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I hope this new on-line issue of the RJIL will be found attractive by our constant readers, and all those interested in international law will enjoy these new contributions[1] of the Romanian and foreign scholars and experts in this field.

Professor Dr. Bogdan Aurescu
Member of the UN International Law Commission

[1] The opinions expressed in the papers and comments published in this issue belong to the authors only and do not engage the institutions where they act, the RJIL or the Romanian Branch of the International Law Association.

Abrevieri / Abbreviations

ADIRI – Asociaţia de Drept Internaţional şi Relaţii Internaţionale / Association for International Law and International Relations

AIEA / IAEA – Agenţia Internaţională pentru Energie Atomică / International Atomic Energy Agency

CAHDI – Comitetul ad-hoc al experţilor în drept internaţional public / Committee of Legal Advisers on Public International Law

CDI / ILC – Comisia de Drept Internaţional / International Law Commission

CEDO / ECHR – Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights

CIJ / ICJ – Curtea Internaţională de Justiţie / International Court of Justice

CJUE / CJEU – Curtea de Justiţie a Uniunii Europene / Court of Justice of the European Union

COJUR – Grupul de lucru Drept Internaţional Public al Consiului UE / EU Council Working Group on Public International Law

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

CPJI / PCIJ – Curtea Permanentă de Justiţie Internaţională / Permanent Court of International Justice

NATO – Organizaţia Tratatului Nord-Atlantic / North Atlantic Treaty Organization

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

TUE / TEU – Tratatul privind Uniunea Europeană / Treaty on European Union

UE / EU – Uniunea Europeană / European Union

UNSC – Consiliul de Securitate al Organizaţiei Naţiunilor Unite / United Nations Security Council

Articole
Articles

Preliminary Focus on the Various Meanings of the Term 'Transnational Law'

Radu Bogdan BOBEI[*]

Abstract

This paper addresses various meanings of the term "transnational law". The evolving interactions between States and non-State actors - active members of the so-called "world society", blurred the Westphalian distinction between international law and domestic law, respectively between public law and private law. State and non–State actors are involved often altogether in manifold cross-borders activities (exempli gratia, commercial and/or investment activities, labour activities). Such activities are in full need of suitable concepts and/or tools to be deployed in the transnational context from nowadays. Permanent evolving cross-border activities of the State and/or non-State actors enabled the scholars to debate passionately on the various meanings of the term "transnational law" (hereinafter "TL"). Such meanings encompasses, for instance, TL as body (field) of law (legal system), or TL as transnational legal process, or TL as method of decision making in international commercial arbitration, or TL as tool or experiment to be used in legal methodology, or TL as theory of law. The above-mentioned meanings are frequently used in order to manage the interplay between international law and domestic law, respectively between public law and private law. Furthermore, such meanings are also used to accommodate the world society with the internationalisation of domestic law, respectively with the evolving of the conflict of laws conceived in the Middle Age as the "domestic or private (discrete) life" of the

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international law. For the purpose of writing this article, the author focuses on various meanings of the term "transnational law". The meanings at stake are to be assessed in the light of the adjective "transnational" that is regularly attributed to multiple nouns and settings. The reader is going to find the idea that "transnational" is not (anymore) an ordinary adjective. It is the evolving life itself of the 21st century! Embraced by the internet, such evolving life can be described as being placeless and timeless.

Key-words: *international law, transnational law, global law, world law, conflict of laws, legal education.*

1. Introduction

The Bucharest Centre for Studies in International and Transnational Law (hereinafter „CSITL"), invites all of us to passionately debate on various issues arising out of the international law and of TL. The term "TL" may be characterized as obscure and, consequently, dangerous by the legal minds. And it is reasonable to think in such way, for at least one reason: human beings are afraid of the unknown.

Notwithstanding, efforts should be deployed in order to discover the unknown. In our days, TL is like the air; it helps us to breath in and out, but it is difficult, even impossible, to define it.

Encouraged by the academic background of the co-founders of the CSITL, Professor Bogdan Aurescu and Associate Professor Ion Gâlea, I took my liberty to dream. And to initiate a preliminary research activity on the term "TL". Such term is to be understood in its various and plural dimensions. It is far from me the wish to express even the slightest idea that this paper promotes an in-depth focus on the aforementioned term. I assumed a more modest goal; that is to focus briefly and preliminarily on some specific meanings of TL. At this stage, "focus" shall be understood only in its purely descriptive meaning developed by scholars all over the world. Subsequent stages, if any, are to be initiated in the following future with a view to understand TL in other dimensions, let us say prospective and the so-called "prescriptive" dimensions.

2. Transnational – An Ordinary Adjective? Not at All!

2.1 Trans-national and Inter-national

The adjective "transnational" accompanies many nouns which are to be pointed out, *exempli gratia,* below. In full conjunction with such nouns, "*trans*" evolves manifold settings. "Trans-" means "*across, beyond, through*".[1] It is easy to notice that the prefix "*trans*-" does not suggest "*between*". Such latter "term is reserved for 'inter-' ".[2] In the context of attaching such prefixes to different nouns, the meaning of the resulting nouns is quite different. For instance, under the umbrella of the term "law", inter-national means a set of rules to be applied "*between* national or domestic legal orders"; trans-national means a particular set of rules or a particular methodological device to be applied or used "*across, beyond, through* national or domestic legal orders". As Professor Craig Scott put it in the 2000s, "while international law as interstate law is more or less the same as talking about law between or among states, transnational law can variously connote law across states, law beyond states, or law through states".

Therefore, the inter-national normative reality is quite different than the trans-national one. First of all, it must be noted that there is a single inter-national normative reality for at least one reason: there is a single system of international law. There are manifold trans-national normative realities as attached to different fields (*exempli gratia*, contract law, corporate governance, labour law, securities, and human rights). Secondly, this paper is going to remind that any trans-national normative reality is hybrid in a way that encompasses the actors (including their activities), sources, content and consequences of the TL. The inter-national law and the normative reality that it designates are not at all hybrid. Such lack of hybridity is fully lively. It survives in spite of the multiplication of regimes of international law which had occurred in order to regulate plural and diverse areas (*exempli gratia*, trade, investment) encompassed by the system of international law itself.

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[1] See Gralf-Peter Calliess, "Reflexive Transnational Law.The Privatisation of Civil Law and the Civilisation of Private Law", in *Zeitschrift für Rechtssoziologie,* vol. 23 (2002), Heft 2, pp. 185-216.

[2] See Craig Scott, "'Transnational law' as Proto-Concept: Three Conceptions", vol. 10 (2009), *German Law Journal*, pp. 859-876.

2.2 Transnational Relations

In the 1970s, political scientists contemplated the concept of "transnational relations". In order to define such concept, 2 (two) trends emerged. Firstly, the above-mentioned concept focused on the actors involved in the transnational relations. For instance, Joseph S.Nye Jr. and Robert O. Keohane "defined transnational relations as 'contacts, coalitions, and interactions across State boundaries that are not controlled by the central foreign policy organs of government' ".[1] Secondly, the concept of "transnational relations" focused on the activity of the actors involved in the process of transnationalism. For instance, Samuel Huntington assesed transnationalism "as a peculiarly 'American mode of expansion' based on 'freedom to operate' rather than 'power to control' ".[2]

In the 1990s, several scholars tried to conceptualize the term "transnational relations". For instance, such relations have been defined as "regular interactions across national boundaries arising when at least one actor is a non-State agent or does not operate on behalf of a national government or an intergovernmental organization".[3]

2.3 Transnational Organizations/Corporations

The concept of "transnational organizations/corporations" had been hotly debated since the end of World War II. In the 1970s, an organization/corporation has been assessed as transnational in the following terms: it constitutes a "relatively large, hierarchically organized, centrally directed bureaucracy .... that performs a set of relatively limited, specialized, and in some sense, technical functions... across one or more international boundaries, and insofar as is possible, in relative disregard of those boundaries"[4]. In our time, the interplay between transnational

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[1] See Joseph S.Nye Jr. & Robert O.Keohane (eds.), *Transnational relations and World Politics*, 1972, p. xi. This work is quoted by Anne Marie Slaughter, "The Accountability of Government Networks", *Indiana Journal of Global Legal Studies*, vol.8, no.2, Spring, 2001, pp.347-367. The latter paper had been republished by Paul Schiff Beman (ed.), *The Globalization of International Law,* Rouledge (Taylor & Francis Group) Publishing House, New York, 2016, pp.475-496.

[2] See Samuel Huntington, "Transnational Organizations in World Politics", 25 *World Pol.* (1973), p. 333, at p. 344. This work is quoted by Anne Marie Slaughter, *op. cit.*

[3] See Thomas Risse-Kappen, "Bringing Transnational Relations Back In: Introduction", in *Bringing Transnational Relations Back in 3* (Thomas Risse-Kappen ed., 1995). This paper had been quoted by Harold Hongju Koh, "Review: Why Do Nations Obey International Law", in *The Yale Law Journal*, vol.106, no.8, June 1997, pp.2599-2659.

[4] See Samuel Huntington, *op. cit*.

organizations/corporations and nation-States is evolving. That is why the above-mentioned concept is frequently revisited.[1]

2.4 Transnational Communities

The sociological jurisprudence operates with different and various types of the concept of "community" (inter-national, supra-national, sub-national, national). It operates also with an evolving type; that is "trans-national communities".[2] The latter communities emerged in the light of an undeniable phenomenon; that is immigration that transcends the political borders of the nation-States. The transnational communities are one of the four types of the transnational social spaces; the other three latter spaces are "small groups, particularly kinship systems; issue networks, transnational organizations".[3] In Thomas Faist's view, "transnational communities refers to communities made up of individuals or groups, settled in different national societies, sharing common interests and references - territorial, religious, linguistic -, and using transnational networks to consolidate solidarity beyond national boundaries".[4] The key-elements of such social groups might be summarized in two dimensions. Firstly, there is a social group that emerge from interaction through or across or beyond the boundaries of the nation-States; such interaction is mutual by nature. Secondly, the transnational communities are (fully) oriented around a common goal or project, respectively around their "imagined" identity.[5]

2.5. Transnational (Judicial) Governance

The development of "Governance without (national) Government(s)" is related to the 20th century history of State. The relationship between the State and the law plays an important role. Such development is to be viewed

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[1] See Gralf-Peter Callies, "Introduction: Transnational Corporations Revisited", in *Indiana Journal of Global Legal Studies*, 2011, vol.18, iss.2, article 1.

[2] See Roger Cotterrell, "Transnational Communities and the Concept of Law", in 21 *Ratio Juris* (2008), pp. 1-18, reprinted in M.Giudice, W.Waluchow and M.Del Mar (eds.), *The Methodology of Legal Theory*, Farnham: Ashgate, 2010, pp.403-20.

[3] See Thomas Faist, "Transnational social spaces out of international migration: evolution, significance and future prospects", *Archives Européennes de Sociologie*, 1998, 39(2), pp. 215-247. See also Thomas Faist, "Transnational Social Spaces", in *Journal of Ethnic and Racial Studies*, vol.38, 2015, issue 13, pp.2271-2274.

[4] See Thomas Faist, *op. cit*.

[5] See Marie-Laure Djelic, Sigrid Quack (eds.), *Transnational Communities. Shaping Global Economic Governance,* Cambridge University Press, 2012.

as "a progression from a formalist Rule of Law to a *juris* generative, substantive law-issuing social and welfare State (...)".[1]

The end of the Cold War order encouraged plural and diverse networks to emerge in the context, supra-context and sub-context of the so-called "complex, multi-level, global governance".[2] The rise of the so-called "global civil society" determined the connection of various non-governmental entities, including NGOs, to the phenomenon of governance. It should be noted that „the question of differentiating law and non-law is to define the nature of transnational governance".[3] Such latter governance is evolving by its very nature beyond the political borders of the nation-States. Therefore, the governance becomes and lives transnational(ly).

Transnational governance is connected to manifold fields. Transnational *corporate* governance is one of the fields of such a generous concept of "transnational governance".[4] It should be noted that the so-called "transnational governance regimes" comprise also "labour law, capital market law, contract law in general and consumer protection law in particular".[5] Moreover, in the transnational arena, the concept of "conflict of laws" begins to play an evolving role since the early 2000s.[6] It is easy to notice that the conflict of laws became one of the main regulatory regimes designed to address transnational issues arising out of various fields. It is not a mystery anymore that "national private laws, and therefore private international law (conflict of laws – A/N), can contribute to an effective system of transnational governance"; in other words, private international

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[1] See Peer Zumbansen, "Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back", *UC Irvine Journal of International, Transnational, and Comparative Law: Vol.1 Symposium: Transnational Legal ordering and Private Law* (2016), pp. 160-194, available at https://scholarship.law.uci.edu/ucijil/vol1/iss1/8, last visited on 10/09/2020.

[2] See Paul Schiff Berman, "From International Law to Law and Globalization", 43 *Columbia Journal of Transnational Law* 485 (2005), pp.485-556.

[3] See Peer Zumbansen, "Transnational legal pluralism", in *Transnational legal Theory* 1.2 (2010), pp. 141-189.

[4] See Peer Zumbansen, "Neither "public", nor "private", "national", "international": transnational corporate governance from a legal pluralist perspective", in *TranState Working Papers*, no.128, Collaborative Research Center 597- Transformations of the State, Bremen, available at: https://www.econstor.eu , last visited on 10/09/2020.

[5] See Peer Zumbansen, *Transnational legal pluralism(2010). Comparative Research in Law and Political Economy. Research paper 1/2010*, available at http://digitalcommons.osgoode.yorku.ca/clpe/70 , last visited on 10/09/2020.

[6] See Horatia Muir Watt, "The Relevance of Private International Law to the Global Governance Debate", in Horatia Muir Watt, Diego Fernández Arroyo(eds.), *Private International Law and Global Governance,* Oxford University Press, 2014, pp.1-22.

law (conflict of laws, my note) should be regarded "as a venue for transnational regulatory concerns".[1]

Last, but not least, transnational governance deploys a particular judicial dimension. In such latter dimension, transnational governance refers to the role of the domestic courts. In other words, the so-called "transnational judicial governance" means "the regulation of transnational activity by domestic courts".[2]

2.6. Transnational Moral Entrepreneurs

The transnational moral entrepreneurs emerged at the time when the law of international human rights started to play a significant role in the world arena. Such role had been supported by the "state practice exhibiting increasingly norm-enunciation and procedural institution-building".[3] The transnational moral entrepreneurs of the nineteenth-century pursued goals "particularly critical to the norm-generating developments", adopted by the States in the fields covered by treaties addressing the prohibition of piracy, slave trade, prostitution etc.[4] One of the main goals of such transnational moral entrepreneurs involved their efforts "toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society".[5]

2.7 Transnational Legal Pluralism

In order to understand the notion of "transnational legal pluralism", it is useful to clarify the concept of "legal pluralism". In its famous article, John Griffiths understood by "legal pluralism the presence in a social field of more than one legal order".[6] The concept of legal pluralism addressed

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[1] See Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", in *Columbia Journal of Transnational Law* 40:2(2002), pp. 209-274.

[2] See Christopher A.Whytock, "Transnational Judicial Governance", in *Journal of International and Comparative Law*, issue 1, volume 2, Fall 2011, pp.55-68.

[3] See Harold Hongju Koh, *op. cit*.

[4] *Ibid*.

[5] See Ethan A.Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society", in 44 *Int'l Org.* 479(1990). This author even defined the concept of "transnational moral entrepreneurs" by pointing out their goals. The paper of the above-mentioned author had been quoted by Harold Hongju Koh, *op. cit*.

[6] See John Griffiths, "What is legal pluralism?", in *The Journal of Legal Pluralism and Unofficial Law*, volume 18, 1986-issue 24, pp. 1-55.

initially the interplay (including the way to deal with it) between State law and customary law arising out of the former colonies.[1] In 1988, Sally Merry pointed out that the aforementioned concept has developed so as to manage "the pluralistic quality of law under advanced capitalism".

In the period of time between the end (1989) of the Cold War and 2020, the concept of "legal pluralism" had been fervently attached to the notion of "transnational". For instance, we are going to see that Professor Peer Zumbansen contemplates transnational legal pluralism (hereinafter "TLP") as a "proposal to conceive of transnational law from a methodological perspective".[2] It is easy to notice that TLP – which corresponds to TL itself, is to be assessed as a methodological device and not as a new body of law (new field of law), as Philip Jessup envisaged in the early 1950s. TLP represents a methodological way to be developed with a view to "depict the space (but not territorially defined space) in which the legal pluralist analysis of legal and non-legal regulation occurs".[3] Therefore, Professor Peer Zumbansen suggests that TLP constitutes the right methodological device which "makes reference to the space (methodological space *–A/N*) that is left empty between conceptualization of legal order from either a 'national' or 'international' perspective". Furthermore, TLP, as defined by Professor Peer Zumbansen, appears as "a methodological tool (in various areas) to make sense of the emerging normative order of the world society".

The lack of the world State is not a tragedy. The world society fully exists. Such latter society is able to develop a myriad of sub-societies, be it spatially determined or placeless (including internet chat groups).[4] Such world society acts in various and hybrid ways. One is the digital way; that's why I suggest calling the aforementioned society "digital (world) society". The digital (world) society felt the need of a hybrid tool – TLP itself, to address its activities. TLP consists of overlapping legal/non-legal tools, local or domestic/sub-regional/regional/international tools, be it hard law or soft law instruments. Furthermore, TLP provides full energy for the management of the diverse and complex functional interactions between the trans-border activities of the members of the world society. Such members identify themselves with the mankind as a whole.

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[1] Sally Engle Merry, "Legal Pluralism", in *Law and Society Review*, vol.22, no.5(1988), pp.869-896. Legal pluralism had been assesed in its historial dimension by Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", in *Sydney Law Review*(2008), vol.30, pp.375-411.

[2] See Peer Zumbansen, *op. cit*.

[3] Ibid.

[4] See Paul Schiff Berman, *op. cit*.

2.8 Transnational Policy Making

The concept of "Transnational Policy Making" is attributed to Matthias Lehmann.[1] The latter scholar developed the afore-mentioned concept for the purpose of suggesting the need of de-bordering the State and the Conflict of Laws. Furthermore, it had been pointed out that a borderless world civil society is not anymore in a (full) need of the choice of law theories based on personal, or, territorial, or governmental interest factors. New realities do not need old-fashioned ideas or old ideas. Therefore, in Matthias Lehmann's view, a new conflicts' methodology is on its way. That is the so-called "Transnational Policy Through Choice-of-Law Rules". In the light of such methodology, "the applicable conflict rules are chosen in function of a specific goal"; "this goal is (...) to make the split of the world into different legal systems less harmful"; "in pursuing this goal, different needs of the world citizens and the international community may be taken into account".[2]

2.9 Transnational Legal System

The concept of "transnational legal system", if any, is deeply linked to the Age of Globalization. Maybe this Age is coming to an end, at least in its version developed prior to the Age of … the new Coronavirus. The Age of Globalization had been anyway developed on the basis of the "people, goods, services, money and ideas and other things that are readily cross bordering".[3] Such basis requires a highly decentralized (legal) system. That is the transnational legal system and its transnational legal order. The conflict of laws might thus be assessed as a truly foundation for transnational legal order.[4]

3. Transnational = Global?

"Global" means, logically, everywhere. "Global" does not mean transnational that is „*across, beyond, through*". Therefore, acting

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[1] See Matthias Lehmann, *From Conflict of Laws to Global Justice*, Columbia University 2011, available at https://core.ac.uk , last visited on 10/09/2020.
[2] See Matthias Lehman, *op. cit*.
[3] See Christopher A.Whytock, "Conflict of Laws, Global Governance and Transnational Legal Order", (March 14, 2018), *UC Irvine Journal of International, Transnational, and Comparative Law*, Vol.1, 2016; UC Irvine School of Law Research Paper No.2018-16, available at SSRN: https://ssrn.com/abstract=3140886 , last visited on 10/09/2020.
[4] See Christopher A.Whytock, *op. cit*.

transnational does not mean necessarily acting globally. Allow me, my dear readers, to be more specific!

The so-called "global law", if any, suggests at least two ideas: firstly, it suggests an idea of universality; secondly, it suggests a centralized top-down regulation or single set of legal rules.[1] In other words, global law "posits (...) that universal legal norms are being created and diffused globally in different legal domains"; "global law is the law that is everywhere".[2] The so-called "centralized top-down" regulation suggests the idea of vertical integration. The latter type of integration had been quite familiar to the usual type of business organization deployed before and after the Second World War.[3] In Martin Shapiro's view, "vertical integration was the capitalist equivalent of socialist central economic planning".

On the contrary, TL "comprises legal norms that cross borders and thus apply to parties located in more than on jurisdiction, but may or may not be global in nature".[4] Such view contemplates trans-nationalism as being detached from the nation State. In other views, which might be subject to future analysis, trans-nationalism cannot be detached from the State, as "transnational suggests, in its name already, less an overcoming than a transcending of the state".[5] In other words, TL is something that is not without, but beyond the State[6] (and with the help of nation State).

In the light of the former view, legal norms that are transnational by nature, but not global at all might exist. For instance, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter "Rome I Regulation") constitutes a transnational regulation for at least one reason: it crosses the borders of the States that are members of the European Union. Rome I Regulation does not constitute a global legal device because it does not cross the borders of the States of the entire world.

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[1] See Martin Shapiro, "The Globalization of Law", in *Indiana Journal of Global Legal Studies* (1993) vol.1:iss.1, article 3, pp.36-64; see also Ralf Michaels, "State Law as a Transnational Legal Order", in *UC Irvine Journal of International, Transnational, and Comparative Law*, 2016, vol.1, 141, pp.141-160.

[2] See Elisabeth Heger Boyle and John W. Meyer, *Modern Law as a Secularized and Global Model* Soziale Welt 49: 275-294, 1998, as quoted by Gregory Shaffer, "Transnational Legal Process and State Change: Opportunities and Constraints", in *IILJ Working Paper* 2010/4, finalized 07/02/10(www.iilij.org), last visited 10/09/2020.

[3] See Martin Shapiro, *op. cit*.

[4] See Gregory Shaffer, *op. cit*.

[5] See Ralf Michaels, *op. cit*.

[6] See Ralf Michaels, "The True Lex Mercatoria: Law beyond the State", in 14 *Indiana Journal Global Legal Studies*, 2007, pp.447-468.

For the purpose of understanding the true meaning of transnational and of global, let us briefly contemplate the interplay between trans-nationalism and globalization (reality, theory and ideology).[1] The idea of trans-nationalism and its vehicle (TL itself) arises when the globalization is in a big trouble. It seems that even prior to 2020 the slow decline of the globalization, irrespective of its dimension (reality, theory or ideology), evolved fervently. The rise of trans-nationalism seems to occur inevitably.[2]

I dare say that trans-nationalism might be used in order to diminish the revenge, if any, of the national(ism) which had been isolated, especially after the end of the Cold War, by the globalization. The trans-nationalism protects the "public" and "private" souls of the international law endangered by the global, respectively by the national(ist) instincts. Trans-nationalism protects also the domestic or local legal systems whose roots and purposes are diminished by the globalists and nationalists. International law survives and flourishes in trans-nationalism. Domestic legal systems survive and flourish also in trans-nationalism.

The trans-nationalism plays the role of the arbitrator in the interaction or battle between any globalist instincts and any national(ist) ones. Therefore, the global and national(ist) instincts altogether might gently coexist under the generous umbrella of the trans-nationalism. Trans-nationalism should be assessed as a dream, not as a nightmare. Furthermore, trans-nationalism should be assessed as a promise, not as reality. The whole mankind needs more dreams and more promises than it needs nightmares and realities. Last, but not least, due to trans-nationalism the global and national(ist) instincts may become feelings. Instincts are ... bad, feelings are ... good.

4. TL – Body (Field) of Law or Legal System

4.1. Professor Jessup's Understanding on TL

In the 1950s, Professor Philip C. Jessup delivered the Storrs Lectures at the Yale Law School. In the context of such lectures, the famous professor introduced international lawyers to the term "TL". His lectures provided him with the opportunity to contemplate "the complex interrelated world

[1] Globalization is assessed as such by Ralf Michaels, "Globalization and Law: Law Beyond the State", in *Law and Social Theory* 287(Reza Banakar & Max Travers(eds.), 2013).
[2] See Ralf Michaels, *op. cit*.

community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of states' ".[1]

Professor Jessup focused, first of all, on the undeniable existence of the purely concrete problems and not on the abstract categories of law. Such focus reminds us of the School of thought of legal realism.[2] Professor Jessup labelled the purely concrete problems as "transnational situations" (hereinafter "TS"). TS shall be labelled as such because their spreading is localized in more than one domestic or national jurisdiction. Therefore, any TS exists and flourishes, logically, across border(s). TS involves inevitably manifold actors - "individuals, corporations, States, organization of States, or other groups". The actors of any TS (hereinafter "ATS") are hybrid by their nature (*exempli gratia*, public/private actors, State/non-State actors, religious/non religious actors). Such various ATS interact variously in various TS. For instance, "a private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at an European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French counsel to advise on the settlement of his client's estate in France (...)".[3]

Any TS generates transnational legal problems (hereinafter TLPs). Such latter legal problems may occur even within domestic legal systems.[4] Therefore, TLPs may not occur necessarily, let's say, between or across domestic legal systems or beyond a particular domestic legal system. In other words, particular TLPs may also arise out of non-TS (domestic situations). It should also be noted that TLPs, be it generated by TS or not, "expressly mixed public and private, domestic and international, and cut across issue areas ranging from international human rights, to trade, environment, international business transactions (...)".[5]

Professor Jessup felt the need to use a particular concept in order to legally integrate any TS and ATS. In other words, the undeniable existence of the

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[1] See Philip C.Jessup, *Transnational Law*, Yale University Press, New Haven, 1956, p. 1. See also Hessel E.Yntema, "Book Review, Jessup, P.C., "Transnational Law. New Haven: Yale University Press, 1956", pp.113, in *The American Journal of Comparative Law*, volume 6, issue 2-3, Spring-Summer 1957, pp.364-365.

[2] See Ralf Michaels, "Does Brexit Spell the Death of Transnational Law?" (July 1, 2016). *German Law Journal(Brexit Suppl.),* vol.17, pp.51-62, 2016; Duke Law School Public Law & Legal Theory Series no/2016-41.

[3] See Philip C.Jessup, *op. cit*.

[4] See Henry Steiner, Detlev Vagts, *Transnational Legal Problems: Materials and Text,* The Foundation Press nc., New York, 1976, Pp.li, 1449.

[5] See Henry Steiner, Detlev Vagts, *op. cit.*, at xvii.

TS and of the ATS needed to be captured within a particular body (field) of law.

Professor Jessup contemplated the possibility to apply to TS the concept of international law. Indeed, international law deals with situations that transcend national frontiers. In other words, international law exists, develops, flourishes (only) across border(s). It had been already outlined that TS involve a myriad of ATS, be it, for instance, State and/or non-State, public and/or private, religious/non-religious. Consequently, Professor Jessup came to the idea that "the term 'international' is misleading since it suggests that one is concerned only with the relations of one nation (or State) to other nations (or States)". Furthermore, "just as the word 'international' is inadequate to describe the problem (TS), so the term 'international law' will not".

Professor Jessup contemplated also the possibility to apply to the TS the term "private international law" (conflict of laws). Such term deals also with the cross-border(s) activities of the ATS involved in TS. The above-mentioned term and the suggested experiment of Professor Alf Ross - "in word-coining 'inter-legal law' for 'private international law' ", did not provide much help to Professor Jessup in legally integrating any TS and the activities of the ATS. In other words, Professor Jessup came to the idea that neither international law, nor private international (inter-legal) law (conflict of laws) seemed to be suitable to regulate the undeniable existence of any TS and the activities of the ATS.

It became obvious that TS required a legal concept that it had to be not State-centric, be it international or domestic law in its dimension of the conflict of laws. Consequently, Professor Jessup used, "instead of 'international law' (and of conflict of laws), the term 'transnational law' (TL) to include all laws which regulate actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules which do not wholly fit into such standard categories".[1] As Professor Peer Zumbansen put it, it had been suggested "in the 1950s, (...) a legal response to those border-crossing activities which are not adequately

[1] See Philip C.Jessup, *op. cit*. Professor Luisa Antoniolli suggests that P.C. Jessup "did no refer to TL as an independent branch of law, but rather as a flexible approach to issues that could not be easily dealt with through dichotomies of private/public law and international/national law". See Luisa Antoniolli, "The future of European Private Law at the Crossroads of Public and Private Law", in *Eppur si muove: The Age of Uniform Law (Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday)*, volume 1, International Institute for the Unification of Private Law, Rome, 2016, pp.481-500.

captured by either conflict of laws or public international law".[1] Today, the most common meaning of the term "TL" is the one referring to a particular body (field) of law. Such body of law "targets transnational events and activities - that are transnational situations (TS – *A/N*), which involve more than one national jurisdiction".[2]

Thus, in Professor Jessup's view, TL was to turn into a body(field) of law or legal system that from conception, was detached from "the blind acceptance of traditional classifications and labels".[3] In other words, a new body (field) of law or legal system emerged in the world arena. That is TL, whose functional dimension framed its goal. "Functional dimension" shall be understood as follows: TL had been designed "to regulate actions or events that transcend national frontiers". The latter actions and events might be labelled as transnational when "cuts through the distinction between national and international and thus between what is within and what is without the State (nation State)".[4] In other words, "transnational (...) indicates something which extends or goes beyond national boundaries";[5] furthermore, "we can define transnational as pertaining to the scope of application or the functions of TL".[6]

I dare point out three more ideas.

(i) First, Professor Jessup's understanding on TL is to be summed up as follows:

Such body (field) of law is hybrid by its *objects* (transnational activities/TS), *subjects* (State/ non-State, public/private, religious/non religious) and *origins* (international law/domestic laws understood in their dimensions of the conflict of laws, any other laws). In other words, the actors, norms and processes are to be assessed as key-elements with a view to define the so-called "space" of transnational law.[7] The hybrid origins of TL permeate its content. Therefore, such content is also hybrid by nature. The rules of

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[1] See Peer Zumbansen, "Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power," in *Law and Contemporary Problems*, vol. 76.2(2013); pp. 117-138.

[2] See Gregory Shaffer, *op. cit*.

[3] See Philip C.Jessup, "The concept of Transnational Law: An Introduction", in 3 *Colum.J.Transnat'l.1*(1963-1964).

[4] See Craig Scott, *op. cit*.

[5] See Gralf-Peter Calliess, *op. cit*.

[6] See Ralf Michaels, *op. cit*.

[7] Peer Zumbansen, *Defining the Space of Transnational law: Legal Theory, Global Governance and Legal Pluralism(September 26, 2011).* Osgoode CLPE Research paper No.21/2011. Available at SSRN: https://ssrn.com/abstract=1934044 or http://dx.doi/org/10.2139/ssrn.1934044 , last visited 10/09/2020.

international law, be they public or private, respectively any other rules, be they State or non-State rules,[1] are designed to complement and supplement international law, conflict of laws and domestic law(s).[2]

(ii) Secondly, Professor Jessup did not coined the term "TL" as Joseph Story did it with the term "private international law"; or as Jeremy Bentham did it with the term "inter-national law".[3] Professor Jessup developed only the idea of TL understood in its dimension of a new suggested body (field) of law. The latter professor acknowledged himself that the word (adjective) "transnational" has been previously used by Joseph E. Johnson,[4] Percy Elwood Corbett and Arthur Nussbaum. In the same period of time, TL, understood in its dimension of body (field) of law, was also contemplated by C. Wilfred Jenks.[5] Notwithstanding, the mentioned professor did not spell properly and clearly TL as body (field) of law. Prior to Professor Jessup's TL, such latter term had been applied by German scholar Ernst Rabel in its famous work "The Conflict of Laws. A Comparative Study". Furthermore, it seems that the first use of the terminology "TL" is attributed to the Swiss law professor Max Gutzwiller. This professor carried out its intellectual activity in the 1930s.[6]

(iii) Thirdly, under the umbrella of law, transnational shall be not regarded as world law. Only the so-called "global law", if any, shall be regarded as "world law", for at least one reason: global law is everywhere; only world law is everywhere. TL is not everywhere; it exists through or across or beyond ... everywhere. The so-called "world law", if any, embraces the

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[1] See Ralf Michaels, *op. cit*.

[2] See Peer Zumbansen, *Beyond Territoriality: The Case of Transnational Human Rights Litigation (2005*), All Papers. Paper 258, available at http://digitalcommons.osgoode.yorku.ca/all_papers/258, last visited 10/09/2020.

[3] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 296-97(J.H.Burns & H.L.A. Hart eds., 1970) (1789). See also M.W.Janis, "Jeremy Bentham and the Fashioning of „International law", in 78 *American Journal of International Law*, 405, 409(1984). The above-mentioned writings have been quoted by Harold Hongju Koh, *op. cit.*

[4] See Anne Marie Slaughter, *op. cit.*

[5] See C.Wilfred Jenks, "The scope of International Law", in 31 *British Yearbook of International Law*, 1, 1954.

[6] See Christian Tietje and Karsten Nowrot, in Christian Tietje, Alan Brouder, Karsten Nowrot(eds), *Philip C.Jessup's Transnational law Revisited- on the Occasion of the 50th Anniversary of its Publication, Essays in Transnational Economic law*, no. 50/February 2006, footnoted no.75-78, pp.26-27. These essays have been published under the auspices of the Institute for Economic Law, Transnational Economic Law Research Center, Faculty of Law, Martin-Luther-University Halle-Wittenberg.

international law coined by Bentham in 1789 and the concept of TL spread in 1956, but not coined by Professor Jessup.[1]

4.2. Professor Craig Scott's Understanding on TL

In the 2000's, Professor Craig Scott focused on the concept of TL understood also in its dimension of body (field) of law,[2] be it distinct or not from other components of the legal universe. He suggested 3(three) paths linked to three conceptions of TL as proto-(legal) concept.

The first conception of TL had been developed under the umbrella of the so-called "transnationalized legal traditionalism". Pursuant to the ideas of legal traditionalism, the legal universe is divided in two kinds of legal systems: (public) international law and the State or domestic or municipal laws. In the light of the transnationalized legal traditionalism, TL shall not be regarded as something distinct either from (public) international law, or from State laws. Professor Craig Scott put it clearly: TL "would be permitted to exist only as the combined functioning of public international law and domestic legal systems, and of their mutually regulated interaction". The first approach emerges from the interpretation of Professor Jessup's following wording: "all law which regulates actions and national frontiers".

The second conception of TL had been developed under the umbrella of the so-called "transnationalized legal decisionism". TL is seen initially as a (legal) method combining the tools provided by private international law (conflict of laws) and (public) international law. In other words, TL uses altogether the mechanism(s) of conflict of laws "for a variety of potentially applicable substantive rules from domestic legal systems to be (...) applied and the interaction of domestic (private) and public international law". In the light of such interaction, any "public international law norm could itself be chosen as a rule of decision in a given context". TL is not to be reduced to its status of legal method. Transnational legal decisionism occurs and evolves in the context of "the resulting (institutionally generated) interpretations or applications of domestic and international law to TS". Such resulting and interpretations purport to decisions and/or outcomes. In other words, TL shall be truly regarded as "outcomes of legal decision making faced with a transnational problem (...)". The second approach emerges as a result of the interpretation of Professor Jessup's following wording: "both public and private international law being included".

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[1] See Harold J.Berman, "World Law", in *Fordham International Law* (1994), volume 18, issue 5, article 4, pp.1617-1622.
[2] See Craig Scott, *op. cit*.

The third conception of TL had been developed under the umbrella of the so-called "transnational socio-legal pluralism". In legal pluralist thinking, law is not seen anymore as an exclusive product of the States.[1] TL might be seen as an autonomous field from the fields of international law and domestic laws, including the conflict of laws. Therefore, such conception suggests that TL – as "cross-stitching legal discipline", is designed to occupy an autonomous normative sphere that is very distinct from normative spheres occupied by international law and domestic laws, including conflict of laws. In other words, Professor Craig Scott invited us to see TL as "neither national nor international nor public not private, at the same time being both national and international, as well as public and private". This third approach emerges as a result of the interpretation of Professor Jessup's following wording: "other rules which do not fit into such standard categories (both public and private international law)".

4.3 Professor Roger Cotterrell's Understanding on TL

In the context of inquiring on the nature of "law" and of "society", Professor Roger Cotterrell pointed out the emergence of a "very disparate and problematic, but increasingly significant, type of regulation".[2] That is TL. Such new type of (legal) regulation purports to be the core of a new discipline or legal field. It should be noted that TL determines all of us to re-think some particular relationships. The above-mentioned professor outlines the relationships between law and State, public (law) and private (law), sources of law and legal authority.

In other words, Professor Roger Cotterell's TL blurrs mainly the westphalian distinction between international law and domestic or municipal legal systems. In the light of such view, it seems to me that the conflict of laws is to be re-internationalized in a subtle way. Such re-internationalisation of the conflict of laws is fully encouraged by the lively interaction of international law and domestic legal systems. TL itself serves

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[1] Various issues related to the legal pluralism are depicted by Paul Schiff Berman, *The Evolution of Global Legal Pluralism(2017),* GWU Law School Public Law Research Paper No.2017-42; *The Evolution of Global Legal Pluralism,* in Roger Cotterrell & Maksymilian Del Mar (eds.), *Authority in Transnational Legal Theory:Theorising Across Disciplines* 151, 2016; GWU law School Public Law Research Paper No. 2017-42; GWU Legal Studies Research Paper No.2017-42, available at https://ssrn.com/abstract=2999743 or http://dx.doi.org/10.2139/ssrn.2999743, last visited 10/09/2020.

[2] See Roger Cotterrell, *What is Transnational Law ?(*March 13, 2012), Law & Social Inquiry, Vol.37, No.2, 2012, pp.500-24; Queen Mary School of Law Legal Studies Research paper No.103/2012, available at SSRN: https://ssrn.com/abstract=2021088 , last visited 10/09/2020.

to consolidate the latter interaction in TS. Furthermore, it seems that the so-called "global civil society" is in full need of such interaction to be deployed in order to facilitate the evolving of TL. Last, but not least, it seems to me that Professor Roger Cotterrell's TL questions the tension, if any, between (public) international law and (private) international law, respectively between State and non-State law, be it religious or not.

Anyway, in Professor Roger Cotterrell's understanding, TL lives in at least three dimensions. First, TL is seen as an extension of the so-called "territorial jurisdiction" across the political borders of the nation States. Second, TL evolves as a particular regulation issued neither by the agencies of the nations States, nor by the international legal bodies. Third, TL is a suitable normative space not yet fully emerged in order to facilitate the cross-border(s) transaction(s).

4.4 Professors Robert Wai's and Daniela Caruso's Understanding on TL

Some scholars focus on the so-called "private" side of TL. The works of Professors Robert Wai and Daniela Caruso are truly outstanding.

In Professor Robert Wai's understanding, it seems that TL is exclusively or, at least predominantly, private law making. Therefore, transnational private law (hereinafter TPL) encompasses municipal private laws and private international law. Professor Robert Wai suggests that private international law is to be understood as State laws related to 3 (three) kind of issues: choice of law, jurisdiction, recognition and/or enforcement of judgments.[1] Framed as such, TPL is assessed as a particular form or an intermediate level of transnational governance. Such form or level is fully decentralized. Professor Robert Way borrows the meaning of "transnational governance" from the legal thinking of Christian Joerges, for whom "transnational governance includes various and untraditional types of international and regional collaboration among both public and private actors".[2]

The core idea of TPL is the concept of interlegality. Such concept is apparently borrowed from the legal thinking of Boaventura de Sousa Santos. The latter scholar suggested a descriptive meaning of the interlegality, which "describes different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of

[1] See Robert Wai, "The Interlegality of Transnational Private Law", in *Law and Contemporary Problems*, Vol.71, 2008, pp.107-127.
[2] See Robert Wai, *op. cit*.

qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life".[1] However, it seems to me that Professor Robert Wai suggests a more dynamic understanding of the interlegality. The pillars of its understanding are plural normative orders, normative contestation, harmonization or unification; all of such key-elements are based on the interaction or interrelationship. Therefore, Professor Robert Wai recommends to see the interlegality as follows: "with plural orders one should expect an interrelationship of normative contestation as much as an interrelationship of harmonization or unification".[2]

Private law solely is not able to face the realities emerged in the context of plural normative orders. Such latter orders might be used with a view to evolve the transnational governance. Private law needs the help of the conflict of laws. In the 2000s, Professor Robert Wai argued that the conflict of laws "can contribute to an effective system of transnational governance".[3] This contribution plays a key-role in a pluralistic system of regulation permeated by State, inter-State, supra-State, non-State and sub-State actors altogether.

In Professor Daniela Caruso's understanding, TPL evolves under the umbrella of the world (commercial) order thrived mainly in the 2000s[4]. The main peculiarity of such world (commercial) order is related to the "an intricate mix of cross-border dealings between individuals (private actors – *A/N*) and public entities". Such latter entities are acting, logically, *de jure gestionis*. In the very beginning of the 20th century, a similar mix encouraged the American legal realists to spread their ideas in order to diminish, even to deconstruct, the private/public (law) distinction. For instance, it had been stated that "private contracts adjudication constitutes a matter of public policy making".[5]

Anyway, the Westphalian duo (international law/domestic laws) began to be under attack.[6] Furthermore, the ideology of this duo seemed to be weakened in the context of cross-border (commercial) dealings. Such dealings have been made among different and plural merchants located in different places in the world. Transnational activities of the merchants (transnational

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[1] See Boaventura de Sousa Santos, *Toward a New Legal Common Sense* 437(2d ed. 2002), as quoted by Robert Wai, *op. cit*.
[2] See Robert Wai, *op. cit*.
[3] See Robert Wai, *op. cit*.
[4] See Daniela Caruso, *Private Law and State-Making in the Age of Globalization,* 2005-2006, www.nyujilp.org , last visited 10/09/2020.
[5] See Morris Cohen, "The Basis of Contract", 46 *Harvard Law Review* 553, 562(1933).
[6] See Stephen D. Krasner, "Compromising Westphalia", *International Security*, vol.20, no.3 (winter 1995-1996), pp.115-151.

commerce) evolved more and more, respectively required a particular body of law, but not one "centralized" by the States. That is TPL in its version of the so-called new *lex mercatoria*. The old *lex mercatoria* - that is the *lex mercatoria* emerged in the Middle Ages - have been seen as a true threat under the Westphalian logic issued in the 16th century and developed during three centuries.[1] At least prior to 2020, TPL is to be assessed as a legal tool to be used by the merchants with the goal "to depart from State-based rules or courts".[2] In other words, the (new) merchants achieved a successful 'privatization" of the disputes - by the way of commercial arbitration, and of the "substantive" rules (true usages and course of dealings) to be applied in their disputes.

It is easy to notice that TPL deploys a procedural level. Such level consists of the rules of commercial arbitration applicable to the procedure of solving the disputes among the merchants. Furthermore, TPL deploys a substantive level. Such level consists of usages and course of dealings applicable to the merits of the disputes among the merchants. At least in its substantive dimension, transnational commercial law, hereinafter TCL, part of TPL, emerged on the basis of revolutionary methods. Such methods are revolutionary for at least one reason: TCL 'implies a new approach intended to enable us to devote our efforts to a far greater extent to 'co-ordinating' laws instead of attempting to solve a 'conflict' of laws"[3]. In other words, TCL constitutes the expression of coordinating different and plural commercial (municipal) laws. The success, if any, of such coordination might cause, at least in commercial field, the uselessness of the concept of "conflict of laws". Maybe we are going to answer "Yes" to the question "Is Conflict of Laws Becoming Passé?" worded in the 2000s.[4]

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[1] See Bernardo M. Cremades, Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions,* 2, B.U. INT'L., L.J. 317, 319-20(1984).

[2] See Daniela Caruso, *op. cit.*

[3] See Eugen Langen, "From Private International Law to Transnational Commercial Law", in *Comparative and International Law Journal of Southern Africa*, volume 2, issue 2, July 1969, pp.313-320.

[4] See Harold Berman, "Is Conflict of Laws Becoming Passé? An Historical Response", in Hans-Eric Rasmussen-Bonne, Richard Freer, Wolfgang Luke, Wolfgang Weitnauer (eds.) *Balancing of Interests: Liber Amicorum Peter Hay zum 70.Geburtstag,* Verlag Recht und Wirtschaft GmbH, 2005; Emory Public Law Research paper No.05-42, available at SSRN: https://ssrn.com/abstract=870455 , last visited 10/09/2020.

4.5. Professor Gregory Shaffer's Understanding on TL

TL constitutes a particular body (field) of law which is not "exclusively or predominantly private law making".[1] In other words, the public and private sides of the (transnational) normative life coexists under the generous umbrella of the TL. Unlike international law, be it public or private, and municipal laws, TL is denationalized.[2] Professor Gregory Shaffer understands TL as being detached from the States; TL lives and flourishes without the States. Under its denationalized dimension, it seems as follows: "trans" means, in Professor Gregory Shaffer's understanding, (more) "*without* (the States)" than "*across, beyond, through*" the States or *without* the State/*across, beyond, through* the State altogether.

The pillars of the Professor Gregory Shaffer's TL are transnational legal norms, transnational legal processes and transnational legal orders[3]. It is appropriate to point out the meanings attributed by this scholar to the 3 (three) concepts.

First, transnational legal norms means "legal norms that cross borders and thus apply to parties located in more than one jurisdiction, but may or may be not global in nature". Such parties, be it public or private (professional/non-professional) actors, are involved in activities that cross borders and generate TS. At this stage, TL- truly a body (field) of law -, fully applies to TS. Various legal norms – which regulate various areas of social life, are subject to the export and import across borders. The so-called "flow" of legal norms might involve institutions, be it international, regional or sub-regional (for instance EU), and/or networks, be it public or private, "that define and convey the legal norm". At this stage, TL is to be seen as "Transnational Construction and Flow of Legal Norms". In other words, it is suggested to assess TL in accordance with one of the goals of the socio-legal studies, which is to identify the source of changes within various and plural legal systems. In its dimension of transnational construction and flow of legal norms, TL applies to TS and purely national or municipal situations altogether.

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[1] See Gregory C.Shaffer, Carlos Coye, "From International law to Jessup's Transnational Law, from Transnational law to Transnational Legal Orders", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements With Jessup's Bold Proposal*, Cambridge University Press, 2020, pp.126-152; UC Irvine School of Law Research Paper No.2017-02, available at SSRN: https://ssrn.com/abstract=2895159 , last visited 10/09/2020.

[2] See Gregory C.Shaffer, *op. cit*.

[3] Ibid.

Second, the aforementioned transnational construction and flow of legal norms take place through various and plural processes. At this stage, the so-called "transnational legal processes" (hereinafter "Tlps"), emerge. Tlps involve a myriad of actors, hybrid by nature; such actors deploy, across borders, activities that are also hybrid by nature. Professor Gregory Shaffer refers to various actors, such as government officials, or/and members of international secretariats, and/or professionals, and/or business representatives, and/or civil society activists. In various domains, all these actors use various legal norms, be they a mixture or an amalgam of hard law and soft law.[1]

Third, Tlps are to be seen as sources of the so-called "transnational legal orders" (hereinafter „TLOs"). Tlps take place in various and plural aspects of the social life. Therefore, TLOs are various and plural. Furthermore, it seems that TLOs are functioning semi-autonomously in different areas of social life and in different legal fields.[2] Professor Gregory Shaffer conceptualizes TLOs as a "collection of transnational legal norms and associated institutions (and other actors) within a given functional domain".[3] As already pointed out, the hybridity of the actors involved in the Tlps cannot be (anymore) denied. Furthermore, the hybridity amounts to the following idea: the members of the transnational institutions are not necessarily States; such members may be also non-State actors. The institutions are transnational because their members (*exempli gratia* public/private and/or State/non-State actors) are coming from plural and various jurisdictions.[4]

TLOs shall be not mixed up with the concept of "transnational legal ordering" (hereinafter "TLOg"). TLOg is nothing else than the above-mentioned "transnational construction, flow, settlement, and unsettlement of legal norms in particular domains".[5] In other words, TLOg depicts the legal norms that circulate across borders and permeate different domains; one of these domains is the so-called "private and business" area. That's why the

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[1] See Gregory C.Shaffer, Mark A.Pollack, "Hard vs.Soft Law: Alternatives, Complements and Antagonists in International Governance", in *Minnesota Law Review*, Vol. 94, pp.706-99, 2010; Minnesota Legal Studies Research Paper No.09-23, available at SSRN: https://ssrn.com/abstract=1426123 . See also Gregory C.Shaffer, Mark A. Pollack, "Hard Versus Soft Law In International Security", 52 *Boston College Law Review* 1147(2011), available at http://lawdigitalcommons.bc.edu/bclr/vol52/iss4/1 , last visited 10/09/2020.

[2] See Gunther Teubner, "Global Bukovina: Legal Pluralism in the World-Society", in Gunther Teubner (ed.), *Global Law without a State*, Dartsmouth, pp.3-28, 1996, available at SSRN: https://ssrn.com/abstract=896478

[3] See Gregory C.Shaffer, *op. cit*.

[4] See Ibid.

[5] See Gregory C.Shaffer, Carlos Coye, *op. cit*.

subject "theorizing transnational legal ordering of private and business law"[1] had been fervently debated. Furthermore, it should be noted the interaction between public international law, private international and TLOg. Such interaction means international law, be it public or private, and TLOg 'shape, complement and support each other".[2]

As to the concept of TLOs, I recall that this concept embraces in a normative way both formalized (hard – *A/N*) and non-formalized (soft – *A/N*) legal norms. Furthermore, the same concept has been designed to collect "associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions".[3]

4.6 Professor Christopher Whytock's Understanding on TL

„Conflict of laws contributes to transnational legal order (TLOs)".[4] That's one of the key-ideas worded by Professor Christopher Whytock. It is easy to notice that this scholar addresses a particular level of TL; that is the level of TLOs, as defined above. Therefore, various conflict of laws rules, be it hard rules or soft ones, constitute one of the foundations of the TLOs. The other one is international law. In our times, conflict of laws and international law are separated. It had been suggested to initiate a new dialogue between the conflict of laws and the international law with a view to approach such legal fields fully together.[5] Such not separated focus reminds us that the founders of the conflict of laws initially viewed their subjects as "part and parcel of international law, namely that part that deals with private entitlements and

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[1] See Gregory C. Shaffer, "Theorizing Transnational Legal Ordering of Private and Business Law", UC Irvine Journal of International, Transnational and Comparative Law:Vol.1, 1, 2016, available at: https://sholarship.law.uci.edu/ucijil/vol1/issu1/2.

[2] See Gregory C.Shaffer, Terence Halliday, *With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering*(December 8, 2016). UC Irvine School of Law Research Paper No.2016-59, available at SSRN: https://ssrn.com/abstract=2882851, last visited 10/09/2020.

[3] See Gregory C.Shaffer, Carlos Coye, *op. cit*.

[4] See Christopher A. Whytock, *op. cit*.

[5] See Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 Journal of Private International Law 121(2008); see also Alex Mills, *The Confluence of Public and Private International Law- Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge University Press, 2009.

litigation"- and, for this reason, Joseph Story named it "private international law"(conflict of laws)".[1]

The afore-mentioned contribution is evolving in spite of the (yet) predominant contemporary domestic or municipal character of the sources generating the conflict of laws. Therefore, the legal background of the conflict of laws is fully fragmented. Reassessing it as the old-new part of international law, the conflict of laws shall assume nomore its fragmented status, even if in the last 50 years international law itself became diverse. As constitutive part of the international law, the conflict of laws itself is able to generate a fruitful existence of TL understood in its dimension of TLOs. For the time being, we are living in a sort of strange situation; conflict of laws contributes to TLOs, "but conflict of laws is itself traditionally disordered".[2] Furthermore, Professor Christopher Whytock points out clearly that such situation persists even if the European Union and the Organization of American States provide, in an ordered way, truly transnational levels of regulation on the conflict of laws, at least in two areas (commercial law and family law).

To sum up, Professor Christopher Whytock's TL is to be understood in its dimension of TLOs. Such TLOs are consisting of international law and conflict of law rules altogether. Under the umbrella of TLOs, conflict of laws might (re)become a part of international law. Such umbrella facilitates the coexistence of private and public actors acting in plural and various domains, including the domain of transnational commercial arbitration.[3]

4.7 Professor Harold Hongju Koh's Understanding on TL as Transnational Legal Process (hereinafter called „Tlp")

"Why Do Nations Obey International Law?" is not an ordinary question.[4] It is a question that had been formulated in order to find out among other issues the meaning of Tlp. In Professor Koh's vision, TL constitutes an

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[1] See Mathias Reimann, *A New Restatement - For the International Age*, 75 Indiana Law Journal, 575, 577(2000). This article is also quoted by Christopher A. Whytock, *Toward a New Dialogue Between Conflict of Laws and International Law,* American Journal of International Law (AJIL) Unbound, Vol.110, 2016; UC Irvine School of Law Research Paper No.2018-22, available at SSRN: https://ssrn.com/abstract=3145220, last visited 10/09/2020.

[2] See Christopher A. Whytock, *op. cit*.

[3] See Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12 Bus.&Pol.Article 10(2010), available at http://scholarship.law.uni.edu/faculty_scholarship, last visited 10/09/2020.

[4] See Harold Hongju Koh, *op. cit*.

undeniable and lively body (field) of law. The rules of TL occur and evolve in light of the concept of Tlp.[1] Professor Koh suggested a descriptive concept of Tlp as follows: "Tlp describes the theory and practice of how public and private actors- nation-States, international organizations, multinational enterprises, non-governmental organizations, and private individuals - interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize rules of transnational law". Tlp shall be distinguished from the so-called "international legal process" (hereinafter "ILP"). The concept of ILP had been coined by Abram Chayes, Tom Ehrlich and Andreas Lowenfeld in 1968. Through the lens of any ILP, it is possible to study "the law's role in the process of policy decisions in the international realms".[2]

Professor Koh points out four main and distinctive features of any Tlp.

First, Tlp is far from being traditional. It is fully non-traditional for at least one reason: the study of international law does not differentiate anymore public from the private, and domestic from international. In fact, the so-called "transnationalists" are promoting the blending of international law and domestic law(s); furthermore, the transnationalists suggest that "the power of the executive branch should be constrained by judicial review and the concept of international comity (...)".[3]

Second, Tlp is far from being exclusively nation-State centred. In other words, any Tlp involves States, State actors and non-State actors altogether. It seems that any Tlp facilitates the horizontal coexistence of the actors, be it States, State and/or non-State actors, involved in various TS that generate TLPs. Such horizontal or polycentric coexistence fully loosen the vertical relationship between States, respectively State actors and non-State actors. Furthermore, the aforementioned coexistence fully promotes the flourishment of the interactions among hybrid actors with the goal to generate the interactions between international law and local or domestic laws.

Third, Tlp is far from being static. It is fully dynamic and restless. For the purpose of reaching its dynamism, Professor Koh's Tlp "transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again". The

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[1] See Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process,* 75 Nebraska Law Review(1996), pp.181-207, available at: https://digitalcommons.unl.edu/nlr/vol75/iss1/7 , last visited 10/09/2020.

[2] See Harold Hongju Koh, *op. cit*.

[3] See Harold Hongju Koh, *Why Transnational Law Matters,* Penn St.Int'L.Rev.745-753(2006).

consequences of such dynamism are manifold. For instance, domestic laws, be it private or public laws, contain legal concepts arising out of international settings; furthermore, international (public and/or private) laws contain legal concepts arising from domestic settings.

Fourth, Tlp is fully normative. The interaction between the above-mentioned actors generates interactions between international law, be it public or private law, and domestic laws, be it public or private law. A new set of rules emerge. Such latter rules constitute the core of the TL understood as a specific body of law. The rules of TL are "interpreted, internalized and enforced, thus beginning the process all over again". I take my liberty to add that the rules of TL are also internationalized. Professor Koh also points out at least two dimensions of such last feature of any Tlp. First, Tlp is normative in the dimension that it depicts the workings of such process. It should be reminded that Professor Koh's TL constitutes a "kind of hybrid between domestic and international law that can be downloaded, uploaded, or transplanted from one system to another".[1] Under this first dimension, any Tlp reflects "how international interaction among transnational actors shapes law". Second, Tlp is normative because of its... normativity. "Normativity" means that any Tlp develops the ability to point out "how law shapes and guides future interactions: in short, how law influences why nations obey". Under the umbrella of the aforementioned dimensions of any Tlp, the circle is completed, as the interactions among hybrid actors facilitate the emergence of various and hybrid rules of law; the latter rules facilitates the emergence of various and hybrid interactions among various and hybrid actors, be it States, State actors and/or non-State actors. At this stage, we are locating ourselves in the universe of TL. In other words, TL fully deploys in front of our eyes its miraculous existence.

5. Professor Emmanuel Gaillard's Understanding on TL as Method of Decision Making (hereinafter called "MofDM")

For the purpose of understanding the approach of this scholar, it seems appropriate to underline some ideas. Firstly, in the world of merchants, the general principles of law amount to the status of the transnational (commercial) rules of law (*lex mercatoria*) which occur and evolve independently of any domestic or national legal order. *Lex mercatoria*

[1] See Harold Hongju Koh, *op. cit*.

consists also of mercantile customs generally accepted by trading nations.[1] Secondly, the rules of mercantile law (*lex mercatoria* or law merchant) and of maritime law emerged as constitutive part of the so-called "Law of Nations" (*jus gentium*). The other two constitutive parts of the Law of Nations were natural law and "the mutual transactions between sovereigns as such which alone could be called both 'inter-national' and 'law' ".[2] In other words, the Law of Nations had been designed to focus on "private as well as public, domestic as well as trans-border transactions"; the system of the Law of Nations was monistic, inasmuch as international law and domestic law together constituted a unified legal system, with domestic institutions acting as important interpreters and enforcers of international legal norms.[3] The monistic era of the international law had been replaced in 1789 by Jeremy Bentham by the way of inventing the term "inter-national law". A dualistic approach of international law occured. Therefore, Jeremy Bentham suggested as follows: "the public law of nations operates on a separate horizontal plane for States only"; in other words, the dualistic era of international law means the departure from natural law to positivism.[4] Under the umbrella of such positivism, the States themselves create the international law.

In the universe of international commercial proceedings, the arbitrators enjoy the power to apply rules of law as well as (domestic) laws to the substance of the dispute. In the light of the UNCITRAL Model Law,[5] various domestic regulations based on such quasi-legal international instrument allow such power. Such rules of law are nothing else than transnational commercial rules or *lex mercatoria.*[6] In other words, commercial rules of law constitute the soul of the so-called "transnational commercial law", hereinafter called "TcL"; TcL is, logically, a constitutive part of the TL itself. Professor Emmanuel Gaillard contemplated TL, understood in its dimension of TcL, merely as MofDM, to be used in international commercial arbitral proceedings, rather than as a list of general

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[1] See Harold Hongju Koh, *supra* note 5. This scholar quotes Harold J. Berman, *supra* note 59. In Harold J.Berman's view, the notion of „world law embraces, but not replace, the term 'international law'(...) and the term 'transnational law' ".

[2] See Harold J.Berman, *supra* note 96.

[3] See Harold Hongju Koh, *supra* note 5.

[4] See Harold Hongju Koh, *supra* note 5.

[5] See article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments, as adopted in 2006.

[6] As to the interplay between commercial arbitration and transnational law, see Peer C.Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law,* European Law Journal, volume 8, no.3, pp.400-432, 2002.

principles of commercial law.[1] Such approach does not deny the usefulness of the list of the principles of commercial contract law, hereinafter called "UNIDROIT Principles" drafted under the auspices of the International Institute for the Unification of Private Law (hereinafter called "UNIDROIT").

In the context of using TcL, understood in its meaning of MofDM, Professor Emmanuel Gaillard suggested that in any given commercial dispute, the arbitrators enjoy the power to derive "the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice-of-law process, but from a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognized".[2] The lively background of such the purpose to limit any "comparative law analysis to two legal systems or to those of a region"; secondly, the wide acceptance of the transnational commercial rules of law that are to be applied to the substance of the dispute; thirdly, the aforementioned acceptance "must be sufficiently wide for the rule to be qualified as a general principle of law". It should be noted that, in Professor Emmanuel Gaillard's view, transnational (commercial) rules do not encompass, technically speaking, the trade usages.

In sum, this scholar suggests that TcL, understood in its dimension of MofDM, does not amount to a distinct legal system revisited. It seems that it is more practical to contemplate TcL as follows: "if not a genuine legal order, Tcl perform (...) a function strikingly similar to that of a genuine legal system".

6. Professor Peer Zumbansen's Understanding on TL as Tool or Experiment to be Used in Legal Methodology

In the Age of Globalization, if any, national societies - the core of the nation-States, are going to be replaced by the so-called "world society". It seems that the world society does not feel a need to deal with the nations-States. The world society acts and reacts in a different normative reality that is quite detached from national roots. Such *sui generis* normative reality mixes up elements arising out of international, domestic, federal and quasi-federal legal orders altogether. In the last 30-40 years, the aforementioned legal orders were intersecting each other actively. The world society felt the

[1] See Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making*?, Arbitration International, volume 17, issue 1, 1 March 2001, pp.59-72.
[2] See Emmanuel Gaillard, *supra* note 102.

need of a specific tool to manage the interplay between international law and domestic law, respectively between public law and private law. Furthermore, the empty spaces, if any, between international and domestic law, respectively between public law and private law had to be filled in. The "spaces", if any, are to be exclusively understood in their methodological (functional- *A/N*) and not in their territorial dimension.

In the context above, Professor Peer Zumbansen suggests "to understand TL primarily as a methodological approach and less as a distinctively demarcated legal field, such as contract or administrative law".[1] In the middle of the tensions, if any, between international law and domestic law, respectively between public law and private law, the world society is struggling to identify a legal device in order to survive and flourish. That is TL understood as "methodological inquiry into the nature of law in a global context".[2] In other words, Professor Peer Zumbansen suggests approaching the TL under the umbrella of a specific tool or experiment to be used in legal methodology. Such latter tool or experiment is useful for at least one reason: „the tensions between national and global, public and private, law and non-law can be understood as constitutive elements of an emerging understanding of the Law of World Society".

To sum up, in Professor Peer Zumbansen's understanding, TL is more a method than a distinct field of law. Such method deploys its roots in the context of international law, conflict of laws, comparative law and sociological jurisprudence. By the way of using such roots, TL constitutes a proper tool for legal methodology. Such tool is going to be used in order to complement and/or supplement international law and domestic laws.[3]

7. Professor Ralf Michaels's Understanding on TL as Theory of Law

Unlike Professor Gregory Shaffer, Professor Ralf Michaels suggests that TL is not detached from the States. The latter professor suggests also that TL lives and flourishes beyond the States, but not without the States.[4] "Beyond the State" does not mean that TL does not rely on the State; TL relies on the State "including when it simultaneously gives rise to the transformations of

[1] See Peer Zumbansen, *supra* note 52.
[2] See Peer Zumbansen, *supra* note 46. See also Peer Zumbansen, *Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiarity,* 79 Law and Contemporary Problems 215-238 (2016), available at: https://scholarship.law.duke.edu/lcp/vol79/iss2/10
[3] See Peer Zumbansen, *supra* note 54.
[4] See Ralf Michaels, *supra* note 32.

the State". In other words, the State might be seen as a transnational legal order, (TLO), on the one hand, states qualify themselves as TLOs, on the other hand.

The so-called "transnationalization" of the State evolves in conjunction with the decline of the Westphalian model that amounted to the basis of the nation-State. Under the latter model, the (traditional) international law was based on the principles of territoriality and State autonomy.[1] Furthermore, the transnationalization, if any, of the State proclaims at least three lively consequences. First, the State is and/or becomes a TLO. Secondly, TL should be contemplated as a reproduction of national law.[2] Thirdly, the so-called "theory of TLOs" should be conceived broadly. In Professor Ralf Michaels's understanding, such theory embraces and/or encompasses the States as factors and objects altogether of the aforementioned theory. In the light of such ideas, the latter professor points out clearly that "TL is no longer a body of law and does indeed become a theory of law".

8. The Areas of TL

Irrespective of its meanings that might well be inter-connected, TL acts and reacts in various areas. I am not going to be bold and suggest an exhaustive of the list of such areas. It might be more cautious from my side to point out only, *exempli gratia,* some areas. Previous scholarly writings helped me a lot in so doing.

If TL is going to be contemplated as a purely transfer of laws, we are finding ourselves in the universe of Professor Koh's Tlp. Therefore, it is about the transfer of laws between domestic and international or/and between international and domestic law and/or between domestic laws (legal transplants). Such transfer constitutes the core of any Tlp. Tlp evolves in a way to articulate the transnational legal substance, hereinafter called "TLS".[3] TLS encompasses private law. That is TPL "that has emerged in a variety of areas, such us the new *lex mercatoria,* international finance, international banking law, and the law of cyberspace". It might be added, for instance, the transnational contract law.[4] TLS encompasses also public

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[1] As to the source of the predominance of sovereignty in Westphalian model, see Stephen D.Krasner, *Compromising Westphalia*, 20 Int'l Security 115(1995). Such paper is quoted by Harold Hongju Koh, *supra* note 5.

[2] See Ralf Michaels, Nils Jansen, *Private Law Beyond the State ? Europenization, Globalization, Privatization,* 54 American Journal of Comparative Law, 843, 886-87.

[3] See Harold Hongju Koh, *supra* note 94.

[4] See Graf-Peter Calliess, *The Making of Transnational Contract Law,* Indiana Journal of Global Legal Studies:Vol.14:Iss.2, Article 12.

law that has emerged in several areas. Professor Koh suggests to contemplate as TL some "public" areas such as: the law of global democracy, the law of global governance, the law of transnational crime, the law of transnational injury and redress, the law of regulation of transnational markets, the law of transnational dispute resolution.

Under the umbrella of the so-called "public" areas of TL, we also find the conflict of laws, which is able to promote an effective system of transnational governance.[1] On this occasion, it should be reminded that Professors Bartolus of Sassoferrato (1313-1357) and Baldus of Perugia (1327-1400) "inaugurated private international law as the branch of international law";[2] the other branch is public international law. In other words, the theory of conflict of laws amounts to public law and not to private law. That's why the conflict of laws enters the sphere of public transnational law and not of private transnational law. Furthermore, public transnational law might encompass the so-called "transnational (rules of civil) procedure".

In Professor Peer Zumbansen's view, the "public" side of TL focuses also, for instance, on the issues related to the human rights litigation, constitutional law, administrative law; the "private" side of TL concentrates, for instance, on the topic of corporations (the so-called "corporate governance").[3] Last, but not least, scholars spread the idea that TL focuses on comparative law, investment law, and regulation of the cross-border derivatives.[4]

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[1] See Robert Wai, *supra* note 18.

[2] See Harold Hongju Koh, *supra* note 5.

[3] See Peer Zumbansen, *Transnational Law. Comparative Research*, in Law & Political Economy, Research paper No.9/2008, available at http://digitalcommons.osgoode.yorku.ca/clpe/181; furthermore, see Peer Zumbansen, *supra* note 15, and Peer Zumbansen, *Transnational Law, Evolving*, Comparative Research in Law & Political Economy, Research Paper No.27/2011, available at http://digitalcommons.osgoode.yorku.ca/clpe/65 .

[4] See Ralf Michaels, *Transnationalizing Comparative Law* (December 17, 2015); Duke Law School Public Law &Legal Theory Series no.2016-8; TLI Think! Paper 02/2016, available at SSRN: https://ssrn.com/abstract=2705436 ; See also Nicoles M. Perrone, *International Investment Law as Transnational Law*(January 22, 2020), in Peer Zumbansen(ed.), *Oxford Handbook of Transnational Law* (Oxford & New York: Oxford University Press), 2020, available at SSRN: https://ssrn.com.abstract=3523632 or http://dx.doi.org/10.2139/ssrn.3523632 , and Hannah L.Buxbaum, *Transnational Legal Ordering and Regulatory Conflict: Lessons from the Regulation of Cross-Border Derivatives*(2017). Uc Irvine J.Int.'l, Transnat'l, & Comp.L.91(2016); Indiana Legal Studies Research Paper No.365, available at SSRN: https://ssrn.com/abstract=2905197

It easy to notice that TL covers plural and various areas of law, be it public or private law or public-private law altogether. In the latter category enters, for instance, labor law- "an area of law that has forever been at the frontlines of conflict between a libertarian private law ideology ('you get what you contracted for') and a public and social law architecture committed to redistribution".[1] TS and ATS enable public law and private law to blend each other. Furthermore, it had been previously pointed out the deep interpenetration of domestic (legal) systems and international (legal) system.[2] The tensions, if any, of such merger and interpenetration are to be managed in the light of the TL. The legal minds must be accommodated with the aforementioned merger and interpenetration. Such accommodation might occur under the roof of the law schools and in the context of studying TL.

9. TL and Legal Education

Do we need legal education in TL? Certainly we are in a full need of a (new) legal curriculum that might provide a general course on TL. Prestigious scholars suggested already that law schools cannot neglect anymore the transnational reality from nowadays. As already pointed out, such transnational reality permeates various and plural areas of law, be it international or domestic, respectively public or private law.

Professor Mathias Reimann suggested in the 2000s a new basic course for the international curriculum. That is TL general course dealing with "the breadth, diversity, and the interrelatedness of current international legal issues".[3] There are at least two reasons that support the idea of teaching such a TL general course. First, since the end of the (old and bi-polar) Cold War, the line or the boundary between public and private international law is not anymore so certain and fully meaningful. Second, since the end of the (old and bi-polar) Cold War, the line or the boundary between international law and domestic law became "less clear and rigid as well", as Professor Mathias Reimann pointed out already. I dare to suggest another reason as well: the new legal global order from nowadays – that might amount to a (new and multi-polar) Cold War, requires the need to face the new reality. The foundations of such latter reality amount to the blending of public law

[1] See Peer Zumbansen, *supra* note 105.
[2] See Harold Hongju Koh, *supra* note 5.
[3] See Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, Penn State International Law Review: Vol.22:No.3, 2004, Article 3, available at: http://elibrary.law.psu.edu/psilr/vol22.iss3/3.

and private law, respectively to the interpenetration of (domestic) legal systems and international (legal) system.

Professor Mathias Reimann suggests 4 (four) pillars for a TL general course. In other words, such course should focus on (i) the major actors (State and non-State) of TL, (ii) the sources (of public and private international law) of TL, (iii) the leading principles (of international jurisdiction and cooperation) of TL, (iv) the most important dispute resolution mechanisms (both public and private).

"Why TL matters?" of Professor Koh might be reworded as follows: "Why transnational legal education matters?" It matters because international relations are not anymore exclusively State-centred; the individuals, corporations, NGOs interact actively within manifold networks that transcend the borders of the States. Therefore, Professor Koh suggested also in the 2000s "international modules in the basic courses of Procedure, Torts, Constitutional law and Contracts". In the context and subtext of such modules, the students should be accommodated with discussions on Transnational Contracts, Transnational Torts, Transnational Crimes, Transnational Procedure, Transnational Property, Transnational Constitutional Law and so on.

Last but not least, Professor Peer Zumbansen and other scholars suggest including transnational law elements in the first-year law school curriculum.[1] Such suggestion aims "to illustrate the transnationalization of law at the heart of what is usually considered as law with a merely domestic scope". In his previous writings,[2] Professor Peer Zumbansen also pointed out that specific disputes "have long ceased to be of concern only to those working in international law". For instance, the so-called "Filártiga decision" rendered in the 1980s inspired subsequently a lot of claims brought against State actors and non-State actors (private corporations) by

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[1] See Peer Zumbansen, *Why Global law Is Transnational: Remarks on the Symposium around William Twining's Montesquieu Lecture*, Transnational Legal Theory 4.4(2013): 463-475. This author mentions also the efforts developed to adapt the first-year law curriculum to the transnational realities of the 21st century. Professor Peer Zumbansen mentions, for instance, Gerald Torres, *Integrating Transnational Legal Perspectives into the First Year Curriculum,* 23 Penn State International law Review 801, 2005; Rosalie Jukier, *Challenging the Existing Paradigm: How to Trans-nationalize the Legal Curriculum,* 24 Penn State International Law Review 775, 2006; Anita Bernstein*, On Nourishing the Curriculum with a Transnational law Lagniappe,* New York Law School, Public Law and Legal Theory Research Paper Series 06/07, available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=987347

[2] See, for instance, Peer Zumbansen, *supra* note 114.

former victims of human rights violations. The famous *Kiobel v. Royal Dutch Petroleum Co*. case is one expression of such inspiration.[1]

All such ideas encourage all of us to rethink the legal curriculum in order to put the legal minds of the students in line with the transnationalism that surrounds the classic normative settings. "We are in an important sense all comparatists now (...)".[2] Such wording might be re-dimensioned as follows: "We are in an important sense all transnationalists now". It need to be re-dimensioned for at least 3 (three) reasons suggested previously by Professor Koh.[3] First, law is "downloaded" from international law to domestic or municipal law; therefore, the experts on domestic laws must possess relevant knowledge of international legal system. Secondly, law is "uploaded (from domestic laws to international law) then downloaded (from international law to domestic law)"; therefore, the experts on international law and domestic laws must possess relevant knowledge of the international legal system and domestic legal systems altogether. Thirdly, law is "borrowed" under the umbrella of legal transplants from a specific domestic legal system to another specific domestic legal system; therefore, the legal experts originating in a specific domestic legal system must possess relevant knowledge of the domestic legal system of the "borrower". In the last hypothesis, comparative law accompanies and promotes transnationalism.

10. Conclusion

We are living in liquid times. The firm distinctions deployed in the past Ages are not anymore available in the Fluid Age that we are living. The fragility, if any, of such firm distinctions (*exempli gratia,* State law/non-State law, international law/domestic laws, public law/private law) might be overcome and/or managed in the light of TL, be it body (field) of law (legal system), or transnational legal process, or method of decision making, or tool to be used in legal methodology, or device to be used in the theory of law. It should not be neglected that all such meanings and others, if any, of

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[1] See Patrick Kinsch, *The Demise of International Human Rights Litigation in the US Courts ?,* Chris Thomale, *The Kiobel tragedy: missed chances for corporate social responsibility*, Fabien Marchadier, *Extraterritorial application of domestic statutes: tip-toeing around the issue of international competence*, in Horatia Muir Watt, Lucia Bizikova, Agatha Brandao de Oliveira, Diego P. Fernandez Arroyo (eds.), *Global Private International Law. Adjudication without Frontiers*, Edward Elgar Publishing Limited, Cheltenham, 2019, pp.302, 303-309, 310-318, 319-331.

[2] See Peer Zumbansen, *supra* note 119. The author quotes the wording of William Twinning expressed on the occasion of his lecture held in the context of the Tilburg Law Lecture Series, Montesquieu Seminars, vol.4, n.30-31, 2009.

[3] See Harold Hongju Koh, *supra* note 94.

TL might be more or less fully (inter-)connected. Irrespective of the meaning or conception attributed to TL, I dare to say that TL evolves as a true phenomenon. That is transnationalism that might be assessed as being the origin and the goal of TL. It seems that transnationalism might be captured not only in purely legal order, but also in legal sociology and legal anthropology settings altogether. In the light of its hybrid nature, TL amounts to the focus of the study of Law and of (World) Society.

Furthermore, TL allows us to dream, as Professor Jessup did in 1950s.

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Legal Implications of Outer Space Warfare
- Part I -

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Abstract**:** *Beginning with 1966, under the aegis of the United Nations, five international treaties covering various aspects of states' activities in outer space came into existence, the most important being the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies or "the Outer Space Treaty" (OST). However, as technological development progressed and states incurred new vulnerabilities from their dependence on space-located assets, the danger of conflict in this new realm also increased, thus transforming outer space into an area of confrontation.*

Currently, there is no clarity as to the interpretation of international legal norms in the particular context of outer space warfare. The international legal community has promoted two initiatives, with the aim of drafting a manual on the applicability of international law in the context of space military operations. Both the Manual on International Law Applicable to Military Uses of Outer Space (MILAMOS) and the Woomera Manual on the International Law of Military Space Operations attempt to draw from other relevant manuals, such as the San Remo Manual or the Tallinn Manual which contain soft law rules on armed conflicts at sea and, respectively, on cyberspace conflicts.[1]

The purpose of the present paper is to analyse the five UN treaties pertaining to outer space and to clarify certain issues related to the legal regime of this environment, such as the definition of outer space, the

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[1] "What is the MILAMOS Project", available at <https://www.mcgill.ca/milamos/>, last visited 10/09/2020 (hereinafter cited as: The MILAMOS Project); "Drafting the Woomera Manual", available at <https://law.adelaide.edu.au/woomera/drafting-the-woomera-manual>, last visited 10/09/2020 (hereinafter cited as: The Woomera Manual).

demarcation of outer space from airspace and the legal status of the geostationary orbit.

Key-words: *Outer Space Treaty; geostationary orbit; delimitation; customary international law; res communis.*

1. Introduction

The Statute of the International Court of Justice (ICJ) contains, in Article 38(1), a list that commentators refer to as being the most authoritative statement of the sources of international law.[1] Consequently, according to the said article, the formally acknowledged sources of international law are treaties, custom, general principles of law, judicial decisions and the teachings of the most highly qualified publicists.

Space law is a newly developed branch of international law, the earliest attempts to formulate norms pertaining to this subject dating back to the end of the 1950s, when the UN General Assembly acknowledged the necessity of cooperation in space-related matters and of concluding international agreements.[2] To materialize these efforts, the General Assembly established an Ad Hoc Committee on the Peaceful Uses of Outer Space, tasked with the analysis of the technical, legal and other issues raised by the launch of the first satellite.[3] The Committee (COPUOS) became permanent one year later, in 1959, and its works are the roots of the cluster of international agreements pertaining to outer space.[4]

The outer space legal framework comprises the five UN treaties dealing with general and particular issues triggered by the states 'activities in this

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[1] United Nations, Statute of the International Court of Justice, 18 April 1946, Art. 38(1); Malcolm N. Shaw, *International Law*, Cambridge University Press, Seventh Edition, 2014, p. 70; James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th Edition, 2012, p. 20; Cassandra Steer, "Sources and law-making processes relating to space activities", in Ram Jakhu, Paul S. Dempsey, *Routledge Handbook of Space Law*, Routledge, 2017, pp. 3-24, p. 5.

[2] United Nations General Assembly Resolution 1348 (XIII), 13 December 1958, A/RES/1348 (XIII); Isabella Henrietta Philepina Diederiks-Verschoor, Vladimir Kopal, *An Introduction to Space Law*, Kluwer Law International, 2008, p. 2; Peter Jankowitsch, "The background and history of space law", in Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law*, Edward Elgar Publishing, 2015, pp. 1-28, p. 10.

[3] Jankowitsch (2015), p. 10; Bin Cheng, *Studies in International Space Law*, Clarendon Press Oxford, 1997, p. 102; Diederiks-Verschoor and Kopal (2008), p. 3.

[4] United Nations General Assembly Resolution 1472 (XIV), 12 December 1959, A/RES/1472 (XIV), Part A, Art. 1; Jankowitsch (2015), p. 12; Cheng (1997), p. 217.

new environment.[1] The present article will analyse each of these instruments in the following paragraphs. However, it will firstly attempt to clarify the issues related to the legal status of outer space, including the controversial aspect of delimiting outer space from air space.

2. The Legal Status of Outer Space

Discussing sovereignty in the merits of the *Palmas Arbitration,* Judge Max Huber underlined the tripartite classification of territory according to the degree of sovereignty a state might exercise over it and as recognized under international law.[2] Firstly, there is the national territory over which the state has full sovereignty and jurisdiction, including the territorial sea, soil, subsoil and the column of air above.[3] The second category is *terra nullius,* which designates a territory open for acquisition, over which no state exercises sovereignty.[4] *Res communis* or *res extra commercium* displays the same absence of sovereign control but, as opposed to the second category, states are not allowed to acquire it.[5] The 1970 UN General Assembly Declaration on the Seabed and Ocean Floor introduced a new territorial regime, *the common heritage of mankind,* which was subsequently reiterated in the Moon Agreement and the Convention on the Law of the Sea.[6]

Territories designated as *res communis* or *common heritage of mankind* cannot be acquired by states. However, the former allows freedom of access,

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[1] United Nations, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, United Nations General Assembly Resolution 2222(XXI), 1966; United Nations, Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, United Nations General Assembly Resolution 2345 (XXII), 1967; United Nations, Convention on International Liability for Damage Caused by Space Objects, United Nations General Assembly Resolution 2777 (XXVI), 1971; United Nations, Convention on Registration of Objects Launched into Outer Space, United Nations General Assembly Resolution 3235 (XXIX), 1974; United Nations, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, United Nations General Assembly Resolution 34/68, 1979.

[2] Permanent Court of Arbitration, Island of Palmas Case (Netherlands, USA), 4 April 1928, Reports of International Arbitral Awards, Volume II, pp. 829 – 871, p. 838.

[3] Cheng (1997), p. 386; Brownlie's Principles (2012), p. 447; Shaw (2014), p. 354.

[4] Brownlie's Principles (2012), p. 251; Jan Klabbers, *International Law*, Cambridge University Press, 2013, p. 77; Shaw (2014), p. 355.

[5] Brownlie's Principles (2012), p. 252; Shaw (2014), p. 355.

[6] United Nations General Assembly Resolution 2749 (XXV), "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction", 17 December 1970, para. 1; The Moon Agreement, Art. XI (1); United Nations, Convention on the Law of the Sea, 10 December 1982, Arts. 136, 137.

exploitation and exploration, while the latter is regulated by a strict international management regime based on equity in terms of distribution of resources and benefits derived from its exploitation.[1] The OST explicitly prohibits the appropriation of outer space, the Moon and other celestial bodies, while mentioning that the exploration shall benefit all states, without discrimination as to the economic or scientific development.[2] At a first glance, the wording of Article I seems to suggest that outer space and its elements fall within the scope of the common heritage of mankind. However, this exploration "for the benefit and in the interests of all countries" is more likely to imply open access and dissemination of scientific information with the international community, as well as access to telecommunication or weather satellites. The OST does not provide for the obligation of establishing an international regime to manage resources on an equitable basis, unlike the Moon Agreement.[3] Consequently, there appears to be a contradiction between the two instruments as to the legal status of outer space. To solve this impediment, recourse shall be made to the status of each of the two instruments and their acceptance by the international community. On the one hand, as will be demonstrated in the second part of the present article, the provisions of the OST, at least those deriving from the UN General Assembly Resolutions on outer space, have gained the status of customary international law.[4] On the other hand, the Moon Agreement has been ratified by an exceptionally small number of states compared to the total membership of the UN.[5] At best, its provisions are binding *inter partes.* Nevertheless, an international management regime for lunar and celestial bodies resources, as suggested by the phrase *"common heritage of mankind"* included in the Moon Agreement, established among 18 non-space faring states is highly unlikely to function. Recognition by a vast majority of the international community is inherent in the nature of the concept and is required for it to emanate rights and obligations.

In conclusion, the author of the present article considers that the outer space, the Moon and other celestial bodies shall be considered *res communis*, outside national appropriation but allowing freedom of exploration and exploitation. The first argument supporting this conclusion is the fact that

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[1] Cheng (1997), p. 386; Shaw (2014), p. 385
[2] The Outer Space Treaty, Arts. I, II.
[3] The Moon Agreement, Art. XI.
[4] *See* pp. 11-13.
[5] Only 18 states ratified the Moon Agreement. United Nations Office for Outer Space Affairs, "Status of International Agreements Relating to Activities in Outer Space as at January 2020", available at <https://www.unoosa.org/documents/pdf/spacelaw/treatystatus/TreatiesStatus-2020E.pdf>, last visited 10/09/2020.

the provisions of the OST are also applicable to the Moon and other celestial bodies and the treaty enjoys a wide acceptance by the international community, thus gaining the status of customary international law. Secondly, as previously mentioned, only a small number of states signed and ratified the Moon Agreement. Moreover, the treaty only qualifies the Moon and other celestial bodies as "*common heritage of mankind",* without providing additional details as to how this status will affect states's activities in this environment. In comparison, the other instrument creating a special regime for an area designated as *"common heritage of mankind",* the Convention on the Law of the Sea, has 168 states parties and establishes a detailed international management regime to regulate activities in the area.[1] This difference strenghtens the unsustainable nature of this status for the moon and other celestial bodies. Consequently, the void space, as well as the Moon and other celestial bodies, are *res communis* as within the scope of the OST.

2.1 Definition and Delimitation of Outer Space

Throughout the texts of the outer space-related agreements and even in the title of the most important treaty in this field, one can persistently encounter the term "outer space".[2] Despite its importance in establishing the jurisdictional scope of the outer space legal system, there is no agreed definition of what constitutes the "outer space" from a legal point of view.[3] From a scientific perspective, there is a distinction between atmospheric and extra-atmospheric space based on the physical characteristics of each environment, but no legal instrument clearly stipulates a delimitation between air space and outer space, thus also defining the latter.[4]

From a legal perspective, the importance of the locational differentiation between air and space stems from the opposite regimes regulating each of them. States have sovereignty over the air space above them, which is considered an inalienable part of their territories.[5] The OST and all other relevant agreements prescribe the freedom of exploration and use of outer

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[1] The Convention on the Law of the Sea, Part XI;

[2] Vladen S. Vereshchetin, "Outer Space", in Max Planck Encyclopaedia of Public International Law, 2006, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1202?prd=EPIL>, last visited 10/09/2020.

[3] Ibid.

[4] Ibid.

[5] United Nations, Convention on International Civil Aviation, Chicago, 7 December 1944, 15 UNTS 295, Art. 1; Vereshchetin (2006); Brownlie's Principles (2012), p. 204; Gennady Zhukov, Yuri Kolosov, *International Space Law*, Statut Publishing House, 2014, p. 141.

space and the prohibition of asserting sovereignty over any part of it, including the moon and other celestial bodies.[1] Consequently, the issue rests in how to reconcile two opposed legal regimes regulating two locations not clearly delimited from each other. So far, they have harmoniously co-existed side by side, without any serious conflicts arising from this ambiguity.[2] However, the evolution of technology might lead to the development of objects capable of conducting flights in both air and space, such as the Space Shuttle. Thus, distinguishing the jurisdictional scope of the two legal regimes based solely on the technical characteristics of a particular object will no longer suffice and additional difficulties will emerge.

Discussions concerning the delimitation of outer space from air space date back to the end of the 1950s, when the Ad Hoc Committee on the Peaceful Uses of Outer Space decided in its report that the issue does not call for prioritization.[3] During the first ten years following the conclusion of the Outer Space Treaty, 27 proposals concerning the delimitation and definition of outer space have been lodged with the COPUOS Legal Sub-Committee.[4] According to the views expressed by the UN member states over the 50 years since the birth of the outer space legal framework, two main approaches regarding the definition and delimitation of outer space can be inferred.

The *functionalist* approach argues that a strict geographical delimitation between air space and outer space is unnecessary and the jurisdictional scope of the outer space legal regime can be derived from the nature of the object and the purpose for which it is employed.[5] Therefore, the activity in itself rather than its *locus* is determinant in asserting which legal regime is

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[1] The Outer Space Treaty, Arts. I, II; The Moon Agreement, Art. 4; Zhukov and Kolosov (2014), p. 141.

[2] Vereshchetin (2006); Diederiks-Verschoor and Kopal (2008), p. 15; Zhukov and Kolosov (2014), p. 141

[3] United Nations Ad Hoc Committee on the Peaceful Uses of Outer Space, "Report", A/4141, 14 July 1959, p. 68; Cheng (1997), p. 426.

[4] United Nations Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, Background Paper "The Question of the Definition and/or the Delimitation of Outer Space", A/AC.105/C.2/7, 7 May 1970, pp. 15-35; United Nations Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, Background Paper "The Question of the Definition and/or the Delimitation of Outer Space", Addendum, A/AC.105/C.2/7/Add.1, 21 January 1977, pp. 8 – 15; Diederiks-Verschoor and Kopal (2008), p. 17.

[5] Cheng (1997), p. 445; Diederiks-Verschoor and Kopal (2008), p. 18; Franken Lyall, Paul B. Larsen, *Space Law. A Treatise*, Ashgate, 2009, p. 169; Zhukov and Kolosov (2014), p. 142.

applicable.[1] One of the consequences of this view is that an aborted space launch where the space object failed to reach orbit would fall under the ambit of space law.[2] The launch or re-entry of a space object through the air space of a third state could also raise issues as to the safety of air traffic.[3] Under the functionalist approach, outer space law would regulate the object and its activity and air traffic control regulations would not be applicable.[4]

The *spatialist* approach favours the determination of a lower limit from which outer space would begin, thus delimitating it from air space.[5] States have put forward proposals for a wide range of criteria that could provide a basis for the delimitation of outer space from air space. Firstly, there was the equation of the upper limit of air space with the concept of "atmosphere", a proposal rejected on the ground that there is no clear demarcation line between the atmospheric and extra-atmospheric space.[6] The same criticism was brought to Belgium's suggestion of delimitation based on the division layers of the atmosphere.[7] Other proposals took into account the maximum altitude an aircraft can reach, based on the definitions of "aircraft" included in the annexes of the Paris and Chicago Conventions, and the lowest perigee of an orbiting satellite.[8] A similar approach based on the capabilities of flight instrumentalities proposes as boundary between air space and outer space the so-called Von Karman Line, situated at about 100 km above sea level.[9] However, changes in atmospheric conditions, such as the density of the air, make the Von Karman Line unstable.[10] This, coupled with technological developments allowing the stationing of satellites at lower altitudes might trigger uncertainty as to the exact boundary, thus reviving the issue. The most criticized criterion for establishing a boundary between

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[1] Cheng (1997), p. 445.
[2] Lyall and Larsen (2009), p. 170.
[3] Ibid., p. 171.
[4] Ibid., p. 172.
[5] Vereshchetin (2006); Diederiks-Verschoor and Kopal (2008) pp. 17-18; Lyall and Larsen (2009), p. 165; Zhukov and Kolosov (2014), p. 141;
[6] Background Paper on the Definition and Delimitation of Outer Space – Addendum (1977), p. 16.
[7] Ibid., p. 17.
[8] Background Paper on the Definition and Delimitation of Outer Space (1970), p. 41; Background Paper on the Definition and Delimitation of Outer Space – Addendum (1977), p. 19.
[9] Background Paper on the Definition and Delimitation of Outer Space (1970), p. 45; Background Paper on the Definition and Delimitation of Outer Space – Addendum (1977), p. 20.
[10] Background Paper on the Definition and Delimitation of Outer Space (1970), p. 44; Lyall and Larsen (2009), p. 168.

air space and outer space is the one of "effective control".[1] The proposal argued that the upper limit of air space and the lower limit of outer space should be the highest altitude at which a state can exercise effective control.[2] This clearly favoured the most developed states in terms of economy and technology, while breaching the principle of equality of states since some of them would enjoy sovereignty over a wider portion of air space than others.[3]

As Bin Cheng argues, public international law is mostly a spatialist regime, especially since sovereignty and jurisdiction are two of the most important elements in international relations.[4] This feature helps to provide clarity as to the implementation of a certain regime and the solution for international disputes.[5] For instance, the law of the sea regime clearly establishes the limits of the territorial waters, the exclusive economic zone, archipelagic baselines, and other geographical elements, demarcating them from the high seas, which enjoy a different legal status.[6] Similarly, Article VI of the Antarctic Treaty provides for the locational scope of the treaty.[7]

An additional argument in favour of the demarcation of outer space from air space stems from the fact that, in certain instances, the mere nature of an activity might not suffice to determine its legality since this depends on the *locus.* An example of such an act is the monitoring of defence installations of a foreign state.[8] If this act is conducted within the jurisdiction of the observed state, it can be deemed as illegal and the said state might take coercive action against the perpetrator.[9] However, if the same act occurs in the high seas or in the airspace above high seas, it is permissible and the observed state has no right to interfere.[10] This is the reason why, in 1960, the United States did not object to the USSR's shooting down of a U-2 reconnaissance aircraft and the imprisonment of the pilot, while, two months later, protested to the downing of an RB-47, which flew over the high seas.[11]

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[1] Background Paper on the Definition and Delimitation of Outer Space (1970), p. 49; Background Paper on the Definition and Delimitation of Outer Space – Addendum (1977), p. 24.
[2] Ibid.
[3] Ibid.
[4] Cheng (1997), p. 441.
[5] Ibid.
[6] The Convention on the Law of the Sea, Arts. 3 – 16, 48, 57, 76, 86.
[7] Conference on Antarctica, The Antarctic Treaty, Washington, D.C., 1 December 1959, Art. VI.
[8] Cheng (1997), p. 445.
[9] Ibid.
[10] Ibid.
[11] Ibid.

It was the same action, but conducted in locations under different legal regimes.

Most nations, including those active in outer space, favour the functional approach or adopt a "wait and see" position, arguing that there is no urgent need for the delimitation of outer space from air space.[1] While the United States always refrained from circumscribing to one of the approaches, the Russian Federation (as successor of the USSR) oscillated from the Soviet Working Paper of 1979, which proposed a clear demarcation boundary at 100 – 110 kilometres above sea level, to a reluctance in supporting such a development since it might "complicate space activities currently being carried out".[2] France explicitly favours a functional approach, while Germany and the United Kingdom adopted a position similar to that of the United States, according to their answers to the questions raised by the COPUPOS Legal Sub-Committee in relation to the definition and delimitation of outer space.[3]

As already discussed, the demarcation of outer space from air space bears a significant importance for the applicability of international law rules pertaining to the two different legal regimes, thus providing clarity and predictability. The present article proposes as solution the establishment of a boundary according to the lowest perigee a satellite can attain. Member states of the United Nations, such as Italy and Belgium, have already made proposals based on this criterion.[4] According to Czech astronomer Lubos Perek, this criterion has the advantage of depending on the physical characteristics of the object and the environment in which it would be stationed.[5] Building a satellite capable of attaining a perigee point lower than 90 km would entail excessive costs since it requires large quantities of heavy materials to obtain an "extreme mass-to-area ratio".[6] Moreover, there

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[1] Vereshchetin (2006); Stephan Hobe, Kuan-Wei Chen, "Legal status of outer space and celestial bodies", in Ram S. Jakhu, Paul Stephen Dempsey, *Routledge Handbook of Space Law*, Routledge, 2017, pp. 25 – 41, p. 28.

[2] United Nations Committee on the Peaceful Uses of Outer Space, "Questions on the definition and delimitation of outer space: replies from Member States", Addendum, A/AC.105/889/Add.10, 21 February 2012, p. 5; Cheng (1997), p. 452

[3] A/AC.105/889/Add.10, p. 3; United Nations Committee on the Peaceful Uses of Outer Space, "Questions on the definition and delimitation of outer space: replies from Member States", A/AC.105/889/Add.8, 9 December 2010, p. 3; United Nations Committee on the Peaceful Uses of Outer Space, "Questions on the definition and delimitation of outer space: replies from Member States", A/AC.105/889, Add.3, 2 February 2009, p. 2.

[4] Background Paper on the Definition and Delimitation of Outer Space – Addendum (1977), p. 22.

[5] Ibid.

[6] Ibid.

would be no benefits from stationing a satellite at such a low altitude.[1] The lowest perigee registered by a satellite was 96 kilometres in 1974.[2] More recently, Japan's Aerospace Exploration Agency (JAXA) Tsubame satellite attained an orbital altitude of 167.4 kilometers in 2019 and maintained it for seven days, thus attaining the title of "the lowest altitude by an Earth observation satellite in orbit".[3] According to the European Space Agency (ESA), commercial airplanes do not reach an altitude higher than 14 kilometres, thus far lower than the lowest perigee ever registered.[4] In conclusion, according to the analysis conducted above, the line of demarcation between outer space and air space should be established at an altitude between 90 and 100 kilometres above sea level, subject to a potential revision if significant technological breakthroughs intervene. This lower limit of outer space is supported by scientific arguments, related to the technical characteristics of satellites and economic arguments, since a satellite capable of orbiting at a very low altitude would require costly materials. Moreover, several states in the COPUOS already suggested a similar limit, suggesting the possibility of reaching political consensus. The following part of the present paper will discuss the legal status of the geostationary orbit.

2.2 The Legal Status of the Geostationary Orbit

In 1976, eight equatorial states signed the so-called *Bogota Declaration,* claiming that they have sovereignty over the portions of the geostationary orbit above their territory.[5] Colombia even included in its constitution that the relevant segment of the geostationary orbit is part of the country's territory.[6] States argued that the declaration does not contradict the terms of

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[1] Background Paper on the Definition and Delimitation of Outer Space – Addendum (1977), p. 22.

[2] Skynet – IIA, launched by the United Kingdom, no longer in orbit - Cheng (1997), p. 450.

[3] Japan Aerospace Exploration Agency, "Super Low Altitude Test Satellite "TSUBAME" (SLATS), available at <https://global.jaxa.jp/projects/sat/slats/>, last visited 10/09/2020; "Japan's low altitude satellite Tsubame registered in Guinness World Records", 30 December 2019, available at <https://www.japantimes.co.jp/news/2019/12/30/national/japan-low-altitude-satellite-tsubame/#.XtU7GTozaUk>, last visited 10/09/2020.

[4] European Space Agency, "Types of orbits", available at <https://www.esa.int/Enabling_Support/Space_Transportation/Types_of_orbits>, last visited 10/09/2020.

[5] "Declaration of the First Meeting of Equatorial Countries", Bogota, 3 December 1976, Art. 1(3).

[6] "Colombia's Constitution of 1991 with Amendments through 2015", available at <https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en>, last visited

the Outer Space Treaty, to which five of the signatories are part of, since the agreement did not mention the geostationary orbit or explicitly define it as part of the outer space.[1] Consequently, the Bogota Declaration is an outcome of the lack of definition and delimitation of outer space.

The geostationary orbit is "a circular orbit above the equator at a height of approximately 36.000 kilometres (22.300 miles)" and it is mostly used for stationing telecommunication, meteorology and navigation satellites.[2] The geostationary orbit has been placed under the jurisdiction of the International Telecommunications Unit (ITU), an agency of the United Nations tasked with the allotment of radio spectrum and satellite orbits.[3] The allocation of slots for the placement of satellites on the geostationary orbit must be made on an equitable and non-discriminatory basis, placing a particular consideration on the needs of developing states.[4]

Considering the similarities of the language used in Article 44 of the ITU Constitution with the one of the outer-space related treaties and the geographical position of the geostationary orbit, located far above the 100 kilometres limit established as viable in the previous sub-chapter, it can be strongly affirmed that the geostationary orbit is part of the outer space. As a result, it enjoys the same legal status of *res communis* and no state has the right to appropriate parts of it. This position coincides with the views recently expressed in the COPUOS Legal Sub-Committee, which argue that the geostationary orbit "should not be subject to national appropriation (…) and that its utilization should be governed by applicable international law and in accordance with the principle of non-appropriation of outer space".[5]

10/09/2020, Art. 101; United Nations Committee on the Peaceful Uses of Outer Space, "National legislation and practice relating to the definition and delimitation of outer space", Addendum, A/AC.105/865/Add.13, 6 March 2013, p. 2.

[1] Cheng (1997), p. 455; M. J. Peterson, *International Regimes for the Final Frontier*, State University of New York Press, 2005, p. 63; Zhukov and Kolosov (2014), p. 143.

[2] Ibid.

[3] Plenipotentiary Conference of the International Telecommunications Union, "Instrument Amending the Constitution of the International Telecommunication Union", Minneapolis, 1998;
UCS Satellite Database, updated 1 April 2020, available at <https://www.ucsusa.org/resources/satellite-database>, last visited 10/09/2020, Arts. 1, 12, 44; Peterson (2005), p. 63; Lyall and Larsen (2009), p. 234; About International Telecommunication Union (ITU), available at <https://www.itu.int/en/about/Pages/default.aspx>, last visited 10/09/2020.

[4] Instrument Amending the ITU Constitution, Art. 44.

[5] United Nations Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, "Draft Report – Matters relating to the definition and delimitation of outer space and the character and utilization of the geostationary orbit, including consideration of ways and

3. The Five Outer Space-Related Treaties

3.1 The Outer Space Treaty

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies ("The Outer Space Treaty") was adopted in December 1966 and entered into force in October 1967.[1] It is considered the foundational basis of the entire corpus of outer space law, encompassing both general principles of international law and principles specifically applicable to outer space.[2] An important feature of the treaty is the fact that it transforms the provisions of the UN GA Resolutions 1721 and 1962, the first documents to prescribe the guidelines for states' activities in outer space, into binding legal obligations.[3]

Presently, 110 member states of the UN have ratified the OST and 23 member states have signed it.[4] This widespread endorsement of the principles prescribed in the convention and their codification from non-binding Resolutions adopted unanimously prompted certain authors to argue that, at least, some of them gained the status of customary law and, therefore, are binding on all states regardless whether they are signatories or not.[5] Before addressing the customary character of the principles contained in the OST, they need a brief assessment.

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means to ensure the rational and equitable use of the geostationary orbit without prejudice to the role of the International Telecommunication Union", A/AC.105/C.2/L.309/Add.2, 5 April 2019, p. 3.

[1] The Outer Space Treaty; Lyall and Larsen (2009), p. 53; N. M. Matte,"Outer Space Treaty", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law. Law of the Sea, Air and Space*, Elsevier Science Publishers, B.V., 1989, pp. 251 – 253, at p. 251.

[2] Frans Von der Dunk, "International space law", in Frans Von der Dunk, Fabio Tronchetti (ed.), *Handbook of Space Law*, Edward Elgar Publishing, 2015, pp. 29-126, p. 49; Lyall and Larsen (2009), p. 53; Cheng (1997), p. 156; Diederiks-Verschoor and Kopal (2008), p. 23.

[3] United Nations General Assembly Resolution 1721 (XVI) "International co-operation in the peaceful uses of outer space", 20 December 1961, A/RES/1721 (XVI); United Nations General Assembly Resolution 1962 (XVIII) "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space", 13 December 1963, A/RES/1963 (XVIII); Matte (1989), p. 251; Lyall and Larsen (2009), p. 54.

[4] Outer Space Treaties Status January 2020, p. 10.

[5] Hobe and Chen (2017), p. 26; Lyall and Larsen (2009), p. 71; Antonio Cassesse, *International Law*, Oxford University Press, 2001, p. 120.

a) Substantive Content

The first three articles of the OST encompass the fundamental norms, which regulate space activities. Article III bears a particular importance for the purpose of the present article since it recognizes the applicability of international law and the UN Charter to the activities of states in outer space.[1] Consequently, states must comply with the obligation to maintain international peace and security, states must respect the prohibition of the threat or use of force and states have the obligation to promote international cooperation and understanding, even when they act outside the boundaries of Earth.[2] Another fundamental norm enshrined in the OST is the equality of states regarding the exploration and use of outer space, including the moon and other celestial bodies.[3] Article I of the OST prescribes that any endeavour "shall be carried out for the benefit and in the interests of all countries", without discrimination as to their level of economic or scientific development.[4] The wording of the Article suggests that this right is not limited to member states.[5] The treaty extends and recognizes the right to benefit from, explore and use space to all states, irrespective of their status as parties to the convention, in a similar manner to the Convention on the Regulation of Aerial Navigation and the Convention on International Civil Aviation regarding the right of states over the airspace above their territory.[6] Article II of the OST bars states from appropriating or claiming sovereignty over portions of outer space, the moon and other celestial bodies, either through occupation or through other means.[7] This provision is key to the distinction between the airspace and outer space in terms of legal status, the former being under state sovereignty.[8]

The only provision focused on military activities in outer space is Article IV, which prescribes for a partial demilitarization of the extra-terrestrial space.[9] It contains an absolute prohibition on placing nuclear weapons or other weapons of mass destruction in the orbit around the Earth, on the

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[1] The Outer Space Treaty, Article III.
[2] United Nations, Charter of the United Nations, 1945, Article 2; The Outer Space Treaty, Article III.
[3] The Outer Space treaty, Article I.
[4] Ibid.
[5] Ibid.
[6] League of Nations, Convention on the Regulation of Aerial Navigation, Paris, 13 October 1919, 11 LNTS 173, Art. I; The Chicago Convention (1944), Art. I; Lyall and Larsen (2009), pp. 59-60.
[7] The Outer Space Treaty, Art. II.
[8] Diederiks-Verschoor and Kopal (2008), p. 26.
[9] The Outer Space Treaty, Art. IV.

moon or other celestial bodies, or in the void space between them.[1] However, the demilitarization of outer space is only partial because, while the moon and other celestial bodies must remain weapon-free, there is no prohibition regarding the placement of military installations and non-nuclear weapons in the empty space between them.[2]

Article V of the OST defines the status of astronauts as "envoys of mankind" and imposes the obligation upon states parties to "render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas".[3] Moreover, states have the obligation to inform other states parties or the Secretary-General of the UN of any phenomenon manifesting in outer space that might pose a danger to the astronauts.[4]

Despite the evident "state-centricity" of space law, as developed through the OST, Article VI envisages the possibility of private actors to conduct activities in the extra-terrestrial space.[5] Under Article VI of the OST, a state incurs international responsibility for any national activity conducted in outer space, regardless whether a governmental or non-governmental entity carries it out.[6] Moreover, the state party has the obligation to authorize and continuously monitor the actions of non-governmental entities in outer space, including the moon and other celestial bodies.[7] However, this international responsibility triggered under Article VI OST cannot be equated with state attribution under the Articles on Responsibility of States for Internationally Wrongful Acts. As the next chapter will argue, there is an important difference between attributing a wrongful conduct to a state and holding that state responsible under the OST for failure to take all necessary measures to ensure compliance with international law. This distinction is essential in the context of warfare, since attribution determines the legitimate target for an action in self-defence.

The treaty is silent as to the definition of "national activities", thus creating uncertainty in terms of the instances when a state may be held responsible. It

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[1] The Outer Space Treaty, Art. IV; Matte (1989), p. 252; Cheng (1997), p. 245.
[2] The Outer Space Treaty, Art. IV; Matte (1989), p. 252; Cheng (1997), p. 245; Diederiks-Verschoor and Kopal (2008), p. 27.
[3] The Outer Space Treaty, Art. V (1).
[4] The Outer Space Treaty, Art. V (3).
[5] The Outer Space Treaty, Art. VI; Stephen Gorove, "Sources and Principles of Space Law", in Nandasiri Jasentuliyana (ed)., *Space Law - Development and Scope*, Greenwood Publishing Group, 1992, pp. 45–58, at pp. 46–48; Lyall and Larsen (2009), pp. 65 – 68; Von der Dunk (2015), pp. 45 – 46.
[6] The Outer Space Treaty, Art. VI.
[7] Ibid.

is generally considered that three schools of thought emerged on this issue. The first one holds that any activity in outer space conducted by nationals of a state party falls under the definition of "national activities".[1] The second school of thought argues that the state is responsible for any activity for which liability for damage is triggered under Article VII of the OST and when it holds the status of the state of registry of a satellite under Article VIII.[2] The third approach defines "national activities" as any activity over which a state has the right to exercise some form of jurisdiction.[3] This last perspective is desirable since, according to Article VIII of the OST, the state of registry retains both jurisdiction and control over any object launched into space and the personnel on board.[4]

Article VII establishes the regime of liability for damage caused by space activities and follows the same broad lines as Article VI.[5] The two articles constitute an innovation in international law since, traditionally and as mentioned above, states are responsible or liable only for acts directly or indirectly attributable to them.[6]

In regards to jurisdiction, the OST provides that a state retains it over launched objects carried on its registry and the personnel on-board while stationed in outer space or on a celestial body.[7] Moreover, the objects' presence in outer space or on a celestial body bears no consequence on the state's ownership over them, thus making it impossible to become *res nullius.*[8] The issue of registration was quite ambiguous at the moment the treaty was drafted since there was no obligation on the state parties to maintain such registries and no formal institution established for the purpose of keeping record of objects launched into space.[9] Under the terms of UN General Assembly Resolution 1721, states were called upon to voluntarily

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[1] Carl Q. Christol, *Space Law: Past, Present, and Future*, Kluwer Law International, 1991, p. 247; Armel Kerrest de Rozavel, "Remarks on the Responsibility and Liability", in *Proceedings of the Fortieth Colloquium on the Law of Outer Space*, 1998, p. 139; Lyall and Larsen (2009), p. 66; Von der Dunk (2015), p. 53;

[2] Henri Abraham Wassenbergh, "Public Law Aspects of Private Space Activities and Space Transportation in the Future", in *Proceedings of the Thirty-Eighth Colloquium on the Law of Outer Space*, 1996, p. 246; Von der Dunk (2015), p. 54

[3] Cheng (1997), pp. 658; Zhukov and Kolosov (2014), pp. 66-67; Von der Dunk (2015), p. 54.

[4] The Outer Space Treaty, Art. VIII.

[5] The Outer Space Treaty, Art. VII.

[6] Cheng (1997), pp. 238 – 239; Zhukov and Kolosov (2014), pp. 65 – 68; Lyall and Larsen (2009), p. 66.

[7] The Outer Space Treaty, Art. VIII.

[8] The Outer Space Treaty, Art. VIII; Lyall and Larsen (2009), p. 67

[9] Cheng (1997), p. 655; Lyall and Larsen (2009), p. 67; Zhukov and Kolosov (2014), p. 82.

provide data to the UN Secretary General on any launch they plan to perform.[1] The adoption of the 1975 Convention on Registration of Objects Launched into Outer Space crystallized the practice of national and international registration into a binding obligation and formalized the registry held by the UN Secretary General.[2]

Articles IX to XII of the OST focus on international cooperation and actions that will foster good relations among states in the quest of pursuing the exploration of outer space.[3] State parties are under the obligation to avoid actions that might lead to the harmful contamination of the moon and other celestial bodies or the Earth's environment.[4] In case their activities might negatively interfere with the activity or experiment of another state, states must consult with them.[5] The potentially affected state also has the right to request such a consultation.[6] Additionally, the treaty imposes the obligation on state parties to allow other states "to observe the flight of space objects" launched by them and facilitate access to their "stations, installations, equipment and space vehicles on the moon and other celestial bodies", all on a non-discriminatory and reciprocity basis.[7] Article XII, which prescribes the obligation to allow access to objects stationed in outer space, derives its content from Article VII of the Antarctic Treaty, a legal instrument that greatly influenced the outer space regime established through the UN GA Resolutions and, subsequently, the OST.[8]

This concludes the analysis pertaining to the substantive content of the OST, the main legal instrument regulating activities in outer space. The following part of the present article will argue the customary nature of the norms included in this treaty.

b) The Outer Space Treaty and Customary International Law

Scholars support the idea that, at least some of the provisions of the Outer Space Treaty gained the status of customary international law.[9] The author

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[1] UN GA Resolution 1721, Part B; Lyall and Larsen (2009), p. 67; Zhukov and Kolosov (2014), p. 84.
[2] The Registration Convention, Arts. II, III.
[3] The Outer Space Treaty, Arts. IX – XII.
[4] The Outer Space Treaty, Art. IX.
[5] Ibid.
[6] Ibid.
[7] Ibid., Arts. X, XII.
[8] The Outer Space Treaty, Art. XII; The Antarctic Treaty, Art. VII; Cheng (1997), pp. 221, 249; Lyall and Larsen (2009), p. 69; Zhukov and Kolosov (2014), p. 23.
[9] *See* supra.

of the present paper concurs with this position and the following paragraphs will prove that the principles enshrined in the treaty are part of the corpus of customary international law. As a result, all states must abide by them, regardless whether they are parties to the treaty.

Article 38(1) of the ICJ Statute defines custom as "evidence of general practice accepted as law".[1] Consequently, two elements are involved in the creation of customary international law namely, an objective or material one constituted by the actual behaviour of states, and a subjective or psychological element represented by the belief that such behaviour is required by law *(opinio juris sive necessitatis)*.[2] Evidence of state practice can be derived from administrative acts, decisions of courts, legislation, participation in treaty-making, diplomatic correspondence and statements of officials.[3] Often, proof of *opinio juris* overlaps with that of state practice since passing a certain law, concluding a treaty or voting in a certain manner a UN GA resolution suggest a conviction that legal norms or principles require such an action.[4]

Considering that the creation of a customary rule is an abstract process, which poses difficulties in determining the substantive content based on evidence of state practice and *opinio juris,* the International Court of Justice (ICJ) dealt in its jurisprudence with a wide array of issues on this topic. On uniformity and consistency, the Court held in the *Anglo-Norwegian Fisheries Case* that a relatively uniform state practice is essential before a custom comes into existence.[5] There is no need for the practice to be in *"absolute rigorous conformity"* with the presumed rule and any actions contrary to it should be regarded as breaches rather than proof of the emergence of a new rule.[6] As the Court emphasized in the *North Sea Continental Shelf Cases*, the passage of only a short period of time since the rule came into existence does not constitute a bar to the emergence of customary law.[7] Moreover, the Court clearly recognized the possibility that a treaty might constitute the basis of customary law rules, as long as the rule

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[1] The ICJ Statute, Art. 38(1)(b).
[2] Brownlie's Principles (2012), pp. 24-26; Klabbers (2013), p. 26; Shaw (2014), p.53.
[3] Brownlie's Principles (2012), p. 24; Klabbers (2013), p. 28; Shaw (2014), p. 58.
[4] Ibid.
[5] *Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951: ICJ Reports 1951, p. 116,* p. 131.
[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14*, para. 186.
[7] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969, p. 3*, para. 74.

is *"of a fundamentally norm-creating character"*.[1] Paragraph 73 of the judgment bears a particular importance for the purpose of the present sub-chapter. In it, the Court held that a *"widespread and representative participation in the convention might suffice of itself"* to prove the emergence of customary international law, as long as the states whose interests are particularly affected by the rule become state parties.[2] In their dissenting opinions to the judgment, Judges Lachs and Sorenson concurred with the judgment of the Court and clearly emphasized that the dynamic and swift evolution of technology calls for a more rapid development of international law norms.[3]

The first argument supporting the customary nature of the OST stems from the fact that, out of 193 members of the United Nations, 110 states ratified the treaty and an additional 23 signed it.[4] These figures show a widespread participation of states to the convention, including the space-faring nations having the financial and technological possibilities to conduct outer space activities.[5] This is clearly in line with the decision of the ICJ in the *North Sea Continental Shelf Cases.*[6] Even in the absence of this decision, the widespread participation would suffice to prove the existence of both state practice and *opinio juris* necessary for the emergence of customary international law.

The second argument substantiating the contention that the OST gained the status of customary international law rests in the fact that most of the provisions included in the treaty are based on the text of the UN General Assembly Resolution 1962 adopted unanimously by the member states of the UN.[7] The operative part of the Resolution is almost identical to the provisions included in the treaty. It prescribes the equality of states in the

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[1] Ibid. para. 71.
[2] Ibid, para. 73.
[3] Dissenting Opinion of Judge Lachs, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* ICJ Reports 1969, pp. 219 – 240, p. 230; Dissenting Opinion of Judge Soresen, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* ICJ Reports 1969, pp. 242 – 258, p. 244.
[4] UN GA Resolution 1962; Matte (1989), p. 251; Lyall and Larsen (2009), p. 54; "Status of the Charter of the United Nations and Statute of the International Court of Justice", available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en>, last visited 10/09/2020.
[5] Ibid. The United States of America, the United Kingdom of Great Britain and Northern Ireland, the Russian Federation, Japan, China, India, Canada, Germany, France, Luxembourg have all ratified the Outer Space Treaty.
[6] *The North Sea Continental Shelf Cases (1969)*, para. 73.
[7] UN GA Resolution 1962; Matte (1989), p. 251; Lyall and Larsen (2009), p. 54

exploration and exploitation of outer space, the prohibition on the national appropriation, the rule on international responsibility and the obligation to conduct outer space activities in accordance with international law, including the Charter of the UN.[1] The fact that there has been no formal objection towards the treaty further supports the customary nature of the OST.[2] With the exception of the signatories of the Bogota Declaration that claimed sovereignty over portions of the geostationary orbit, there is a generally uniform state practice, in compliance with the principles of the Outer Space Treaty.[3] Consequently, the Bogota Declaration represents a violation of Article II of the OST, rather than proof of absence of its status as customary law.[4] As upheld by the ICJ, any instances departing from the rule are breaches of it.[5] In accordance with ICJ's decision in the *North Sea Continental Shelf Cases*, the fact that only five decades passed since the Outer Space Treaty entered into force bears no consequence to the crystallization of its principles into customary international law.[6]

In conclusion, space law principles such as non-appropriation, peaceful uses of outer space, the Moon and other celestial bodies, international cooperation in space-related matters and non-militarization have transformed from mere treaty obligations among state parties into customary rules binding upon all states in the international community.

3.2 The Rescue Agreement

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space ("The Rescue Agreement") was adopted by the General Assembly in December 1967 and entered into force one year later.[7] It builds on Articles V and VIII of the OST, which contain provisions regarding the status of astronauts and prescribe the conditions for the return of space objects.[8]

Article V of the OST confers upon astronauts the status of "envoys of mankind", thus indicating their entitlement to assistance in case of distress.[9]

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[1] Ibid.
[2] Lyall and Larsen (2009), p. 78
[3] Ibid.
[4] The Outer Space Treaty, Art. II.
[5] *The Nicaragua Case (1986)*, para. 186
[6] *The North Sea Continental Shelf Cases (1969),* para. 74.
[7] The Rescue Agreement; Cheng (1997), p. 265; Lyall and Larsen (2009), p. 135; Von der Dunk (2015), p. 78.
[8] Ibid.
[9] The Outer Space Treaty, Art. V; Cheng (1997), p. 417; Von der Dunk (2015), pp. 79 – 80.

The Rescue Agreement extends the obligations of the Contracting Parties to render support to a spacecraft's personnel experiencing distress, such as an accident or an emergency landing.[1] It can be observed that the title and the Preamble of the agreement refers to "astronauts", whereas the operative part uses the word "personnel". While they used to be considered synonyms, this slight difference has more relevance in the context of evolving technologies, which will allow commercial space flights.[2] Consequently, this interpretation might extend the applicability of the agreement to cover situations of distress experienced by "space tourists" or other persons on board of a spacecraft falling outside the scope of the term "astronaut".

In accordance with Articles 2 and 3 of the Rescue Agreement, the degree of responsibility for giving assistance to space personnel in distress depends on whether their location is under the jurisdiction of the Contracting State.[3] If the emergency or unintended landing took place in the territory of a state party to the convention, the state has the obligation to take all necessary measures to rescue the personnel and must promptly inform the launching authority and the UN Secretary General of the steps it takes.[4] In cases of accident or unintended/emergency landing in the high seas or a territory outside the jurisdiction of a state, the Contracting Parties having the capabilities and the possibility to render assistance shall do so, if necessary.[5] The Rescue Agreement makes mandatory the return to the launching state of any personnel of a spacecraft landed on the territory of another state party, in the high seas or "in any other place not under the jurisdiction of any State".[6] Reading Articles 3 and 4 of the Rescue Agreement in conjunction with Article V of the OST, it can be concluded that state parties must also render assistance to the personnel of a distressed aircraft in outer space or on a celestial body and must return any such personnel to the launching authority.[7]

In regards to space objects and their component parts, the state parties to the convention incur similar responsibilities to those attached to the personnel

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[1] The Rescue Agreement, Art. 1.

[2] Nandasiri Jasentuliyana, *International Space Law and the United Nations*, Brill Nijhoff, 1999, pp. 190–191; Manfred Lachs, *The Law of Outer Space: An Experience in Contemporary Law-Making – Reissued on the Occasion of the 50th Anniversary of the International Institute of Space Law*, Martinus Nijhoff Publishers, 2010, pp. 76–77, 83; Von der Dunk (2015), p. 80.

[3] The Rescue Agreement, Arts. 2, 3.

[4] Ibid., Art. 2.

[5] Ibid, Art. 3.

[6] The Rescue Agreement, Art. 4.

[7] The Rescue Agreement, Arts. 3,4; The Outer Space Treaty, Art. V; Cheng (1997), p. 285; Lyall and Larsen (2009), pp. 139 – 140;

of an aircraft.[1] However, in this case, the obligation of taking steps for the recovery is triggered only as long as there is a request made from the launching state.[2] If a contracting party receives information that a space object or its components landed anywhere except on territory under the jurisdiction of a third state, it must immediately inform the launching state and the UN Secretary General.[3] The same obligation applies to information about potentially hazardous objects, which the launching authority must remove immediately.[4]

Another important feature of the Rescue Agreement is the definition of "launching authority" included in Article 6.[5] It is important to mention that it places states and international organizations on equal footing in terms of the rights and obligations stemming from the treaty.[6] However, an international organization can be considered the "launching authority" as within the scope of the agreement only if it has declared its acceptance of the terms and if a majority of its states parties are also part of the Rescue Agreement and the OST.[7]

In the context of a potential outer space conflict, the status of the astronauts might differ according to their involvement in the hostilities. States parties to the Rescue Agreement will incur the same obligations of assistance in regards to astronauts conducting peaceful exploratory missions. However, the same rules will not be applicable to those directly involved in military operations during warfare, which will fall under the scope of international humanitarian law norms.

3.3 The Liability Convention

The third treaty, part of the *corpus juris spatialis,* is the 1972 Convention on International Liability for Damage Caused by Space Objects ("the Liability Convention").[8] The issue of liability for damage caused by objects launched into outer space was brought before the COPUOS Legal Sub-Committee by the United States in 1962, when the US representative produced a metal piece presumably originating from Sputnik IV, found on a street in

[1] The Rescue Agreement, Art. 5.
[2] Ibid.
[3] Ibid., Art. 5(1).
[4] Ibid., Art. 5(4).
[5] Ibid., Art. 6.
[6] Cheng (1997), p. 281; Von der Dunk (2015), p. 81.
[7] Ibid.
[8] The Liability Convention.

Manitowoc, Wisconsin.[1] Following proof that accidents in outer space might lead to harmful consequences on Earth's surface, the UN member states reached an agreement on an international convention that regulates liability for damage caused by outer space objects.[2] 98 states ratified the Convention, with an additional 18 signing it and four international organizations lodging declarations of acceptance of rights and obligations.[3] It is the last outer space treaty to enjoy a relatively widespread acceptance.

Article I of the Liability Convention defines the terms relevant for the purpose of the treaty.[4] Damage comprises both harm against individuals (loss of life, injury or other health impairment), as well as against property of states, natural or juridical persons, and of international organizations.[5] The convention explicitly stipulates that "launching" covers attempted launching and "space object" covers its components, the launching vehicle and parts of it.[6] Drawing from Article VII of the Outer Space Treaty, it establishes four categories of states that can simultaneously incur liability for damage caused by a space object.[7] These are as follows:

a) the state launching the object;

b) the state procuring the launch of the object;

c) the state from whose territory the object is launched;

d) the state from whose facility the object is launched.[8]

Article XXII clarifies that any reference to "states" also includes intergovernmental organizations, as long as they have lodged a declaration of acceptance and the majority of the state parties to that organization have ratified the Liability Convention and the OST.[9] This interpretation is not applicable to Articles XXIV to XXVII, which grant the right to initiate and take part in a review process of the Convention, to propose amendments and to withdraw.[10]

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[1] Cheng (1997), p. 288
[2] Ibid.
[3] Outer Space Treaties Status January 2020.
[4] The Liability Convention, Art. I.
[5] Ibid., Art. I(a).
[6] Ibid., Art. I (b), (d).
[7] Ibid., Art. I (c).
[8] Ibid.
[9] The Liability Convention, Art. XXII (1).
[10] Ibid.

The Liability Convention draws two distinct liability regimes, depending on the location where the damage has occurred.[1] Damage caused on the surface of the Earth or to aircraft in flight triggers absolute liability for the launching state, while fault-based liability is attached to damage caused anywhere outside the terrestrial surface to a space object or to the property or personnel on board of it.[2] However, the last category fails to cover certain instances of damage such as that caused to an astronaut outside of his spacecraft while in outer space or on the surface of a celestial body or to a parachutist in airspace.[3]

According to the convention, joint liability is applicable in two instances. Firstly, in case a third state incurs damage from the collision of two space objects belonging to other states, the launching states are jointly and severally liable.[4] The same differentiation between absolute and fault-based liability is provided for in this case.[5] Compensation due to be payed to the third state is calculated according to the extent each launching state is at fault.[6] The second instance of joint liability is represented by the damage caused by a space object jointly launched by two or more states.[7] The article grants the state, which paid compensation for damage the right to a claim for indemnification from each participant to the joint launching.[8] It was necessary to include this entitlement since the damaged state has the right to request compensation from "any or all of the launching States".[9] The Convention envisages the possibility of exoneration from absolute liability as long as the launching state proves that the damage occurred, wholly or partially, as a result of gross negligence or of an intentional act or omission of the claimant state.[10] No exoneration is possible for damage caused by an act in breach of international law, particularly the UN Charter and the OST.[11]

Another interesting feature of the Liability Convention is the significant relaxation of the rule on nationality of claims.[12] The categories entitled to

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[1] Ibid., Arts. II, III.
[2] Ibid.
[3] Cheng (1997), p. 323; Zhukov and Kolosov (2014), p. 96.
[4] The Liability Convention, Art. IV (1).
[5] Ibid., Art. IV 1(a), (b).
[6] Ibid., Art. IV (2).
[7] Ibid., Art. V (1).
[8] Ibid., Art. V (2).
[9] Ibid., Art. V(2).
[10] The Liability Convention, Art. VI (1).
[11] Ibid., Art. VI (2).
[12] The Liability Convention, Art. VIII; Cheng (1997), p. 307; Lyall and Larsen (2009), p. 111; Von der Dunk (2015), pp. 90-91.

claim compensation for damage caused by a space object are the nationality state, the state on whose territory the damage occurred or the victims' state of permanent residence.[1] The Article seems to establish a hierarchy among these categories, which are mutually exclusive in regards to the claim for compensation. A claim made by the nationality state excludes the other two from the right to request compensation, whereas a claim presented by the territorial state entails that the state of permanent residence is barred from lodging one. However, this hierarchy is only apparent since states positioned lower in this hierarchy can present a claim before those higher in the hierarchy decided to do so.[2]

Victim states should first present a claim for compensation through diplomatic channels within one year from the date the incident has occurred or the state received information about it.[3] If the diplomatic negotiations fail, the claimant state and the launching state shall establish a Claims Commission.[4] Articles XV to XIX deal with procedural aspects concerning the activity of the Commission.[5] If an international organization is liable for damage caused by a space object, the claim for compensation shall be firstly presented to the organization itself.[6]

Currently, there are more than 2000 operational satellites orbiting the Earth.[7] Any attack of a state against the space assets of another state might cause damage to a third state. Components of a destroyed satellite might fall on the surface of the Earth and space debris is released following the use of an ASAT weapon. Moreover, a weaponized satellite might incidentally destroy a space asset of a third state located near the actual target. Therefore, the rules on liability are important to ensure that the third state will be adequately compensated for any damage incurred as a result of aggressive acts perpetrated between two or more states.

3.4 The Registration Convention

The fourth legal instrument comprised by the outer space treaties package is the Convention on Registration of Objects Launched into Outer Space ("the Registration Convention"), which entered into force in 1975.[8] Its importance

[1] The Liability Convention, Art. VIII.
[2] Cheng (1997), p. 307.
[3] The Liability Convention, Arts. IX, X.
[4] Ibid., Art. XIV.
[5] Ibid., Arts. XV – XIX.
[6] Ibid., Art. XXII (3).
[7] UCS Satellite Database as of 1 April 2020.
[8] The Registration Convention.

stems from the fact that it clarifies and details the concept of registration introduced in the Outer Space Treaty.[1]

The Convention creates two sets of obligations, namely the establishment of both a national register and an international one maintained by the UN Secretary General.[2] These registries provide the means to identify a space object for planning a launch and, most importantly, for establishing liability in case of a potential damage.[3] Moreover, they provide the basis for jurisdiction over space objects and astronauts on board, as within the scope of Articles V and VIII of the Outer Space Treaty.[4]

According to Article II, the launching state has the obligation to register any space object sent into "earth orbit or beyond" in an appropriate register, on whose existence the UN Secretary General shall be informed.[5] In case there are two or more launching states, they should jointly decide which one of them shall register the object.[6] The state of registry enjoys a margin of appreciation in regards to the content of the registry and "the conditions under which it is maintained".[7] The Outer Space Treaty provides that the state of registry retains jurisdiction over the space object and the personnel on board.[8] However, the Registration Convention acknowledges the possibility of additional agreements concluded among launching states in regards to jurisdiction and ownership.[9]

States have full and open access to the international registry held by the UN Secretary General.[10] Article IV includes a non-exhaustive list of elements that the states of registry must communicate in relation to each space object they have registered.[11] These comprise:

> *"... (a) Name of launching State or States;*
>
> *(b)An appropriate designator of the space object or its registration number;*

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[1] Aldo Armando Cocca, "Registration of Space Objects", in Nandasiri Jasentuliyana, Roy S.K. Lee (eds.), *Manual on Space Law*, Vol. 1, Oceana Publications, 1979, pp. 173–193, p. 173; Christol (1991), p. 213; Von der Dunk (2015), p. 94.
[2] The Registration Convention, Arts. II, III.
[3] Lyall and Larsen (2009), p. 86.
[4] The Outer Space Treaty, Arts. V, VIII.
[5] The Registration Convention., Art. II (1).
[6] Ibid., Art. II (2).
[7] Ibid., Art. II (3).
[8] The Outer Space Treaty, Art. VIII.
[9] The Registration Convention, Art. II (2).
[10] The Registration Convention, Art. III.
[11] Ibid., Art. IV (1).

(c) Date and territory or location of launch;

(d) Basic orbital parameters, including:

(i) Nodal period;

(ii) Inclination;

(iii) Apogee;

(iv) Perigee;

(e) General function of the space object."[1]

The non-exhaustive nature of the list stems from the text of the second paragraph, which envisages the possibility that the state of registry may provide the UN Secretary General with additional information about the space object.[2] Moreover, notification should also be made about any space object which has left Earth orbit.[3] One of the faults of the Convention is the fact that it does not impose a certain time limit for the provision of information by the state of registry. The expression "as soon as practicable" is vague and leaves room for different interpretations.[4] This is all the more important since lack of sufficient information might lead to negative consequences and impunity in cases of damage provoked by a space object. The safety net provided for in Article VI does not completely solve the issue, the process of identifying a space object and its origin potentially being a lengthy one.[5]

The development of private enterprises in space corroborated with the fact that launching states have the right to jointly and freely decide the state of registry, brings the issue of the "flag of convenience" into the realm of outer space law. In a quest to avoid rigorous regulations, commercial enterprises might seek to register their space objects with states that do not have the necessary capabilities to exercise proper supervision and control.[6] Consequently, a *"genuine link"* test should be established, similar to the one envisaged in the *Nottebohm Case,* Article 5 of the Convention on the High Seas and Article 91 of the Convention on the Law of the Sea.[7] Moreover, in

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[1] Ibid., Art. IV (1).
[2] Ibid., Art. IV (2).
[3] Ibid., Art. IV (3).
[4] Ibid., Art. IV (1).
[5] Ibid., Art. VI.
[6] Lyall and Larsen (2009), p. 94
[7] *Nottebohm Case (Liechtenstein v. Guatemala), second phase, Judgment of April 6th, 1955, ICJ Reports 1955, p. 4,* p. 23; United Nations, Convention on the High Seas, 29 April 1958, Art. 5; The Convention on the Law of the Sea, Art. 91.

its Separate Opinion to the *Barcelona Traction Case,* Judge Jessup clearly argued the possibility of extending the rule of ”genuine link” to the relationship between a private company and the state of incorporation.[1] As a result, a potential review of the Registration Convention in accordance with Article X should have on the agenda the possibility to impose conditions in regards to the choice of the state of registry. This is particularly important in outer space warfare since the state of registry retains jurisdiction and control over the space assets and the personnel on board, even if a non-governmental entity actually launches the object.[2] A state having the technical capabilities of effectively supervising the conduct of the space assets under its registry would ensure compliance with international law, including the prohibition on the use of force enshrined in the Charter of the UN.[3] On the contrary, a state merely used as “flag of convenience” for a satellite would be unable to prevent a non-state actor from perpetrating attacks against other states.

The final part of the present article will analyse the substantive content of the Moon Agreement, the last treaty in the series of five instruments regulating outer space and the least recognized by the international community.

3.5 The Moon Agreement

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (”the Moon Agreement”) represents the final branch of the body of outer space law.[4] Adopted in 1979 by the UN General Assembly, it entered into force only five years later, in 1984, when Austria ratified it.[5] The Moon Agreement enjoys the lowest degree of ratifications among all outer space treaties, with only 18 states parties and 11 signatories, none of them being the major space-faring nations.[6] Professor Bin Cheng considers that it is the poorest drafted instrument in the series of treaties originating from the COPUOS.[7] However, its poor ratification degree might actually

[1] Separate Opinion of Judge Jessup, *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain),* Preliminary Objections, Judgment, ICJ Reports 1964, p. 6, pp. 161 – 221, p. 188.
[2] The Outer Space Treaty, Art. VIII.
[3] Charter of the UN, Art. 2(4).
[4] The Moon Agreement.
[5] ”Agreement Governing the Activities of States on the Moon and Other Celestial Bodies”, available at <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html>, last visited 10/09/2020.
[6] Outer Space Treaties Status January 2020; Lyall and Larsen (2009), p. 178.
[7] Cheng (1997), p. 357

stem from a controversial phrase of *"common heritage of mankind"* included in the treaty, rather than from the style and clarity of the text as a whole.[1]

The treaty greatly extends its cosmographical scope in Article 1, providing that any reference to the "Moon" shall be understood as referring also to the orbits around and the trajectories to or around it.[2] Moreover, it explicitly mentions that any provision relating to the Moon is also applicable to the other celestial bodies, except extra-terrestrial material reaching Earth through natural means.[3]

The non-controversial part of the Moon Agreement essentially reiterates and details the principles enshrined in the Outer Space Treaty, the Liability Convention and the Rescue Agreement for the particular instance of the moon and other celestial bodies.[4] Article 3(2) translates for the first time the prohibition on the threat or use of force enshrined in Article 2(4) of the UN Charter to the realm of outer space.[5] Consequently, any threat or act of aggression originating from the moon or other celestial bodies against the Earth, the moon, spacecraft, personnel on board or man-made space objects is prohibited.[6] However, due to the limited ratification of the agreement, the use of force regime in outer space remains regulated by customary international law and the UN Charter. Other principles covered by the Moon Agreement include freedom of exploration, international cooperation, non-appropriation, the obligation to render assistance to astronauts, rules pertaining to jurisdiction, responsibility and liability, open access to installations and stations.[7]

The controversy surrounding the Moon Agreement and, potentially, the reason why the space-faring nations did not ratify it is raised by Article 11, which declares that "the Moon and its natural resources are the common heritage of mankind".[8] As per Article 1, this extends also to the other celestial bodies.[9] This represents the first instance when an international law

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[1] The Moon Agreement, Art. 11(1).
[2] The Moon Agreement, Art. 1(2).
[3] Ibid., Art. 1(1) and (3).
[4] Cheng (1997), p. 374; Stephan Hobe, "The 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies", in Stephan Hobe, Bernhard Schmidt-Tedd, Kai-Uwe Schrogl, K.U., *Cologne Commentary on Space Law*, Vol. II, 2013, pp. 325 – 426, p. 355; Von der Dunk (2015), p. 100.
[5] The UN Charter, Art. 2(4); The Moon Agreement, Art. 3(2).
[6] The Moon Agreement, Art. 3(2).
[7] The Moon Agreement, Arts. 2, 6, 10, 12, 15.
[8] The Moon Agreement, Art. 11(1).
[9] *See* supra note 140.

instrument grants the status of *"common heritage of mankind* "to a part of the world, even before the Convention on the Law of the Sea did so for the deep ocean bed and subsoil.[1] The concept indicates that certain elements should be exploited under an international arrangement bringing benefits to all mankind, rather than unilaterally by states or commercial entities.[2] Paragraph 1 of Article 11, read in conjunction with paragraphs 5 and 7(d), suggest that any benefits derived from the exploitation of lunar resources or those found on other celestial bodies must be shared equitably among states parties according to an international regime established for the purposes of exploitation.[3] The idea that space-faring nations might be under an international obligation to share proceeds resulted from the commercial exploitation of these extra-terrestrial resources or technologies used in this process with less developed nations which incurred no costs might have acted as a bar against a widespread ratification of the treaty.[4]

4. Conclusion

Since the launch of Sputnik 1 in 1957, states have constantly competed for outer space dominance. Initially, only two nations had the economic and technological capacity of conducting activities in the extra-terrestrial environment. Nowadays, nine countries have launching capacities and the private sector is strongly represented by companies such as SpaceX, Arianespace and Blue Origin. Despite significant efforts by the international community to preserve the outer space for purely peaceful purposes, recent trends show that the five outer space related treaties are far from preventing a military confrontation in this environment. Increased reliance on satellites for both civilian and military purposes created new vulnerabilities and threats for states. Space-faring nations are constantly developing new technologies to protect their space assets, technology that can be used both for defensive and offensive purposes, as demonstrated by ASAT tests conducted by China, Russia and the US. Moreover, the US established the Space Force, the only space-oriented military branch in the world, while a large number of other countries integrated a space component in their air force structure. Consequently, we are currently facing an ascending trend

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[1] Cheng (1997), p. 357; Lyall and Larsen (2009), p. 194; Von der Dunk (2015), p. 101.
[2] Edwin Egede, *Common Heritage of Mankind*, Oxford Bibliographies, 2014; Hobe and Chen (2017), pp. 33-34.
[3] The Moon Agreement, Art. 11 (1), (5), 7(d).
[4] Lyall and Larsen (2009), p. 196; Fabio Tronchetti, *The exploitation of natural resources of the Moon and other celestial bodies: a proposal for a legal regime*, Vol. 4, Martinus Nijhoff Publishers, 2009, p. 50; Von der Dunk (2015), p. 101.

towards the weaponization of space and the possibility of an outer space conflict.

In this context, the international legal community acknowledged the need to assess the applicability of international law pertaining to armed conflict to a potential outer space war and, thus, the MILAMOS and the Woomera Manual projects debuted. The present article attempted to contribute to these efforts and analysed the rules regulating state behaviour in outer space, as well as certain issues arising from these norms. Determining the legal status of outer space and identifying the *lex specialis* applicable to this new environment are important first steps in the process of analysing the applicability of the *jus ad bellum* and *jus in bello* legal regimes in the context of outer space warfare.

As a result, the article addressed the issues of the legal status of outer space, as well as its definition and delimitation. It found that outer space, including the moon and other celestial bodies, are *res communis,* free from national appropriation, but allowing exploitation and exploration. The delimitation of outer space has long been a controversial issue and, so far, states did not reach consensus on this matter. However, based on a series of state proposals made before COPUOS, as well as scientific considerations as to the technical characteristics of a satellite, the present article concluded that the lower limit of outer space should be between 90 and 100 kilometres above sea level, this being the lowest perigee a satellite can attain. Consequently, the geostationary orbit is also part of the outer space treaty, despite the equatorial states'claim of sovereignty. The article also analysed the most relevant provisions of the outer space-related treaties and their significance in the context of an outer space conflict. It is important to mention that the paper demonstrated the customary nature of the provisions included in the Outer Space Treaty.

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Studii și comentarii de jurisprudență și legislație
Studies and Comments on Case Law and Legislation

The Relation between Treaties and the Constitution of Romania: Recent Case-Law of the Romanian Constitutional Court

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Abstract: *In March 2020, the Constitutional Court of Romania issued the Decision no. 142/2020, which represents an important development in the interpretation of the constitutional norms related to the relation between international law and domestic law. As a matter of principle, the Constitutional Court ruled that it does not have jurisdiction to review the constitutionality of a treaty to which Romania is a party, once the treaty had entered into force. The constitutional review is limited, in this case, the „external" requirements of the law for the ratification of that treaty. According to article 11 paragraph 3 of the Constitution of Romania, constitutionality of treaties can be reviewed only before consent to that treaty is expressed and, if non-conformities are found between the treaty and the Constitution, ratification can take place only after the revision of the Constitution. Nevertheless, as an "exception", the Constitutional Court will maintain jurisdiction with respect to examining the conformity of treaties to which Romania is a party with "fundamental principles of international law" which have a correspondent in the Constitution – as it is the case, for example, of the principle of compliance with fundamental rights.*

Key-words: *international law and domestic law; treaties; Constitution; hierarchy of norms.*

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1. Introduction

The relation between international law and domestic law has always been a debated topic. On one hand, from the perspective of international law – merely from the point of view of an international Court – domestic law is ”a fact”, not ”law”.[1] Such fact may prove compliance or non-compliance with an international obligation. At the same time, from the point of view of international law, a State cannot invoke its domestic legislation, not even the Constitution, in order to justify the non-compliance with an international obligation.[2] On the other hand, from the perspective of domestic law, the application of international law depends on the provisions of the respective Constitution and on the practice and case-law of national courts and of the Constitutional Court. As it has been affirmed by the Dutch scholar André Nollkaemper, international law is ”neutral” to how it should be implemented into the domestic sphere: the only obligation it involves is *pacta sunt servanda*; international law does not impose a specific solution to domestic courts related to the place it should have within the domestic legal hierarchy.[3]

Nevertheless, the largest implementation of international law in domestic law is a criterion the assessment of the rule of law. The Venice Commission included ”relationship between international law and domestic law” within the „legality” benchmark of its 2016 *Rule of Law Checklist.*[4] Even if the Venice Commission admits the „neutrality” of international law (”*the principle of the Rule of Law does not impose a choice between monism and dualism*”), it underlines that ”*at any rate, full domestic implementation of international law is crucial*”.[5]

In Romania, even if the place of treaties within the domestic legal system is regulated by the Constitution, the case-law of the Constitutional Court has played a very important role in consolidating the interpretation to be given to the relevant provisions of the Constitution, in order to ensure the fullest

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[1] *German Interests in Polish Upper Silesia,* PCIJ, Ser. A, no. 7, 1926, p. 19.
[2] Article 27 of the 1969 Vienna Convention on the Law of Treaties between States – United Nations Treaty Series, vol. 1155, p. 331; with respect to impossibility to invoke the Constitution in order to justify the non-compliance with international obligations – *Treatment of Polish Nationals in Danzig,* PCIJ, Ser. B, no. 15, 1928, p. 24.
[3] André Nollkaemper, *National Courts and the International Rule of Law,* Oxford University Press, 2012, pp. 68-70.
[4] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Documents and Publications Production Department (SPDP), Council of Europe, 2016, p. 19.
[5] *Ibid.*, p. 20, para. 48.

possible implementation of international law. This study has the purpose to present the latest developments in the case-law of the Constitutional Court, related to the relation between international treaties and the Constitution itself. This is a ”specific” section of the broader picture of applying international law in domestic law. Shortly, the Constitutional Court decided that it will not examine on the merits the constitutionality of a treaty *after* it has entered into force, subject to certain exceptions: the main question is ”how wide these exceptions are?”. Indeed, this topic has the merit to ”supplement” the interpretation of the constitutional norms related to the relation between treaties and laws.

Therefore, the study proposes to present, first, the general picture of the provisions of the Constitution with respect to the relation between international law and domestic law, second, relevant developments related to the inadmissibility of future possible complaints related to the conformity between treaties and the Constitution and, third, a possible ”open window” left by the Constitutional Court, which might allow to shape its future jurisprudence.

2. General Picture of the Provisions of the Romanian Constitution with respect to the Relation between International Law and Domestic Law

It is our opinion that it might be wise to refrain from labelling the provisions of the Romanian Constitution related to the relation between treaties and domestic law as ”monist” or ”dualist”. It might appear more useful to identify the ”constitutional techniques”, such as *automatic incorporation, supremacy clauses* or *clauses regarding consistent interpretation.*[1] From this perspective, the following clauses could be identified in the Constitution:

a) a clause for *the automatic incorporation* of treaties ”ratified by the Parliament, in accordance with the law” (article 11, paragraph 2).[2] It is true, the scope of this clause is limited to treaties which are ”ratified by the Parliament” and the scope of the automatic incorporation may be enlarged either by way of interpretation, or through the effect of legislative

[1] André Nollkaemper, *op. cit.*, p. 73-77, 139; Antonio Cassese, *Modern Constitutions and International Law,* RCADI, vol. 192 (1985), p. 331; Ion Gâlea, *Dreptul tratatelor,* CH Beck, 2015, p. 335-338; Anthony Aust, *Handbook of International Law,* Oxford University Press, 2nd Ed., 2010, p. 12.

[2] Article 11 (2) provides: ”The treaties ratified by Parliament in accordance with the law are part of the domestic law”.

provisions.[1] The Constitution also contains a clause which may be interpreted as giving effect to customary international law in the domestic legal order (article 10).[2]

b) *supremacy clauses* which cover: i) treaties concerning fundamental human rights – in case of which an express clause is included in the Constitution (article 20 paragraph 2);[3] ii) all treaties "to which the Romanian State is a party" – article 11 paragraph 1.[4] In case of article 11 paragraph 1, its effect as a "supremacy clause" was not evident at the moment of the adoption of the Constitution (especially with respect to treaties covering other matters than human rights). Nevertheless, the Constitutional Court held, gradually but firmly, that a law that is contrary to the provisions of a treaty in force will be considered unconstitutional, because it infringes article 11 paragraph 1.[5]

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[1] In this sense, article 31 paragraph (2) of Law no. 590/2003 on treaties, provides that "the application of and the compliance with provisions of treaties in force represent an obligation for all the Romanian State authorities, including the juridical authority, as well as for Romanian physical and moral persons or who find themselves on the territory of Romania".

[2] Article 10 provides: "Romania maintains and develops peaceful relations with all states and, in this framework, relations of good neighborliness based on the principles and generally accepted norms of international law"; National courts applied directly norms of customary international law, for example in the case of State immunities – for example, Decision of the Supreme Court of Justice no. 1292/2002, file 1781/2002, related to a working contract between a physical person and the Embassy of Canada.

[3] Article 20 paragraph (2) provides: „In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favorable provisions."

[4] Article 11 paragraph (1) provides: "The Romanian State commits to fulfill to the letter and in good faith the obligations resulting from the treaties to which it is a party".

[5] Decision of the Constitutional Court no. 2/2014, concerning the objection of unconstitutionality of provisions of articles I point 5 and II point 3 of the Law for the modification of certain normative acts and of the sole article of the Law for the modification of article 2531 of the Criminal Code, published in the Official Monitor no. 71 of 29 January 2014; Decision of the Constitutional Court no. 195/2015, concerning the exception of unconstitutionality of provisions of article 29 para. 1 letter d) second phrase of the Law on the land registry and real estate publicity no. 7/1996, published in the Official Monitor no. 396/5 June 2015; Decision of the Constitutional Court no. 536/2016 concerning the objection of unconstitutionality of provisions of Law for the modification of Law no. 393/2004 concerning the Statute of locally elected officials, published in the Official Journal no. 730/21 September 2016; Ion Gâlea, *Valențe recente ale interpretării articolului 11 din Constituție*, in Ștefan Deaconu, Elena Simina Tănăsescu (ed.), *In Honorem Ioan Muraru*, Hamangiu, Bucharest, 2019, pp. 174-194.

c) a clause concerning *the consistent interpretation* between the constitutional provisions and international law – which is limited to provisions and treaties related to fundamental human rights.[1]

d) a clause which relates to the relation between the treaties and the constitution, provided by article 11 paragraph 3: "*If a treaty to which Romania is to become a party comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.*"

The latter provision of article 11 paragraph 3 represents the "source" of the question analyzed within this study. This paragraph has been included in the Constitution in 2003 and may be regarded as being inspired from article 54 of the Constitution of France.[2] The essential element is that it represents an "*ex ante"* filter: its scope is limited to treaties "to which Romania is to become a party", not to treaties in force. It ensures that, prior to expression of consent to be bound; Romania cannot become a party to a treaty which is contrary to the constitution. Article 11 paragraph 3 is accompanied by the competence of the Constitutional Court to examine "*the constitutionality of treaties or other international agreements upon request by one of the presidents of the two Chambers, or at least 50 deputies or 25 senators*".[3]

However, article 11 paragraph 3 leaves open the question related to: "what happens if" a treaty "escapes" this *ex-ante* filter? "what happens if" a provision of a treaty is found to be unconstitutional *after* the treaty had entered into force?

As a preliminary remark, before presenting the relevant Constitutional Court decision, it has to be pointed out that the Romanian Constitutional Court has the competence to conduct "*ex ante*" control of constitutionality of laws (meaning that the control is to be conducted "before their promulgation, upon request of the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People's Attorney, at least 50 deputies or 25 senators")[4], as well as "*ex post*" control related to the constitutionality of laws and ordinances, if an "objection" or "exception" is raised before a court or a commercial

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[1] Article 20 paragraph 1 provides: "Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party".

[2] Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit international public,* 9-eme Ed., LGDJ, 2017, pp. 237-321.

[3] Article 146 letter b) of the Constitution of Romania.

[4] Article 146 letter a) of the Constitution of Romania.

arbitration tribunal (by the parties to a case or by the court itself).[1] In the latter case, a Decision of the Constitutional Court which may find a provision to be unconstitutional has the effect to suspend *de jure* the contested provisions and, if the Parliament does not bring the respective provisions in line with the Constitution within 45 days after the publication of the decision, those provisions shall cease their validity.[2]

Because of the fact that, in Romania, treaties are ratified, as a rule, by law, the question that appears is "what happens if" the constitutionality of a treaty provision is contested before a national court – thus triggering the *ex post* control of the Constitutional Court.

3. The Decision of the Constitutional Court no. 142/2020 – the General Rule concerning the *ex post* Control of Treaties

Before 2020, it was generally thought that parties and courts can bring forward "objections" or "exceptions" of unconstitutionality concerning provisions of treaties in force – thus triggering the *ex post* control of the Constitutional Court: for example, in 2012, the Constitutional Court examined on the substance the conformity of certain provisions of the Extradition Treaty between Romania and the United States of America, signed on 10 September 2007.[3]

The case that triggered the Decision no. 142/2020 was related to the following facts: before a national court, a physical person argued that articles 20-22 of the Agreement between Romania and the Republic of Moldova in the field of social security, signed in Bucharest, on 27 April 2011 are contrary to the Constitution, mainly to the articles concerning the non-discrimination and the right to property.[4] The Court identified the

[1] Article 146 letter d) of the Constitution of Romania.
[2] Article 147 of the Constitution of Romania.
[3] Decision of the Constitutional Court no. 1014/2012 related to the exception of unconstitutionality of provisions of Law 111/2008 for the ratification of the Extradition Treaty between Romania and the United States of America, signed in Bucharest, on 10 September 2007, with reference to articles 1 and 22 of the treaty, as well as to the terms "treaty for the extradition of criminals" from its preamble, published in the Official Monitor no. 882/20 December 2012 (hereinafter "Decision 1014/2012"); The Court relied on article 146 d) of the Constitution and found that the contested provisions do not infringe the Constitution (para. 5).
[4] Decision of the Constitutional Cort no. 142/2020 concerning the rejection of the exception of unconstitutionality of provisions of articles 20-22 of the Agreement between Romania and the Republic of Moldova in the field of social security, signed in Bucharest, on 27 Aprilie 2010, ratified by Law no. 130/2011; the Decision is published in the Official Monitor no. 468/03 June 2020 – hereinafter "Decision 142/2020".

”object” of its constitutionality control: on one hand, the authors of the ”objection”/”exception” and the domestic court pointed out the ”sole article” of the Law no. 130/2011, by which the said Agreement was ratified; nevertheless, the Court found that the *real object* of the request concerned the provisions of the Agreement itself.[1] It is important to point out the fact that the Court underlined the difference between the Law by which the Parliament ratified the Agreement, on one side, and the agreement itself, on the other side, as the object of the request were only articles 20-22 of the Agreement.[2]

Starting from this basis, the Court established an important principle related to the control of constitutionality of treaties: as a general approach, the Constitutional Court does not have jurisdiction to examine *ex post* the conformity of international treaties with the Constitution, but has only jurisdiction over verifying the ”external” constitutional requirements of the Law by which the Parliament ratified the respective treaty (for example, if the quorum or majority requirements were met). The relevant paragraph of the Decision reads as follows:

> *”Examining the objection of unconstitutionality, the Court holds that the treaty is a legal act, whatever its particular designation or form, which embodies in written an agreement at State, government or department level, having the purpose of creating, modifying or extinguishing rights and obligations of legal or other nature, governed by public international law and embodied in a single instrument or in two or more related instruments [article 1 letter a) of Law on treaties no. 590/2003]. It results that the conclusion of an agreement, a species of treaty, reflects the concurring will of subjects of international law, not of a single subject. The individual will of each State Party does not maintain its individuality, the treaty being the expression of their common will. As a consequence, a single Party, through its Constitutional Court, cannot hold as unconstitutional a part of the text of the Agreement, with the possible consequence of obliging the other Contracting Party to comply with the generally mandatory character of the decision of the Constitutional Court of such party. The Constitutional Court has the competence to verify only the constitutionality of acts of primary regulation issued by the Romanian State, respectively the sovereign will of the State materialized by the acts of primary regulation adopted, but not the common will of the States parties to the treaty.*

[1] Decision 142/2020, para. 14.
[2] *Ibid.*, para. 15.

Thus, in principle, with respect to a law for ratification/accession, the control of constitutionality through the ex post objection ("exception") of unconstitutionality may regard only the external constitutionality requirements, especially because the effects of the decision of the Constitutional Court are limited to acts of primary regulation issued by the Romanian State, not acts of international law. The decisions of the Court are generally obligatory in the domestic legal order of the State, but they cannot extend their effects with respect to other subjects of international law…"[1]

The following elements could be underlined:

i) the Constitutional Court incorporated in its decision the definition of the treaty provided by the Law on treaties no. 590/2003 (which is partly inspired by the definition provided by the 1969 Vienna Convention on the Law of Treaties between States) ;[2] although it is not the first time when the Court quotes this definition,[3] it is an important sign that the Constitutional Court is willing to "assume" such definition, even if it is provided "only" by law (not by the Constitution).

ii) the Constitutional Court offered details about how it regards the legal nature of a treaty – it is an act of international law, stemming from the sovereign will of *two or more* subjects of international law; for this reason, the Constitutional Court cannot assume jurisdiction over the provisions of the treaty. The Constitutional Court reiterated that "*an act of international law does not become a law or an ordinance in order to be subject to the jurisdiction of the Court in an indirect manner, but maintains its individual character".*[4]

iii) at the same time, the Constitutional Court provided details related to the nature of the law for the ratification of a treaty: even if the ratification is done by law, the ratification "*does not represent an act of law-making on behalf of the parliament, but a modality of expressing consent that the Romanian State shall be bound by that treaty, with the consequence of complying with the provisions of that treaty within the internal law*".[5]

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[1] Decision 142/2020, para. 17.
[2] On the definition of the treaty, see: Anthony Aust, *Modern Treaty Law and Practice,* 2nd Ed., Cambdridge University Press, 2007, p. 16-24.
[3] Decision of the Constitutional Court no. 195/2015, concerning the exception of unconstitutionality of provisions of article 29 para. 1 letter d) second phrase of the Law on the land registry and real estate publicity no. 7/1996, published in the Official Monitor no. 396/5 June 2015, para. 22.
[4] Decision 142/2020, para. 19.
[5] *Ibid.*, para. 20.

iv) nevertheless, the Constitutional Court maintains jurisdiction over the ”external constitutional requirements”; we would suppose that these requirements are represented by the formal constitutional requirements for the adoption of a law for the ratification of a treaty (quorum, majority).

4. The Window Left Open – Compliance with ”Fundamental Principles of International Law”

Besides the ”external constitutional requirements” of the law for the ratification of a treaty, the Constitutional Court left a window open: even if it does not have jurisdiction over the verification of the conformity of treaties concluded by Romania with the Constitution, the Court held that it will, nevertheless, accept jurisdiction in two cases: a) ”*with respect to the violation of fundamental principles of international law that find, in all cases, a corresponding constitutional correspondence”* and b) ”*violation of principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law (for example, the condition of reciprocity in the case of extradition of a Romanian citizen)”.*[1]

At the first glance, the „exceptions” are difficult to understand. The Court explains, indeed, that the first situation – *verification of compliance with fundamental principles of international law* – ensures consistency with previous case-law. As it has been mentioned before, in its Decision no. 1014/2012, the Constitutional Court has examined on the substance the conformity of articles 1 and 22 of the Extradition Treaty between Romania and the United States of America. These contested provisions were alleged, by the party that invoked the objection (”exception”) of unconstitutionality, to have violated the presumption of innocence, provided by article 23 of the Romanian Constitution.[2] In its Decision 142/2020, the Court referred to the previous case of 2012 and explained that ”*in that Decision [1014/2012] the Court had analyzed the compliance with a fundamental principle of international law reflected in article 23 paragraph 11 of the Constitution, related to the presumption of innocence, principle that also represented the basis for expressing the consent of the Romanian State for the conclusion of the treaty“.*[3]

In our view, the ”window left open”, represented by the two cases in which the Constitutional Court retained jurisdiction over the compliance of

[1] Both situations are expressed in Decision 142/2020, para. 21.
[2] Decision 1014/2012, paras. 2, 4, 5.
[3] Decision 142/2020, para. 21.

international treaties with the Constitution, may raise, in the future, certain difficulties.

First, there is no certainty about what the Constitutional Court understood by "fundamental principles of international law". In international law, this notion may lead to the principles[1] of the United Nations Charter, the seven principles provided by the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970,*[2] or the ten principles provided by the *Helsinki Final Act of the Conference for Security and Cooperation in Europe of 1975.*[3] Nevertheless, the Constitutional Court referred to the presumption of innocence as a fundamental principle of international law (which may be derived from the principle of respect for human rights and fundamental freedoms – enshrined also in the Helskinki Final Act).

Second, certain difficulties may stem from the fact that the Constitutional Court seems to create a „hierarchy" between: the treaty that will be subject to review, on one side, and the „fundamental principles of international law", on the other side. In our view, a treaty could be reviewed with respect to its conformity to such principles *only* if these principles would constitute *jus congens.*[4] Nevertheless, the Constitutional Court did not refer to this notion, as did, for example, the General Court of the European Union in the "*Kadi I"* case (when it assumed the examination of the conformity of Resolutions of the Security Council with *jus cogens*).[5]

Third, the Constitutional Court mentioned that the fundamental principles of international law "*find, in all cases, a corresponding constitutional correspondence".*[6] We are not convinced that all principles enshrined, for

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[1] On the nature of principles of international law - *Militarv and Puramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment,* ICJ Reports 1986, p. 14, paras. 42-57.

[2] Resolution of the United Nations General Assembly no. 2626 (XXV) of 24 October 1970.

[3] Text available at https://www.osce.org/files/f/documents/5/c/39501.pdf (consulted 1 June 2020).

[4] With regard to *jus cogens* norms, see Alfred Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law", in *American Journal of International Law*, vol. 60 (1966), p. 55; Robert Kolb, *Théorie du jus cogens international. Essai de relecture du concept*, PUF, Paris, 2001, p. 65-77, Giorgio Gaja, "*Jus Cogens* beyond the Vienna Convention", RCADI, vol. 172, (1981-III), p. 282; articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties between States.

[5] Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Union, 2005,* ECR II-3649, para. 226.

[6] Decision 142/2020, para. 21.

example, by the UN Charter, find a correspondent in the Constitution of Romania.

Fourth, certain unclear elements persist with respect to what should be understood by "*principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law"*. Indeed, in the case of treaties of extradition, the Constitution of Romania provides for the cumulative conditions that the Romanian citizens should be extradited only on the basis of a treaty and on conditions of reciprocity (meaning that the Constitution imposes that a treaty providing for the extradition of Romanian citizens must contain the condition of reciprocity).[1] Nevertheless, besides this clear case, it is difficult to identify the principles the Court had referred to.

As a short conclusion to this sub-section, the Constitutional Court was bound to find a way of reconciling the new approach of its 2020 Decision (the principle that it does not have jurisdiction to control *ex post* the international treaties concluded by Romania, as acts of international law) with the previous case-law, when it has verified on the substance the „constitutionality" of certain treaties. On one side, the Court limited its review of treaties to fundamental principles of international law, and thus it avoided to "subordinate" the provisions of the treaties to provisions of domestic law (even constitutional law). On the other side, the Court did not use the notion of *jus cogens* and included certain notions that may be subject to interpretation (such as "*principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law"*).

5. Consequences of the New Approach Embodied in the Decision no. 142/2020

Despite certain difficulties raised by the „exceptions" related to the application of fundamental principles of international law, the Decision no. 142/2020 represents an important development: *as a matter of principle*, constitutionality of a treaty shall be reviewed only *ex ante*, before the treaty enters into force. This procedure does not offer automatic prevalence of the Constitution over treaties, but simply „avoids conflict": the Constitution provides expressly that if a treaty contains provisions contrary to the Constitution, "*its ratification shall only take place after the revision of the Constitution*".[2] After a treaty enters into force – again, *as a matter of*

[1] Article 19 of the Constitution of Romania.
[2] Article 11 para. 3 of the Constitution of Romania.

principle – it cannot be contested for the reason that its provisions may be contrary to the constitution, even if the *ex ante* review had not been accomplished with respect to the respective treaty.

This conclusion is to be completed by the fact that the case-law of the Constitutional Court accepted already that in case of conflict between a treaty and a law of the parliament, the provisions of a law which are contrary to the treaty will be considered unconstitutional (as being contrary to article 11 paragraph (1) of the Constitution, which stipulates the principle *pacta sunt servanda*). The Court held, in 2015, that certain contested legal provisions ”*breach the obligations assumed by Romania through treaties to which it is a party, thus breaching article 11 paragraph (1) of the Constitution, which stipulates that the Romanian State shall comply in good faith with its obligations from treaties to which it is a party”.*[1]

Thus, if on one side, treaties have precedence over laws, by virtue of article 11 paragraph (1) of the Constitution and, on the other side, treaties may not be subject, as a matter of principle, to a review of their conformity with the constitution after they had entered into force – by virtue of the interpretation provided by the Constitutional Court in its Decision no. 142/2020 – it might sound daring to say, but, *in practice, it might appear that the treaties and the Constitution have similar legal force within the Romanian legal system* – in the sense that both sources of law are superior to laws enacted by the Parliament and there seems not to be a hierarchy between them (as it has been mentioned, treaties cannot be held to be „unconstitutional”).[2] This statement is not modified by the ”exceptions” or ”window left open” retained by the Constitutional Court in its Decision no. 142/2020: the Court maintained jurisdiction to review the treaties concluded by Romania only in relation to ”*fundamental principles of international law”* which find their correspondent in constitutional norms. Practically, it appears that, according to the Constitutional Court, it is not the Constitution that has superiority over treaties, but other norms of international law that are also found in the Constitution (the Court mentioned ”*fundamental principles”,* but, from the

[1] Decision of the Constitutional Court no. 195/2015, para. 25.

[2] Nevertheless, it would not be reasonable, at this point, to argue that treaties have superior legal force over the Constitution, as long as the principle of *supremacy* of the Constitution is expressly mentioned in its article 1 paragraph 5 – see also Decision of the Constitutional Court no. 70/2002 on the objection/exception of unconstitutionality of provisions of article 34 paragraph (1) of Law no. 68/1992 for the election of the Chamber of Deputies and of the Senate, published in the Official Monitor no. 234/8 April 2002.

point of view of international law, we appreciate that *jus cogens*[1] would have been the appropriate category).

Without prejudice to the short conclusion mentioned above, the Constitution still applies to the conditions for expressing consent, as well as to those conditions which are expressly imposed with respect to certain categories of treaties: as it is the case of the example given by the Constitutional Court itself concerning the condition of reciprocity for treaties by which Romania consents to the extradition of its own nationals.

One last comment could be mentioned with respect to the ”window open” allowed by the Romanian Constitutional Court for the legal review of treaties to which Romania is a party. The Court seems to be in line with a ”larger tendency” of domestic courts assume jurisdiction over the scrutiny of a conflict between an international obligation and another international law norm – the latter coinciding with a constitutional law norm. This ”tendency” allows, for example, to refuse the execution of an international obligation owed to a third State, for the reason that a *human right* is violated – as it was the case, for example, of the Orlèans Court of Appeals in 2003, when it refused the immunity of the African Development Bank for the reason of breaching the right to a fair trial (stipulated, *inter alia,* by article 6 of the European Convention on Human Rights).[2] Practically, it was generally the same approach that the European Court of Justice adopted in its decision in *Kadi I,* where it rejected the approach of the General Court and scrutinized the actions of the Union which implemented obligations of Member States resulting from UN Security Council Resolutions, in relation to human rights which applied to the as general principles of EU law (having their source in the ECHR and the constitutional traditions of Member States).[3]

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[1] International Law Commission, ”Peremptory norms of general international law (jus cogens)”, Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, doc. A/CN.4/L.936, 29 May 2019, Draft Conclusion 10, p. 3.

[2] France, Court of Appeals of Orlèans, X c. Banque Africaine de Development, 7 October 2003; the Decision of the Court of Appeals was confirmed by the Cour de Cassation - Cour de Cassation, Chambre sociale, du 25 janvier 2005, 04-41.012; also quoted by André Nollkaemper, *op. cit.*, p. 291.

[3] Cases C-402/05P, C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and the Commission,* [2005] ECR I-6351.

6. Short Conclusion

The Decision of the Constitutional Court no. 142/2020 represents an important development with respect to the approach concerning the relation between international law and domestic law, especially concerning the relations between the Constitution and treaties concluded by Romania. The main element of the Decision is represented by the fact that the Constitutional Court decided that, as a matter of principle, it will not have jurisdiction over the review of the conformity with the Constitution of a treaty, on substantial matters, once it has entered into force. This allows a ”daring” conclusion: *in practice, it might appear that the treaties and the Constitution have similar legal force within the Romanian legal system* – in the sense that both sources of law are superior to laws enacted by the Parliament and there seems not to be a hierarchy between them. Indeed, the constitutionality of a treaty is to be reviewed, according to article 11 paragraph (3) of the Constitution of Romania, before consent of Romania is expressed: in case that incompatibilities are identified, the ratification can be performed ”*only after the revision of the Constitution*”.

Nevertheless, the Constitutional Court maintained jurisdiction over the „external” elements of constitutionality of the law by which the Parliament ratifies a treaty. Moreover, as an „exception”, it assumed jurisdiction also over the review of the treaties themselves, in the following cases: a) ”*with respect to the violation of fundamental principles of international law that find, in all cases, a corresponding constitutional correspondence”* and b) ”*violation of principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law (for example, the condition of reciprocity in the case of extradition of a Romanian citizen)”.* As a general opinion, these ”exceptions” do not establish necessarily the fact that the treaties to which Romania is a party are ”subordinate” to the Constitution (except for the case when the Constitution expressly provides for a condition for the conclusion of a treaty – as it is the condition of reciprocity for extradition of nationals) – because the review to be conducted by the Constitutional Court would be ”between two norms of international law”: the treaty and a ”fundamental principle of international law” (the latter having also a correspondent in the Constitution). In our view, it would have been more appropriate if the Constitutional Court had referred to *jus cogens*, instead of ”fundamental principles of international law”.

This ”exception”, which allows review of treaties in relation to such „fundamental principles” will allow, in the future, the Constitutional Court to put in balance on one side, obligations owed to third parties resulting

from treaties binding on Romania and, on the other side, *human rights* (which might be framed as a "fundamental principle of international law" and have constitutional correspondent). It is to be noted that this tendency is not "single", as it has been followed also by other domestic courts.

Despite the challenges that will be raised by the future interpretation of these "exceptions", the Decision no. 142/2020 is a very commendable step forward, towards the fullest possible application of treaties in the Romanian legal system.

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Contribuţia doctorandului şi masterandului / PhD and Master Candidate's Contribution

The First Acknowledged Climate Change Refugee?

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Abstract: *Climate change and, in particular, sea-level rise mostly affect the coasts of the low-lying island states from the Pacific Ocean, creating the premises for a future humanitarian crisis, because the affected population will have to be relocated to other territories. What should be done for the protection of the environmentally displaced persons? Could States agree to grant them the equivalent protection guaranteed to a refugee? The recent case of a national from the Republic of Kiribati, who searches refugee status in New Zealand after his homeland risks to be submerged, has brought us to the conclusion that sea-level rise could not be ignored anymore. The case was clearly a great opportunity for the acknowledgement of the "climate change refugee" status and showed that, in the future, we may witness a wave of migrants whose right to life is endangered by sea-level rise. Since complementing the legal definition of the refugee or creating new legal tools would be burdensome, we analysed the human rights perspective, which could be an appropriate alternative for enhancing the protection of the individuals affected by sea-level rise.*

Key-words: *climate change, refugee, sea-level rise, human rights.*

1. Introduction

"Climate change is a reality that now affects every region of the world. The human implications of currently projected levels of global heating are catastrophic. Storms are rising and tides could submerge entire island nations and coastal cities. Fires rage through our forests, and the ice is melting. We are burning up our future – literally" – Michelle Bachelet,

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United Nations High Commissioner for Human Rights, 9 September 2019, Opening Statement to the 42nd session of the Human Rights Council.

One of the most frightening outcomes of climate change, sea-level rise, could create insurmountable issues for the people who live along the vulnerable coastlines. In fact, the disappearance of the small low-lying island nations from the Pacific Ocean is not just an ominous outcome. It could become a reality in the next years if the actual trend of sea level rise does not stop or simply diminish. According to scientific studies, the islands of Tuvalu, home for at least 11,000 people, are expected to be totally submerged by 2054 due to the adverse effects of global warming[1] and we would witness what we might name the 'second Atlantis' (the Fifth Assessment Report of the Intergovernmental Panel on Climate Change predicted that sea level would rise by 2100 with up to 70 cm compared to the level measured in 1990). What are the optimum solutions in order to protect the lives of those endangered people and to preserve a decent standard of living? Would it be appropriate to call them refugees, forcing somehow the old definition of this term, or should we create a distinct category for those who flee from their origin States about to sink.

Recently, the case of a national of the Republic of Kiribati who claimed that his right to life was put in danger because of the increasing ocean level has been brought for analysis before the Human Rights Committee of the United Nations. His request for refugee status in New Zealand was denied and the Committee, even though it has largely agreed with the solution, slightly opened the door of a possible acknowledgement of the "climate refugee" in the future.

2. The Challenge to Protect the Individuals Affected by Sea-Level Rise

Tackling the problem of the evacuation of the Pacific islands that are in high danger of disappearance, local leaders have tried to search for help from the neighbouring countries, such as New Zealand or Australia if we speak about the relocations of the 11,000 Tuvaluans, but the feedback is not quite satisfactory (another example could be the Maldives, a State that took into consideration buying lands in India or Sri Lanka for the resettling of their

[1] Rebecca E. Jacobs, "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice", 14 *Pac. Rim L & Pol'y J.*, 2005, p.103.

370,000 inhabitants).[1] New Zealand has agreed in the past to accept small numbers of Tuvaluans (around 75 immigrants per year), if they met specific immigration criteria, while Australia has refused to host those environmental refugees,[2] but offers substantial aids for the small island developing countries and also provides jobs for their citizens. We must question if States like Australia or New Zealand are truly legally obliged to cooperate with the small Pacific Islands to host their population. But beyond this great task lies a bigger problem: the correct legal qualification of the status of these people. Australia may have reasons to be reserved in their hospitality since their government does not see a legally acceptable solution and this reserved behaviour lies in the fact that the traditional definition of the refugee cannot be extended at the moment to the "environmental refugees" or "climate change refugees". Efforts are being made towards this extension as it is a crucial game-changer for the fate of the people affected by sea-level rise. We must evoke here the representatives of Tuvalu who have been vocal in support of a new legal framework for climate refugees.

In 2016 Tuvalu Prime Minister Enele Sopoaga declared: "We have a real situation on our hands right now - 62,000 people every day are displaced by the impacts of climate change", and he reminded that "The Refugee Convention does not cover people displaced across borders by environmental degradation or climate-related disasters, and more recent initiatives to address the problem are non-binding".[3] At the same meeting, the President of Nauru requested support for the creation of a new Special Representative for climate-related security threats: "A new Special Representative[...]would be a lasting legacy of the World Humanitarian Summit and demonstrate to vulnerable countries and communities that we take seriously one of the greatest security threats of our generation".[4]

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[1] Andrew C. Revkin, *Maldives Considers Buying Dry Land if Sea Level Rises*, New York Times, 10 November 2008, available at https://www.nytimes.com/2008/11/11/science/earth/11maldives.html, last visited 31/08/2020.

[2] Tiffany T.V. Duong, "When islands drown: The plight of climate change refugees and recourse to international human rights law.", in *U. Pa. J. Int'l L.* 31 (2009), p. 1248, note 40.

[3] https://www.reuters.com/article/us-humanitarian-summit-climatechange-mig/tuvalu-pm-urges-new-legal-framework-for-climate-migrants-idUSKCN0YF2UD, last visited 31/08/2020.

[4] Ibid.

3. Refugee Law

The refugee has been traditionally seen as a person who, „owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Article 1 of the Convention Relating to the Status of Refugees, 28 July 1951).

This definition should be completed with the particular mention that it must be understood together with the principle of *non-refoulement*, which establishes that refugees must not be forced to return to a territory where their lives or liberty would be threatened.[1] Other definitions of the refugee may be found, for example, in art. 1(2) of the 1969 Organization of African Unity (OAU) Convention, which describes a refugee as "any person compelled to leave his or her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality", or in the 1984 Cartagena Declaration on Refugees, which states that refugees are "persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

Today, the 1951 Refugee Convention is signed by 145 States and may be seen as legally binding not only as an international treaty, but also as customary international law, given its constant application reflected in the States' practice. There is no discussion whether the treaty is binding or not, but it must be noted that there is no enforcement authority instructed to supervise the compliance with the Convention. Of course, at the level of the United Nations, we have the United Nations High Commissioner for Refugees, who is in charge of protecting refugees against abuse, but formally, the Convention itself states that the complaints should be referred to the International Court of Justice,[2] but only the States may file such complaints. This is a mechanism that has never been used before, as States try to avoid complaining about others' practice in the refugee field.

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[1] Article 33 of the Convention Relating to the Status of Refugees, July 28, 1951 (entered into force April 22, 1954).

[2] Article 38 of the Convention Relating to the Status of Refugees, July 28, 1951 (entered into force April 22, 1954).

Therefore, an individual who considers that his rights guaranteed by the Convention are violated, after the exhaustion of the national remedies, may have the following solutions: to file a complaint with the UN Human Rights Committee under the International Covenant on Civil and Political Rights, the ICCPR, or with the UN Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights, the ICESCR (regarding these two last covenants, we would like to remind that the ICCPR guarantees the respect of the civil and political rights of individuals, provides the right of an alleged victim to file a petition and is monitored by the United Nations Human Rights Committee, not to be confused with the United Nations Human Rights Council, while the ICESCR guarantees economic, social, and cultural rights and is monitored by the UN Committee on Economic, Social and Cultural Rights). In fact, as in the most cases of international law practice, it is almost impossible to ensure solid enforcement of the norms of a treaty just in the name of the principle *pacta sunt servanda*. As an example, being criticised for its restrictive refugee policies, Australia may face at most, as scholar suggested, mere international criticism: "it might be subject to widespread criticism, which could in some way or another affect Australia's reputation, but it is most unlikely that it would go to the international court".[1]

Before making a thorough analysis of the conditions to be met in order to be declared a refugee, we must make a clear distinction, for the beginning, between refugees and asylum seekers. Prior to being recognized as a refugee, the individual who flees form his origin State is undoubtedly an asylum seeker, as this is the general name for someone seeking international protection. It may also refer to a person who has applied for refugee status and has not yet received a final decision on his application. In the end, invariably, not every asylum seeker will be recognized as a refugee. However, an asylum seeker, while his application is being examined, should be equally protected by the principle of *non-refoulement*, so he should not be sent home. We could argue that sending back individuals from sea-level rise affected areas expose them to a serious risk of death or inhuman or degrading treatment, as they lack fresh water sources, their crops are compromised and their houses are inhabitable, but we recognize that this reasoning should be applied only in exceptional situations through the lens of the human rights perspective, as also acknowledged by the Human Rights Council: "human rights-based approaches could help disaster-affected persons to gain admission to and to stay in States of refuge. In exceptional

[1] https://www.crikey.com.au/2012/11/29/crikey-clarifier-does-australias-refugee-policy-breach-un-rules/, last visited 31/08/2020.

cases, obligations of nonrefoulement under international human rights law could impose constraints on the return of persons to States affected by disasters. […] more than 50 States had used their discretion to admit persons affected by disasters. This was particularly common in cases where persons were seriously and personally affected by a disaster. While States based their decisions on humanitarian grounds, they took into consideration human rights principles".[1] In addition, there is also a clear difference between the refugee and the migrant, understood as a person who freely chooses to move, but in order to find work, for education, family reunion, or other personal reasons, and not as a result of some life threats. Thus, migrants are not afraid of persecution or serious harm in their countries of origin, as they are still protected by their governments and may return home when they wish, unlike refugees who are deprived of this possibility. Once again, we stress that the conditions to be declared a refugee are: a well-founded fear of being persecuted because of his race (I), religion (II), nationality (III), membership of a particular social group (IV), or political opinion (V) – the five classic allowable grounds-, and he also finds himself outside his country of origin or habitual residence and is unable or unwilling to avail himself of the protection of that country or to return there because of fear of persecution. Additionally, he must not be explicitly excluded from refugee protection and his refugee status must not cease because of a change of circumstances.[2]

4. May Persons Affected by Sea-Level Rise, Who are Forced/Wish to Leave Their Homeland, Be Regarded as Refugees?

At first glance, it is hard to believe that Tuvaluans, for example, or other small Pacific islands' citizens who flee their homes because of the sea-level rise may be declared refugees in Australia or New Zealand, signatories of the 1951 Refugee Convention, as they do not seem to comply with the abovementioned five criteria that could be a reason for persecution. So, at the beginning they may still be seen as asylum seekers and they may file claims for gaining the refugee status, but in the end, interpreting the norm inscribed in Article 1 of the Refugee Convention, it becomes clear that they may, at least, be categorised as migrants, because they still enjoy the protection of their governments. The International Organization for

[1] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, Thirty-seventh session, 26 February – 23 March 2018, A/HRC/37/35, par. 18.

[2] UNHCR, The UN Refugee Agency, *A guide to international refugee protection and building state asylum systems*, Handbook for Parliamentarians N° 27, 2017, pp.17-18.

Migration even published a glossary with terms related to migration, environment and climate change, where they offered the definition of the environmental migrant: "Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad".[1] Of course, questions may be asked in the case where an entire population or governments themselves must flee in exile to avoid being submerged, but that will be analysed later.

As we stated before, at first sight, like other scholars may have observed, climate change displacement is not a well-founded fear based on that five relevant accepted grounds, so the actual definition of the refugee does not respond to the necessities of the people affected by sea-level rise. The Refugee Convention is nowadays an aged document, that has not taken into view the major challenges produced by climate change. While some may be in favour of Georg Nolte's approach on subsequent practice ("As their context evolves, treaties face the danger of either being 'frozen' into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. […] Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable"),[2] others may refuse the trend for including environmental migrants in the old definition of a refugee (we must note that the definition of the refugee is still unchanged since 1951) and ask for enhanced protection under new specific international laws,[3] underlining the low capacity of the current norms to be constantly adapted faced to a rapidly evolving field such as climate change law ("While some individuals displaced by natural disasters and climate change may be "persecuted" in connection with a characteristic protected by the Refugee Convention, the vast majority of these newest forced migrants will need new norms developed to address their unique situations. No doubt what is understood now in connection with disasters and climate change will evolve. Any new norms developed to ensure that states address the needs of these displaced persons should be

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[1] International Organization for Migration (IOM), *Migration, Environment and Climate Change: Evidence for Policy (MECLEP), A Glossary*, 2014, p.13.

[2] George Nolte, *Treaties Over Time, In Particular: Subsequent Agreement and Practice*, Rep. of the International Law Comm'n, 60th Sess., May 5-June 6, July7-Aug. 8, 2008.

[3] Kara K. Moberg, "Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection", 94 *Iowa L. Rev.* 1107, 2009.

capable of adapting to such changes").[1] The situation of the endangered Pacific islanders, who do not fulfil the conditions for being declared refugees, is not an isolated one and, unfortunately, most of the people who originate from third-world countries do not leave their homes fearing persecution, as they often leave because of wars, economic or political instability caused by rebellions and natural disasters. We might conclude that the notion of "persecution", as seen by the 1951 Refugee Convention, is rather restrictive in the general contemporaneous context.

However, the so-called "climate change refugees" are a reality that cannot be ignored. We are not talking only about our recurrent examples of people displaced by sea-level rise, but we should also mention environmental events such as drought, hurricanes, deforestation, famine, extreme pollution, events caused equally by climate change. International law should grant protection to these people despite some norms inscribed in an international convention in the 1950s. Studies have shown that the number of the environmentally displaced persons worldwide could grow up to 150 million by the year 2050,[2] with some numbers going up to 250 million, according to others.[3] Nowadays, at the end of 2019, according to the Global Report on Internal Displacement, at least 5.1 million people were internally displaced by disasters across 95 countries and territories, this being the first time when reports compile a figure of people forced to move because of natural disasters.[4] Most of the disaster displacements were the result of tropical storms and monsoon rains in South Asia and East Asia and Pacific,[5] but we incline to believe that slow processes of degradation of the environment, such as sea-level rise will produce even greater tragedies, leaving no possibilities to rebuild homes or communities in the same places. Storms may come and go, but the submergence of an island is most likely an irreversible process, which implies not only internal displacements, but also international ones. Dark scenarios predict that States like Tuvalu (in the Pacific Ocean) or the Maldives (in the Indian Ocean) will vanish and render their citizens stateless if greenhouse gas emissions will continue to rise.

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[1] Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, Georgetown University Law Center, 2015, p.126.

[2] Dana Z. Falstrom, "Perspective: Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment", 13 *Colorado Journal of International Environmental Law. & Pol'Y Y.B.* 1, 4, 2002.

[3] Rachet Baird et al., *Human tide: the real migration crisis*, A Christian aid Report, May 2007, p.6.

[4] Internal Displacement Monitoring Centre, *Global report on internal displacement*, April 2020.

[5] https://migrationdataportal.org/themes/environmental_migration, last visited 31/08/2020.

Nevertheless, The World Bank offers solutions in a recent document, stating that, with the correct guidance and firm decisions such as cutting greenhouse emissions, we should be able to avoid the worst-case scenario of over 140 million displaced persons and to reduce the number by as much as 80 per cent, which equivalates with more than 100 million people.[1]

In light of these very likely future scenarios, it is highly advisable that international lawyers and professors, together with the specialists who represent the governments and the international organizations responsible for the protection of the migrants, should work to create a safe and uniform legal framework including the so-called "climate change refugees", who are, in some parts of the planet, forced to leave their disappearing environments.

5. Acknowledging the Concept of Climate Change Refugee?

One of the first mentions of the status that people affected by natural events may achieve was in a report for the United Nations Environment Programme, where the author used the term "environmental refugee" to designate the persons who are "forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life".[2] Nowadays, the use of the term "climate change refugee" is heavily disputed, because it is not defined by the 1951 Refugee Convention or other international norms and was, generally, seen as a misnomer. Terminology may vary, as other designations have emerged, such as "environmental refugee" or "ecological refugee", "forced environmental migrant", "environmentally motivated migrant", "disaster refugee", "ecologically displaced person" or even "climate exiles" for those who flee from disappearing States, in danger to become stateless persons.[3] A case has been founded for the following neutral, but much more versatile term: "environmentally displaced persons". An author argues, and not wrongfully, that the latter term is more flexible and will appropriately concentrate the protection of these persons more on the human rights perspective and less on the problematic international refugee law: "Rather than waste time arguing a tentative position under the Refugee Convention, Tuvalu and other states can then focus on their infringed human rights and

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[1] Kanta K. Rigaud, ed., *Groundswell: Preparing for Internal Climate Migration.* World Bank, Washington, DC, 2018.

[2] Essam El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme, 1985, p.4.

[3] https://www.nytimes.com/2005/05/09/opinion/before-the-flood.html, last visited 31/08/2020.

the obligations created from those rights in order to find liability for climate change and its environmental effects".[1] The aforementioned IOM's Glossary with terms in relation with migration, environment and climate change supports the view that involving the term "refugees" in the legal description of the people affected by climate change would be inappropriate. It proceeds to define an environmentally displaced person as someone "who is displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one. This term is used as a less controversial alternative to environmental refugee or climate refugee (in the case of those displaced across an international border) that have no legal basis or raison d'être in international law, to refer to a category of environmental migrants whose movement is of a clearly forced nature".[2]

Even the leaders of the directly involved States question the use of the term "refugee" and advocate for permanent migration and relocation in case of total disappearance underwater: "We want to begin that [the migration process] now, and do it over the next twenty, thirty or forty years, rather than merely, in fifty to sixty years' time, simply come looking for somewhere to settle our one hundred thousand people because they can no longer live in Kiribati, because they will either be dead or drown. We begin the process now, it's a win–win for all and very painless, but I think if we come as refugees, in fifty to sixty years' time, I think they would become a football to be kicked around".[3]

6. A Complementary Protection Centred on Human Rights: an Alternative for the Inability to Expand the Refugee Policies to Persons Affected by Sea-Level Rise

If we stand against an extensive understanding of the term "refugee", we tend to ignore the violation of the human rights to a decent livelihood, to property, to shelter, in its basic forms. Action at the international level must be taken, even though there is still reluctancy in accepting the idea of "climate change refugees". Even the UNCHR has admitted that "there may be situations where the refugee criteria of the 1951 Convention or broader refugee criteria of regional refugee law frameworks may apply, for example

[1] Tiffany T.V. Duong, *op.cit.*, p. 1252, note 55.
[2] International Organization for Migration (IOM), *Migration, Environment and Climate Change: Evidence for Policy (MECLEP), A Glossary*, 2014, p.13.
[3] Former President Anote Tong of Kiribati, quoted by Jane McAdam, *Climate Change, Forced Migration, and International Law*, Oxford Univ. Press, Oxford, 2012, p. 1.

if drought-related famine is linked to situations of armed conflict and violence",[1] but has refused specialised protection, at least at speech level, for people who could not justify a manifest persecution from the State. Generally, refugee law requires a connection between the natural disasters and an act of persecution from the State, which, in this case, appears *post factum* and uses the natural event as a pretext. In other cases, refugee law may be applied if the natural disaster results in a "serious disruption of public order" (as provided by the Organization of African Unity Convention or the Cartagena Declaration). However, the recent case of Ioane Teitiota before the UN Human Rights Committee has shown that the adverse effects of sea-level rise cannot be ignored anymore and that violation of human rights inscribed in the International Covenant on Civil and Political Rights (ICCPR), provoked by climate change, may lead to the application of the principle of *non-refoulement* and thus to accepting asylum for an environmentally displaced person. In our opinion, this is the right path that must be chosen in order to grant protection to this emergent "particular social group" that fear persecution based on the inability of their origin States to support them, even though this might seem like a burdensome task for the States that are fighting sea-level rise or other worse effects of climate change. Enhanced protection of the human rights must be the key to overwhelm the "tyranny" of the traditional perceptions on the concept of "refugee". Therefore, we must analyse how people affected by climate change and, in particular, sea-level rise, may invoke their fundamental rights (enshrined by either the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights) in order to enjoy the same treatment as a refugee, as a so-called "complementary protection".

The well-known case of Ioane Teitiota from Kiribati showed that New Zealand sticks to the strict conditions of the old Refugee Convention and does not allow extensive interpretations. In the *Teitiota v Chief Executive Ministry of Business, Innovation and Employment Case* before the Court of Appeal (and, later, confirmed by the High Court of New Zealand), a Kiribatian applied for refugee status and claimed that he feared to lose his life because of sea-level rise in case he returned home, but, ultimately, he was denied permanent residence in New Zealand. Judge Wild considered that even though we could not deny the adverse effect of sea-level rise on Mr. Teitiota's livelihood (the rise in the level of the Pacific Ocean has affected crops, coconut palms or freshwater supplies), the plaintiff has not

[1] *Climate change and disaster displacement*, available at https://www.unhcr.org/climate-change-and-disasters.html, last visited 31/08/2020.

brought enough evidence to prove the sufficient threat to life: "the Tribunal was right to find that the supplies of food and water for Mr. Teitiota and his family would be adequate if they were required to return to Kiribati. The Tribunal readily accepted that the standard of living of the Teitiota family back in Kiribati would compare unfavourably to that it enjoyed in New Zealand. But the Tribunal was, on the evidence it heard, entitled to find that Mr Teitiota and his family on return to Kiribati could resume their prior subsistence life with dignity".[1] Furthermore, the Court of Appeal's decision relied on the theory that the "persecution" criterion, requested in order to qualify as a refugee, must originate from a human being, including governmental authorities or non-state actors and not from natural causes as in the case of sea-level rise. In the end, Judge Wild concluded by stating crystal clear that "no one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention".[2] However, New Zealand judges did not exclude the possibility that in the future "environmental degradation could create pathways into the Refugee Convention or protected person jurisdiction".[3] Thus, the road to the acknowledgement of the "climate refugees" is not decisively blocked and, as we should see, later on, the efforts of Mr. Teitiota have opened the path to the recognition of a potential *non-refoulement* in the particular situations of those persons that leave their home because of sea-level rise and other climate change impacts.

7. Ioane Teitiota: A Potential "Climate Change Refugee"

We recall that Mr. Teitiota was forced to leave Kiribati because of the environmental degradation and increasing sea-level rise (as claimed by the author of the complaint, the habitability of the capital city of the country was at one of the worst levels: "The situation in Tarawa has become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded,

[1] *Ioane Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*, 2014, New Zealand Court of Appeal 173 at par. 37.
[2] Ibid. par. 41.
[3] CCPR/C/127/D/2728/2016, Human Rights Committee - Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 7th January 2020, par. 2.2.

resulting in a housing crisis and land disputes that have caused numerous fatalities. Kiribati has thus become an untenable and violent environment").[1] He wanted to settle in New Zealand and applied for refugee status under section 129 of New Zealand's Immigration Act 2009, but his application was unsuccessful. The domestic courts could not ascertain refugee status and did not acknowledge a violation of article 6 of the ICCPR.

The New Zealand judges have pursued the analysis of the refugee conditions with the utmost care, not excluding the possibility to expand the scope of the Refugee Convention: "while in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case".[2] Firstly, they tried to find the persecutor and, as explained before, they failed to find an action or an omission of a State or a non-state actor that would generate a fear of persecution in Kiribati. It should have been demonstrated that Kiribati failed to take the necessary steps in the face of a natural disaster. Teitiota defended his opinion and claimed that, even though Kiribati has taken some measures to protect the lives of their citizens (for example, building sea-walls along the coast), these efforts would prove to be useless without international cooperation and identified the industrialized States that contribute the most to pollution as the main "persecutors". However, the arguments were rejected as there was no proof of special intention to do harm from the international community against low-lying developing States as Kiribati. Secondly, the argument of the well-founded fear was also rejected, as there was no proof of any physical menace in Kiribati and food or water was still accessible on the island, although the standards of living have considerably diminished in the context of increasing sea-level rise. Thirdly, it is very hard to claim that persecution is founded on the five grounds provided by the Refugee Convention in the context of climate change which generally affects all people without discrimination, although "refugee protection may be available if environmental issues gave rise to armed conflict targeting a particular segment of the population or to politicized humanitarian relief that discriminated against a particular social group".[3] Finally, it was admitted that "although the environmental degradation caused by both slow and

[1] CCPR/C/127/D/2728/2016, Human Rights Committee - Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 7th January 2020, par. 2.1.
[2] Ibid., par. 2.8 quoting the decision of the Immigration and Protection Tribunal.
[3] *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't [2013] NZHC*, 3125, par. 27.

sudden-onset natural disasters in Kiribati is a "sad reality," that reality did not bring Teitiota's experience within the scope of the Refugee Convention",[1] which is a legal document that does not cover for the moment the special situation of the environmentally displaced persons. As a result, Ioane Teitiota was described as a "sociological refugee" who pursued a better life "by escaping the perceived results of climate change".[2]

Following his unsuccessful efforts to convince the judicial bodies of the feared persecution and the risk to life experienced in an unstable environment, Ioane Teitiota filed an individual complaint with the UN Human Rights Committee. As presented before, the UN Human Rights Committee is not an ideal solution for requesting claims based on ICCPR violations, as it was very reluctant to truly ascertain the infringements. In the past, it has required that the threat to life put by nuclear weapons should be imminent, although it has admitted in a General Comment that nuclear weapons are one of the greatest threats to life ever created by humankind, supported their prohibition and recognized their use as crimes against humanity (or cases where it highlighted the difficulties to be categorised as a victim, implying the need to prove the alleged risk as being more than a theoretical possibility).[3] These were from the start serious signs that successful claims based on sea-level rise issues are not very foreseeable at the horizon, but, in our opinion, the recent decision of the UN Human Right Committee in the case of Ioane Teitiota has done more good than harm. Moreover, as presented before, Mr. Teitiota had already faced refusals to acknowledge his status of "climate refugee" and the violations of his rights in front of New Zealand's Court of Appeal and High Court, as he thoroughly exhausted the domestic remedies before addressing the issue to the UN Human Rights Committee, a condition imposed by the Option Protocol to the Covenant.

Mr. Teitiota essentially claimed that his removal from New Zealand and the forced return to Kiribati violated article 6 of the ICCPR, as "sea level rise in Kiribati has resulted in: (a) the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life; and (b) environmental degradation, including saltwater contamination of the freshwater supply".[4] New Zealand sustained the line of reasoning of its

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[1] *A.F. (Kiribati), [2013], NZIPT* 800413, New Zealand: Immigration and Protection Tribunal, par. 75.
[2] *Ioane Teitiota v Chief Exec. of the Ministry of Bus., Innovation & Emp't [2013] NZHC*, 3125, par. 54.
[3] UN Human Rights Committee, *S. Aumeeruddy-Cziffa and 19 Other Mauritian Women v. Mauritius*, Communication No. 35/1978, par. 9.1.
[4] CCPR/C/127/D/2728/2016, op.cit., par. 3.

judicial bodies and asserted that the author of the complaint is not subject to any real risk of being persecuted or losing his life because there was no evidence that he could not find proper accommodation, raise crops or find potable water at present in the State of Kiribati. Of course, the protection of the right to life in the context of a natural hazard includes positive obligations from the State, but there was no proof that the government of Kiribati omitted to take action at such degree that it would pose a significant threat to life (as shown before, in the author's opinion, Kiribati's capacities should not be taken into consideration, as the sea-level rise is an unjust and disproportionate adversary of this State). Moreover, in reference to the lack of evidence, New Zealand could not find precedents that would justify the fear of death in front of a slow-onset phenomenon: "no evidence had been provided to establish that deaths from such events were occurring with such regularity as to raise the prospect of death occurring to the author or his family members to a level rising beyond conjecture and surmise, let alone a risk that could be characterized as an arbitrary deprivation of life".[1] Accordingly, New Zealand found the communication inadmissible because the claim should not be based on hypothetical violations that may arise in the future,[2] so the risk was not imminent, as requested by the Committee in the precited case of *Aalbersberg et al. v. the Netherlands* or as encompassed in *Beydon et al. v. France*, the claimant did not "show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such effect is imminent".[3] Thus, the risk remained "in the realm of conjecture or surmise".[4] Additionally, New Zealand justified their denial to accept the existence of the risk to life by citing a previous decision of the Committee where *non-refoulement* was not applied, because there was no proof of a direct threat to the life of the claimant,[5] similarly, in their opinion, with the situation of Mr. Teitiota who does not experience a substantiated, immediate threat. The Kiribatian countered New Zealand's views and showed the bad effects of salinization to the health of his family or the compromising of the agricultural crops and drinking water sources. He reiterated that he faces an indirect risk of harm in Kiribati, as the country is expected to be submerged in maximum 15 years[6] (we could assert that, although at *prima facie* sea-level rise is a natural event, it has been the result of anthropogenic activities that harmed the

[1] CCPR/C/127/D/2728/2016, op.cit. 2.9.
[2] *V.M.R.B. v. Canad*a (CCPR/C/33/D/236/1987), par. 6.3.
[3] *Beydon et al. v. France* (CCPR/C/85/D/1400/2005), par. 4.3.
[4] CCPR/C/127/D/2728/2016, op.cit., par. 4.6.
[5] *Lan v. Australia* (CCPR/C/107/D/1957/2010), para. 8.4.
[6] CCPR/C/127/D/2728/2016, op.cit, par. 7.1.

environment, so the threat really is, in an intermediate manner, the outcome of human "exploits").

After considering the compliance of the communication with the procedure rules, the Committee noted that the harm feared by the author of the complaint is not based on mere assumptions: "the author's claims relating to conditions on Tarawa at the time of his removal do not concern a hypothetical future harm, but a real predicament caused by lack of potable water and employment possibilities, and a threat of serious violence caused by land disputes"[1] and declared admissible Ioane Teitiota's claim: "the author presented to the domestic authorities and in his communication, the Committee considers that the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise on the habitability of the Republic of Kiribati and on the security situation in the islands, he faced as a result of the State party's decision to remove him to the Republic of Kiribati a real risk of impairment to his right to life under article 6 of the Covenant".[2] The Committee then proceeds to acknowledge the States' obligation not to extradite, deport or expel individuals that fear violations of articles 6 and 7 of the Covenant in their homeland. It is a comprehensive obligation that extends beyond the principle of *non-refoulement* under refugee law and protects individuals who do not meet the requirements for refugee status. Thus, "States parties must allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement"[3] and all relevant circumstances related to human rights protection from the origin country must be thoroughly analysed. The right to life must be interpreted broadly, including "the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death"[4] or even "foreseeable threats and life-threatening situations that can result in loss of life".[5] The Committee even recalls its remarks on the compromising effect of climate change on the full enjoyment of the right to life: "environmental degradation, climate change and unsustainable development constitute some

[1] CCPR/C/127/D/2728/2016, par. 8.5.
[2] Ibid., par. 8.6.
[3] Ibid., par. 9.3.
[4] UN Human Rights Committee, General Comment No. 36: Article 6 (Right to Life), CCPR/C/GC/36, par.3.
[5] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3.

of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[1]

However, the Committee failed to find the injustice done by the national courts of New Zealand, as it did not believe that Kiribati is in the situation of an imminent general conflict that would cause irreparable harm under articles 6 or 7 under the Covenant or that Mr. Teitiota is in a particularly vulnerable situation that would justify the fear of death.[2] National courts have emphasized the imminent character of the threat to life as a special requirement, requested that the feared arbitrary deprivation of life should come from the action of the government and mentioned that the cruel, inhuman or degrading treatment from article 7 of the ICCPR should not cover general socio-economic conditions, unless they are the outcome of the State's acts or omissions, such as a discriminatory denial of humanitarian assistance[3] (imminence was also been highlighted in an abovementioned case that founded the decision of New Zealand's authority to deny permanent residence of a Kiribatian citizen; the applicant could not prove that there was a sufficient risk to his life at the time of his claim, as the environmental conditions should be "so parlous that his life would be placed in jeopardy, or that he and his family would not be able to resume their prior subsistence life with dignity").[4] The Committee also rejected the argument that freshwater is inaccessible, even though 60 per cent of the capital's inhabitants receive rationed supplies of water from the authorities. It admitted the difficulty to obtain potable water or to grow crops on a salinized soil, but it requested the evidence of effective inaccessibility. Moreover, although it accepted that Kiribati could be submerged in 10 or 15 years, the Committee suggested that there is sufficient time to take appropriate action and relocate all the affected population. As we can clearly see, generally, the reasoning of the Committee was in line with the position of the national courts, rejecting a manifest error or a denial of justice from them. It concluded that "without prejudice to the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in the Republic of Kiribati and new and updated data on the effects of climate change and rising sea-levels thereupon",[5] the

[1] UN Human Rights Committee, General Comment No. 36, op.cit., par. 62.
[2] *Jasin v. Denmark* (CCPR/C/114/D/2360/2014), par. 8.8, 8.9.
[3] A.C. (Tuvalu), [2014] NZIPT 800517-520, New Zealand: Immigration and Protection Tribunal, 4 June 2014, available at: https://www.refworld.org/cases,NZ_IPT,585151694.html, last visited 31/08/2020.
[4] A.F. (Kiribati), [2013], NZIPT 800413, New Zealand: Immigration and Protection Tribunal, par. 74.
[5] CCPR/C/127/D/2728/2016, op.cit., par. 9.14.

deportation to Kiribati did not take place in circumstances that would allow a successful claim on article 6 violations. However, what was really ground-breaking is a certain assertion of the Committee that would open the door for future climate refugees' claims: harm could also be induced through slow-onset events, which do not have the imminent nature of a sudden-onset impact. Even though it refused to ascertain the violation of the right to life in the particular case of Ioane Teitiota, considering that sufficient measures of protection were put in place, the Committee recognised that "without robust action on climate at some point in the future it could well be that governments will, under international human rights law, be prohibited from sending people to places where their life is at risk or where they would face inhuman or degrading treatment".[1] It went on to note the extreme nature of the risk of States' disappearance underwater and to admit that the "conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized".[2]

To sum up, this landmark decision is the first one from the Committee's case law to settle on asylum claims based on the negative effects of sea-level rise. The Committee made it clear that this is not a phenomenon that could be ignored and called for international assistance to efficiently counter the undeniable impact on low-lying developing islands. It did not deny a possible successful claim in the future on violations of the right to life endangered by slow-onset processes as sea-level rise, but for the moment it considered that there is still enough time to solve the relocation issue. However, we consider that the Committee has inappropriately founded its arguments on the adaptive measures of Kiribati, a minnow on the international scale. The threshold required to justify a violation of article 6 should have been decreased in such particular cases were the hardships of life deepen in the context of climate change. Is there really sufficient water, sufficient food or accommodation on an atoll with 500 km^2? As Committee member Duncan Laki Muhumuza noted in his dissenting opinion, the threshold should not be an unreachable one: "The State Party placed an unreasonable burden of proof on the author to establish the real risk and danger of arbitrary deprivation of life – within the scope of Article 6 of the Covenant […] the Committee needs to handle critical and significantly irreversible issues of climate change, with the approach that seeks to uphold the sanctity of human life".[3] In his opinion, the author has sufficiently

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[1] https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling, last visited 31/08/2020.

[2] CCPR/C/127/D/2728/2016, op.cit, par. 9.11.

[3] Ibid., Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), par. 1.

demonstrated the health issues and future problems that may arise due to the lack of proper sources of food and water, considering that we should not wait for increasing deaths caused by the negative effects of sea-level rise in order to ascertain with no doubt the threat to life: "even if deaths are not occurring with regularity on account of the conditions […] it should not mean that the threshold has not been reached".[1] He appreciated the efforts made by Kiribati, but he expressed scepticism their solutions could be fruitful: "Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remain at risk".[2] In a very expressive manner, he concluded that "New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board".[3]

Although still inefficient for Mr. Teitiota, the decision is a guarantee that international human rights bodies are not completely ignorant to the suffering of the individuals from the sinking low-lying islands from the Pacific Ocean and that the Refugee Conventions' restrictive provisions could be overcome by a human rights analysis that could trigger a *non-refoulement* obligation when the individual risks to lose his life or to be subject to torture. We should remind that the decision of the Committee is not legally binding, but it represents, however, a relief and a glimmer of hope that jurisprudence of other national or international courts will follow this path.

8. Conclusion

The case of Ioane Teitiota, the national from the Republic of Kiribati, who flees from the "murky waters" that threat to engulf his home, has certainly created new opportunities for claiming an enhanced protection of the individuals affected by sea-level rise and, in particular, for the reassessment of human rights' importance for the environmentally displaced persons. The respect for the right to life as inscribed in the Article 6 of the ICCPR should not be a negotiable obligation for the State Parties. Although the violation was not acknowledged, the views adopted by the Committee are clearly a warning that the tides might change. The possible destination States must be prepared to take the appropriate decision for the future in order to guarantee

[1] Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), par. 5.
[2] Ibid., par. 6.
[3] Ibid., par. 6.

the protection of the right to life for the persons who might be known as "climate change refugees".

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Recenzie de carte / Book Review

La construcción jurídica de un espacio marítimo común europeo

(coord. by Jose Manuel Sobrino Heredia, Gabriela A. Oanta, Bosch Editor, Barcelona, 2020, 1052 pages)

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We strongly believe that both experts and students will find this book very useful, taking into account, on the one hand, the complexity of the subject at stake and, on the other hand, the fact that very few publications manage to address so easily a broad range of audiences at once.

This publication, the result of the activity of the Network of Excellence for Legal-Maritime Studies (REDEXMAR), which is formed by more than 50

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researchers and professors of public international, private international law and of labor law from France, Greece, Italy, Spain and the United Kingdomseeks to analyze the legal, public and private consequences, both national and international, derived from the progressive creation by the EU of this European common maritime space.

The launch by the EU, in 2007, of an Integrated Maritime Policy, with the aim of supporting the sustainable use of the seas and oceans and developing a coordinated, coherent and transparent decision-making process on all sectoral policies existing at EU level, together with the evolution of the law of the sea, stands proof as a great contribution for contouring the European maritime space. This book comes to highlight and thoroughly analyze the challenges, threats and advantages in the creation of this common space.

This collective book also tries to echo this evolution and the current issues related to sensitive and controversial issues like migration or Brexit, from a legal perspective. Furthermore, the recent jurisprudence of the ITLOS (International Tribunal for the Law of the Sea) is not left out. In addition, a thorough analysis of the *Ukraine v. Russian Federation* (case no.26, ITLOS, PV. 19/C26/Rev.1) and *Panama v. Italy* (M/V Norstar Judgement, ITLOS Reports 2019) cases is provided.

When it comes to the structure of the book, we may notice that it is divided in three parts addressing different topics, all having in common the European maritime space: Part 1- The common European maritime space as a confluence of the different maritime sectorial policies of the European Union, Part 2- The common European maritime space as a setting for work at sea and human rights in the maritime environment and Part 3- The European maritime space as an area of maritime protection and safety in an international environment. The chapters within the three parts are independent one from another, since it is a collective volume encompassing more authors' contributions, which in our view comes to add a plus to this publication.

Another plus of this publication resides in the fact that it is bilingual and some of the articles are in Spanish and some in English.

Some of the articles are accompanied by several excerpts taken from relevant case law, relevant legislations and even maps, which contribute to persuading the reader on the study of the Law of the Sea. The wide array of supporting documents and the dynamic way of presenting each topic shows the authors' desire to combine the theoretical with the practical approach.