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

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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

[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

[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

[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

[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

[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

[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

[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

[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

[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

[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

[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

[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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