* note 50, Art.1.3.

<sup>56</sup> Marco Benatar, *From Probative Value to Authentic Interpretation: The Legal Effects of Interpretative Declarations*, 44 REVUE BELGE DE DROIT INTERNATIONAL 170, 180 (2011).

<sup>57</sup> *Id.*

<sup>58</sup> *Belilos v. Switzerland*, App. No. 10328/83, Case No. 20/1986/118/167/A/132 [1988] ECHR 4, §§ 93–102. See *Delimitation of the Continental Shelf Between the UK and France*, Reports of International Arbitral Awards, June 30, 1977 to March 14, 1978, Vol. XVIII, §§ 30–44.

<sup>59</sup> Guide to Practice, *supra* note 50, Art.1.3.2.

<sup>60</sup> See HORN FRANK, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES 101 (1988).

<sup>61</sup> Gary A. Magnarini, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 664 (1988).

<sup>62</sup> VCLT, *supra* note 21, Art. 20.2.

<sup>63</sup> North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 UNTS 243.

<sup>64</sup> Southeast Asia Collective Defense Treaty (Manila Pact), Sept. 8, 1954, 6 UST 81, 29 UNTS 23.

its member states, and a state's declaration to modify these areas is a reservation.<sup>65</sup> Second, a declaration purporting to exclude or extend the application of a treaty *as a whole* to all or part of its territories without modifying its legal effect is not a reservation.<sup>66</sup> The contents of the respective Declaration on Crimea made by Russia and Ukraine show that both countries seek to clarify the application of the HSC as a whole to the Occupied Areas. They aim to interpret the "scope of application" of the HSC rather than "vary[ing] or exclude[ing] the application of [its] terms."<sup>67</sup> Third, none of the declarants explicitly indicates that the Declaration on Crimea is a condition for them to ratify or continue as a member of the HSC. Consequently, they are not conditional interpretative declarations treated as reservations.<sup>68</sup> Finally, a reservation would modify the legal effect of the HSC applying between the reserving state and other states by the latter's tacit acceptance within twelve months after it was notified,<sup>69</sup> which is not the case here. The respective Declarations formulated by Russia and Ukraine are conflicting. It is impossible for other state to tacitly accept them. Therefore, the objective/material legal effect of the Declaration on Crimea demonstrates that it does not alter the treaty relations between the declarant and the silent majority member states under the HSC.

### B. Recommendations for HSC Member States

The HCCH Permanent Bureau "has neither the mandate nor the power to police the operation of the [HSC]."<sup>70</sup> HSC Article 14 provides for diplomatic channels to resolve difficulties arising between member states regarding service. However, it has never been invoked in practice, suggesting that member states find the Special Commission "a more suitable forum to resolve divergent views."<sup>71</sup> The Special Commission is a group of experts designated by member states to discuss issues with the practical operation of the Convention. It has issued recommendations for HSC member states regarding meanings of civil or commercial matters,<sup>72</sup> service in electronic means,<sup>73</sup> and other matters. It should publish a recommendation to assist member states in adopting a consistent response to the conflicting Declarations on Crimea.

The legal nature of Ukraine's and Russia's Declarations on Crimea are different. According to the late Professor Frank Horn, interpretative declarations may be divided into four categories. The first category is affirmative interpretations that confirm that the treaty text is

<sup>65</sup> FRANK, *supra* note 60, at 101.

<sup>66</sup> VCLT, *supra* note 21, Arts. 2.1(d), 29; Guide to Practice, *supra* note 50, Arts. 1.1.1–1.1.4; Official Comments on Guide to Practice, UN Report of the International Law Commission, 48–52, 63rd Sess., UN Doc. A/66/10/Add.1 (2011).

<sup>67</sup> YILC 1966-II 190; UN Doc. A/CN.4/SER.A/1966/Add.1, 189–90.

<sup>68</sup> Guide to Practice, *supra* note 50, Art. 1.4.

<sup>69</sup> *Id.* Arts. 2.6.12, 2.8.2; VCLT, *supra* note 21, Art. 20.5.

<sup>70</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 7, at 37.

<sup>71</sup> *Id.* at 39.

<sup>72</sup> Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, at 12, at <https://www.hcch.net/en/publications-and-studies/details4/?pid=2281&dtid=2>.

<sup>73</sup> Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Service, Evidence and Access to Justice Conventions, at 5 (May 20–23, 2014), at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6405&dtid=2>.

clear.<sup>74</sup> The second category is clarifying interpretations that aim to address any uncertainty of the treaty text.<sup>75</sup> Both the first and the second categories have nothing to do with the conflicting Declarations on Crimea. The third category is amplifying interpretations that intend to address how new acts or events not covered by a treaty would be dealt with.<sup>76</sup> Not every *praeter legem* statement may be deemed as an interpretative declaration. It would depend on the context of each declaration, the extent to which other parties to the treaty are prepared to accept it, and the nature of the treaty provision in question.<sup>77</sup> Ukraine's Declaration on Crimea can be characterized as an amplifying interpretative declaration. This is because Russia's invasion created a new event not covered by the HSC: that the Ukrainian Central Authority can no longer conduct service in the Occupied Areas. In contrast, Russia's Declaration on Crimea is not an amplifying interpretation and belongs in the fourth category: *interpretation contra legem*.<sup>78</sup> This is because Russia's occupation of Ukraine violated international custom on the prohibition of the unlawful use of force.<sup>79</sup> Therefore, Russia's Declaration on Crimea is contrary to the principle of good faith, a cornerstone of all interpretative undertakings. Although states are sovereign equals at international law, thus they are free to decide whether to acknowledge Russia's *interpretation contra legem*. That said, the International Court of Justice has recently rendered a decision condemning Russia's invasion of Ukraine.<sup>80</sup> Although its decision does not have binding force on all states, it evinces a view that the international community considers Russia's invasion of Ukraine to be a violation of international law. Therefore, the Special Commission should issue a recommendation to assist member states in adopting a consistent response to Russia's *interpretation contra legem*, which can enhance certainty and predictability for private parties in international litigations.

If member states have disputes regarding the nature of the Declarations on Crimea, the Special Commission may draw useful insights from the UN secretary-general's views on the 1948 Convention on the Inter-governmental Maritime Consultative Organization (IMCO).<sup>81</sup> India declared that loan financing of national shipping companies was consistent with IMCO.<sup>82</sup> The UN secretary-general concluded that India's declaration was a "reservation" and circulated it to IMCO members for approval.<sup>83</sup> France, the then Federal Republic of Germany, and the United States disagreed with the Indian "reservation."<sup>84</sup> After lengthy discussions in the UN General Assembly and its Sixth Committee, India announced that its

<sup>74</sup> FRANK, *supra* note 60, at 248.

<sup>75</sup> *Id.* at 249.

<sup>76</sup> *Id.* at 255.

<sup>77</sup> *Id.* at 255–57.

<sup>78</sup> *See id.* at 257–58.

<sup>79</sup> GA Res. 68/262, Territorial Integrity of Ukraine (Mar. 27, 2014); GA Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022).

<sup>80</sup> Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order (Int'l Ct. Just. Mar. 16, 2022).

<sup>81</sup> Convention on the International Maritime Organization, Mar. 6, 1948, 289 UNTS 3, at <https://www.imo.org/en/About/Conventions/Pages/Convention-on-the-International-Maritime-Organization.aspx> [hereinafter IMCO].

<sup>82</sup> Convention on the International Maritime Organization, India Declaration, at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XII-1&chapter=12&clang=\\_en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XII-1&chapter=12&clang=_en#EndDec).

<sup>83</sup> UN Doc. A/4235, at 5.

<sup>84</sup> *Id.*, Annex II, III, IV; FRANK, *supra* note 60, at 269.

declaration was not a reservation but merely a declaration of policy.<sup>85</sup> Consequently, the IMCO Council noted that “the declaration of India has no legal effect” on the interpretation of the Convention.<sup>86</sup> Clarifying the nature of the Indian declaration paved the way to resolve the later controversial declarations made by Cambodia, Indonesia, Malaysia, and Sri Lanka.<sup>87</sup> No publicly available records show that the HSC Special Commission has ever considered the legal nature of Argentina’s declaration against the UK’s extension of the HSC to the Falklands Island. So far eight member states have formulated Declarations on Crimea, the Special Commission should take the opportunity to engage discussions, clarify the nature of these Declarations, and assist other member states in adopting consistent approaches. This will provide a model for the future when other member states use the HSC to demonstrate their territorial claims.

### C. *The Namibia Exception*

The VCLT does not provide a timeline for a state to accept another state’s interpretative declaration. However, private parties in international litigation require certainty about service of process in Ukraine under the HSC. The courts of HSC member states should not recognize only the Ukrainian Central Authority for service in the Occupied Areas just because their governments are politically aligned with Ukraine. Instead, for the reasons set out below, the Namibia Exception protecting the rights and interests of people in a territory controlled by non-recognized government should be extended to service conducted by the Russian Central Authority and local authorities in the Occupied Areas under the HSC.

First, service under the HSC concerns private rights inside the Occupied Areas. Common law countries use the distinction of *de jure* and *de facto* governments to avoid the denial of justice to private parties and political acknowledgement of a non-recognized government.<sup>88</sup> A question concerning private rights within an illegally occupied territory would fall in the realm of the *de facto* government, while rights to issues (e.g., property) outside the territory would belong to the *de jure* government.<sup>89</sup> The practical effect of the former can be recognized; however, the latter cannot.<sup>90</sup> Service of process aims to ensure that a defendant is duly informed of a foreign litigation against it. When the defendant resides in the Occupied Areas, service conducted by the Russian Central Authority under the HSC should belong to the realm of the *de facto* government.

Second, as a practical matter, it will be difficult for the Ukrainian Central Authority to conduct service in the Occupied Areas. Ukraine does not allow service by post under HSC Article 10.<sup>91</sup> Service through the Russian Central Authority is the only realistic way to serve a defendant in the Occupied Areas who has no agents in a foreign forum.

<sup>85</sup> IMCO, *supra* note 81, at endnote 20, at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XII-1&chapter=12&clang=\\_en#20](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XII-1&chapter=12&clang=_en#20).

<sup>86</sup> *Id.*

<sup>87</sup> FRANK, *supra* note 60, at 269.

<sup>88</sup> *E.g.*, *Luther v. Sagor* [1921] 3 KB 532 (Can.).

<sup>89</sup> *Haile Selassie v. Cable and Wireless* [1939] Ch 182 (UK).

<sup>90</sup> *Id.*

<sup>91</sup> Ukraine Declaration, *supra* note 8. In the war, Ukraine should abandon its opposition to service by post.

Third, non-recognition of service conducted by the Russian Central Authority in the Occupied Areas would lead to unsatisfactory or unjust consequences for Ukrainian people in the Occupied Areas who have to comply with the Russian legal order.<sup>92</sup> Non-recognition of the validity of Russian service would doubly penalize them.<sup>93</sup> Ukraine and states supporting it should have been more cautious when declaring that service conducted by the Russian Central Authority and related local authorities in the Occupied Areas is null and void.<sup>94</sup> Invalidating service conducted by Russia goes against the Namibia Exception because it punishes innocent Ukraine people in the Occupied Areas in civil and commercial cases.

#### IV. CONCLUSION

Under the HSC, the Declarations on Crimea should be considered as interpretative declarations rather than reservations, the Special Commission should issue a recommendation to help its member states adopt a consistent approach toward the Declarations, and service conducted by the Russian Central Authority should be covered by the Namibia Exception. The eight HCCH Conventions and many other private law treaties allow a member state to extend their application to a dependent territory without providing a mechanism for other states or the administering international organization to oppose the extension.<sup>95</sup> Therefore, the legal dilemma brought by the conflicting declarations under the HSC is not a unique case. Although these Conventions provide denunciation clauses, denunciation of the Conventions to the territory controlled by a non-recognized government may neither reflect the intents of the opposing member states nor protect the interest of private parties residing in that territory. Hopefully, the preliminary solutions proposed in this Essay can help resolve the conflicting declarations under the HSC and shed light on how other private law conventions may be adjusted in times of war. Further, the solutions demonstrate the private and public international law should be linked to jointly contribute to “the global good.”<sup>96</sup>

<sup>92</sup> See *Adams v. Adams* [1970] 3 All ER 572.

<sup>93</sup> JÜRGEN BASEDOW, GISELA RÜHL, FRANCO FERRARI & PEDRO DE MIGUEL ASENSIO, *ENCYCLOPAEDIA OF PRIVATE INTERNATIONAL LAW* 655 (2017).

<sup>94</sup> See notes 8 and 11 *supra*.

<sup>95</sup> *E.g.*, UN Convention on Contracts for the International Sale of Goods, Art. 93(1), Apr. 11, 1989, 1489 UNTS 3 (*entered into force* Jan. 1, 1988).

<sup>96</sup> VERONICA RUIZ ABOU-NIGM, KASEY MCCALL-SMITH & DUNCAN FRENCH, *LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW* 1 (2018).