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Cuvânt înainte / Foreword

The present issue is hosting in the *Articles* section three studies, one on the *Transnational Law. Approaches and (Commercial) Origins* by Lecturer Radu Bobei, the second of Victor STOICA addressing the *Application of International Law to Cyber Operations* and the third one by Andreea ZALOMIR analysing the *Legal Implications of Outer Space Warfare*.

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The section *PhD and Master Candidate's Contribution* presents Mihai BADESCU's contribution on the *The Legal and Practical Inefficiency of Systematically Introducing Human Rights Clauses in the European Union's Agreements*

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

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

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

Abrevieri / Abbreviations

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

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

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

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

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

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

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

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

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

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

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

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

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

UE / EU – Uniunea Europeană / European Union

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

Articole
Articles

Transnational Law. Approaches and (Commercial) Origins

Radu Bogdan BOBEI*

Abstract:[1] *Transnational law, hereinafter 'TL', be it a real dream or a dreamed reality, is to be outlined in the light of some approaches and its origins. The paper addresses 3 (three) approaches of TL: the ideological approach (Section 1), the operative approach in its academic dimension (Section 2), respectively the operative approach in its non-academic and practical approach (Section 3). Furthermore, the paper addresses the private (and) commercial origins of TL (Section 4). In the first quarter of the 21st century, TL deployed its evolutionary nature. In order to deeply contemplate in future papers the stages of such TL's evolutionary nature, the paper is suggesting for the time being a 'Back to the origins of TL itself!' demarche. It might be a chance to properly contemplate also in future papers the progressive nature of the transnational normativity itself, be it hard or soft. Such latter nature is permanently nurtured by the relationships evolved within the so-called 'world society'. At least in the last 50-60 years, the world society detached the nations from the States themselves and from the Westphalian logic familiar with the nation-States only. The final remarks allow seeing, even briefly, that the newest TL, if any, amounts, at least in its commercial dimension, to TL in its oldest version of commercial dimension itself (Section 5). The so-called 'circle, if any, of TL' in its commercial dimension is fully and perfectly closed; the newest and the oldest* ***lex mercatoria*** *are sharing*

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[1] This research paper constitutes an extended version of the lecture delivered on November 27, 2020, under the auspices of the Centre for Studies in International and Transnational Law (University of Bucharest).

the same core idea - that is the worldwide merchant's common sense in doing business.

Key-words: *transnational (and) commercial law; legal curricula; world society*

1. Ideological Approach

We are today in an important sense all trans-nationalists.[1] Let us say it straight: in the first quarter of the 21st century we were becoming (almost) all trans-nationalists irrespective of the fact that the legal scholars all over the world were becoming or not aware of the transnationalism itself. As far as I am concerned, I modestly suggest to have become (more) aware of the existence of the nowadays transnationalism. That is why I took my academic liberty to approach this topic in the below three dimensions, including the origins of TL itself. It is far from me the idea on the doctrinal need, if any, to spread or to limit the idea and/or the reality of transnationalism. I approach transnationalism in the light of a particular objectivity insofar my intellectual skills allow me to objectively and scholarly behave. Otherwise speaking, my paper's aim is neither to state that transnationalism is good or less good or even bad, nor to convince somebody that transnationalism constitutes the start and the end of the approach, be it legal or not, of the nowadays realities. I humbly dare state that transnationalism can be assessed as a particular stage in the history of the legal thinking. The history as best professor for the whole mankind shall 'decide' the fate of internationalism, or of transnationalism, or of nationalism in legal thinking. As scholars, we must assume the academic mission in order to objectively assess and not to subjectively blame or to subjectively praise the stages of the legal thinking.

Subsequently to the end of the Cold War and at least in the first quarter of the 21st century, we are not living (anymore) in the light of the so-called 'Westphalian duo'.[2] Let us recall that 'the Peace of Westphalia legitimated

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[1] My words paraphrase '(…) We are in an important sense all comparatists now'. See William Twining, "Montesquieu Lecture(s)" 30-31, in Peer Zumbansen, "Why Global Law is Transnational: Remarks on the Symposium around William Twinning's Montesquieu Lecture", *Transnational Legal Theory* vol. 4 no. 4 (2013), pp. 463-475.

[2] In the light of the Peace of Westphalia (1648), two main kinds of legal ordering fully emerged, as follows: municipal State(s) law(s), on the one hand, and public international law, on the other hand. In its traditional dimension, public international law has been conceived as ordering the relations between States only. See William Twining, "Globalisation and Legal Scholarship"*, Tilburg Law Lectures Series, Montesquieu seminars volume 4 (2009)*, published by Wolf Legal Publishers in close cooperation with the Tilburg Graduate School of the Tilburg University Faculty of Law, Netherlands, 2009, pp.37-38. In 2003, the author suggested a "Post-Westphalian Conception of Law" in *Law & Society Review*, volume 37, issue 1, pp. 199-258.

the right of sovereigns (of States, my note) to govern their people of outside interference (….). The treaties of Westphalia enthroned and sanctified sovereigns (States, my note), gave them powers domestically and independence externally'.[1] In the light of the Westphalian model, transnational situations[2] involved only the States as classic subjects of international law. The logic of such model had been conceived as being purely territorial. The sovereign States performed various cross-borders activities in their capacity of the sole (or the main, my note) actors of international law. In order to deal with such situations involving the States themselves and their citizens, the (nation-)States used the devices of the international law. Let us also recall that, under the positivist approach in international law, J. Bentham coined the term 'inter-national' law in 1789.

After the Second World War, it had been undeniably seen that several transnational situations involved not only States, but also 'individuals, corporations (…), corporation of States, or other groups'.[3] These transnational situations amount to the Post-Westphalian Age where States equally co-exist beyond their borders not only with States but also with individuals or other groups; we are fully experiencing today the advantages and the flaws of the Post-Westphalian Age. Anyway, this latter Age requires a legal field, or a legal tool, or a methodological device to be used in order to properly deal with such transnational situations. In the '30s and 50s, Professor Georges Scelle suggested the usefulness of the so-called '*droit des gens*'; Professor Alf Ross suggested the usefulness of the '*interlegal law*' that seemed to be an expanded (private) international law.[4] Professor Philip C. Jessup felt himself not encouraged to use the concepts of 'international'

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[1] See Mark Janis, "Sovereignty and International Law: Hobbes and Grotius", in Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 391, 393. This author is quoted by Stéphanie Beaulac, "The Westphalian Model in defining International Law: Challenging the Myth", 8 *Australian Journal of Legal History* vol. 8 (2004), pp. 181-213, available at SSRN: https://ssrn.com/abstract=672241, last visited on 20 December 2020. The other two primary elements of the Peace of Westphalia (1648) are amounting to wider formal religious freedom and to the introduction of the diplomatic profession. See Steve Patton (2019), "The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy", in *The Histories,* vol.10:iss.1, article 5, available at https://digitalcommons.lasalle.edu/the histories_/vol10/iss1/5, last visited on 20 December 2020. See also Leo Gross, "The Peace of Westphalia, 1648-1948", *The American Journal of International Law,* vol. 42, no. 1 (January 1948), pp.20-41.

[2] I call 'transnational situation' any situation that transcends and/or permeates the territorial borders of any nation-State.

[3] See Philip C. Jessup, *Transnational Law,* Yale University Press, New Haven, 1956, p.3.

[4] In the '80s, the scholars on the topic of global legal pluralism employ the concept of 'interlegality' to depict the interactions between different legal orders. For instance, Boaventura de Sousa Santos, "Law: A Map of Misreading Towards a Postmodern Conception of Law", *J.L. & SOC'Y* vol. 14(1987) pp. 279, 288, 298. The latter author is quoted by Ralf Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism", *Wayne Law Review* vol. 51 (2005), pp.1209-1259.

and/or 'international law' for at least one reason: 'international' is misleading since it suggests that one is concerned with the relations of one nation (or State) to other nations (or States) (…) just as the word 'international' is inadequate to describe the problem (the international problem, my note), so the term 'international' will not do'.[1]

Therefore, Professor Jessup initiated an academic quest with a view to find a more suitable (and subtle, my note) regulatory framework to place any transnational problem[2] arising out of any transnational situation. This scholar employed the notion of 'TL'; 'TL (…) includes all law which regulates actions or events that transcend national frontiers'. It should be reminded that, prior to professor Jessup but also in the 1950s, C. Wilfred Jenks contemplated TL as a particular body or field of law.[3] It should be also reminded that Professor Jessup did not coin either the adjective 'transnational', nor the term of TL; Professor Jessup acknowledges that the 'transnational' has been borrowed from some previous writings/addresses, e.g., from the writings/addresses of Myres McDougal, Joseph E. Johnson, Percy Elwood Corbett, Arthur Nussbaum.[4] In other words, the notion 'transnational', respectively the term 'TL', became worldwide famous under Jessup's ideas notwithstanding the previous employments of such notion and term by the scholars of the 1950s. Such regulatory framework amounted, at a first glance, to a new field and/or discipline and/or body of law - that is 'TL'. I stated 'at a first glance' for at least one reason: as already pointed out, Professor Jessup assessed international, in its both public and (implicitly) private dimensions, as constitutive part of TL. Undoubtfully, international law is a legal discipline; therefore, TL itself might be assessed as a (new) field and/or discipline and/or body of law. Notwithstanding, it shall be never forgotten

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[1] See Philip C. Jessup, *supra* note 4 at page 2, pp.1-2.

[2] For the purpose of this article, I call 'transnational problem' any problem that cross-border and/or permeates the territorial borders of any nation-State, respectively that involves that nation-State and/or other nation-States, and/or individuals, corporations or groups of nation-States. Such transnational problem arises out of any transnational situation, as defined *supra* note 3 on the previous page.

[3] I stated previously this point in one of my papers. See Radu Bogdan Bobei, "Preliminary focus on the various meanings of the term 'transnational law'", in *Romanian Journal of International Law*, vol. 1, 2020, pp. 7-45. My previous paper also pointed out that, prior to Professor Jessup, the term 'TL' had been employed by Ernst Rabel and Max Gutzwiller. Maybe it is useful to recall that the idea of TL has been suggested by Wilfred Jenk in the light of the labour law relations. Not surprisingly, Peer Zumbansen approaches today, in the light of TL, the interplay, if any, between the domains of corporate governance and labour law. See Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law", *Indiana Journal of Global Studies*, vol.13: Iss 1, article 9, available at: http://www.repository.law.indiana.edu/ijgls/vol13/iss1/9, last visited on 20 December 2020 In the light of the case 'Rana Plaza (Bangladesh, 2013)', the so-called 'transnational labour law for global supply chains' is assessed by Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiarity", 79 *Law and Contemporary Problems*, vol. 79 (2016), pp. 215-238, available at: https://scholarship.law.duke.edu/lcp/vol79/iss2/10, last visited on 20 December 2020

[4] See Philip C. Jessup, *Transnational Law,* cited above, p. 2 (footnote no.3).

that Professor Jessup owes his intellectual background to the New Haven School; such doctrinal school of thought assessed international law not as body of rules (discipline or field of law, my note), but as a process of authoritative decision making.[1] In light of these ideas, I advocate to read the 'TL' suggested by Professor Jessup as a *non-territorial process* and not necessarily as body of law that amounts to a new legal field or discipline. For the time being, this is my doctrinal approach, notwithstanding the overwhelming worldwide literature assessing Professor Jessup's TL as body of law (only).[2]

As already pointed out, any transnational situations are very familiar to the Post-Westphalian Age that we are living at least at the beginning of the 21st century. Such Post-Westphalian Age involves not only States, group of States, individuals, corporations etc., but also the presence in a particular social field of more than one legal order; that is the core of the legal pluralism.[3] For instance, in the social field of the European Union, the legal order of European Union itself, the legal orders of the nation-States that are its members and the international legal order exist and co-exist.[4] European Union is to be regarded as a particular and sub-regional organization. Such organization is experiencing the so-called 'sub-regional' version, if any, of TL understood in its dimension amounting to legal pluralism.

TL, be it regarded as worldwide, or regional, or sub-regional way of the legal pluralism's living, drives us to a particular ideological and academic need; that is the need to address properly any transnational situation. It seems that TL, be it legal field or methodological tool and so on, satisfies such ideological need, on the one hand and is fully compatible with the Post-Westphalian logic, on the other hand. Unlike the Westphalian logic based mainly on the territory of the nations-States, the Post-Westphalian logic is

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[1] See Harold Hongju Koh, "Why Do Nations Obey International Law?" *The Yale Law Journal*, vol. 106 (1996- 1997), pp. 2599-2659.

[2] See, for instance, the articles published in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* Cambridge University Press, 2020.

[3] See the seminal article of John Griffiths, "What is Legal Pluralism?", *The Journal of Legal Pluralism and Unofficial Law*, volume 18, 1986, issue 24, pp. 1-55.

[4] The nations-States that are members of the European Union are experiencing the so-called 'shared sovereignty'. Such concept involves 'the engagement of external actors in some of the domestic authority structures of the target State for an indefinite period of time'. Shared sovereignty does not amount to the Westphalian/Vatellian sovereignty whose one core element (the principle of autonomy) is not violated. In other words, the shared sovereignty allows for the violation of the Member States' principle of autonomy. As to the framework of shared sovereignty, see Stephen D. Krasner, "Sharing Sovereignty: New Institutions for Collapsed and Failing States", *International Security*, vol.29, no.2 (Fall 2004), pp. 85-120, published by The MIT Press. See also Stephan D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law", *Michigan Journal of International Law* vol. 25, issue 4 (2004), p. 1075, available at: https://repository.law.umich.edu/mjil/vol25/iss4/15 , last visited on 20 December 2020

purely functional. In other words, the logic of the Post-Westphalian model has been conceived as being purely functional; its *rationale* and goals are to determine all the actors of any transnational situation to be (more) functional. TL's purpose provides for a helpful tool to realize a smooth shift from the territorial logic to the functional one. To sum up, the Post-Westphalian Age requires an extension of the Westphalian duo comprising the municipal or domestic laws of the sovereign States and public international law dealing with the relations between such States only.[1] The legal pluralism draws the attention on the topic involving 'an era of complex, multi-level, global governance (and/or normativity and/or *sui generis* normativity, my note), tied together by networks'.[2]

2. Operative Approach. Its Academic Dimension

This paper's first operative goal is to draw the attention to Law Schools all over the world on a specific academic emergency. The source of the latter emergency is not necessarily my wish or my doctrinal view on the topic of legal education. I just ascertain an emergency arising out of the period of my life time; that is the emergency surrounding the idea already spread to enrich, under the aegis of the so-called 'Transnational legal education', the legal curriculum. Such enrichment is provided through a 'Basic Introduction to Transnational Law.[3] What is transnational law? Does it differ from international law? Is there a new field of law arising out of out the realities emerged after the Second World War? Or is it a methodological tool designed to cope with the interdependence between international law and domestic laws irrespective of the territories of the nation-States? A Basic Introduction to Transnational Law might be the path to the scholarly approach of the transnational problems arising out of the situations that are mainly transnational; these situations become frequently 'transnational' because of

[1] As to the use of the term 'Westphalian duo', see Peer Zumbansen, *supra* note 1 at page 1, p. 463. This latter author borrows such term from William Twining, "Normative and Legal Pluralism: A Global Perspective", *Duke Journal of Comparative and International Law*, vol. 20 (2010), p. 473.

[2] See Paul Schiff Berman, "From International Law to Law and Globalization", available at SSRN: https://ssrn.com/abstract=700668, last visited on 20 December 2020

[3] I suggest starting the basic study of TL either at the same time when studying public international law, either before. It has been suggested in 2004 that the study of TL must be 'broadly conceived as an introduction to international law'. See Mathias Reiman, "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, article 3, available at: http://elibrary.law.psilr/vol22/iss3/3, last visited on 20 December 2020. I had already briefly addressed the topic 'TL and legal education' in one of my previous paper. See Radu Bogdan Bobei, "Preliminary focus on the various meanings of the term 'transnational law'", cited above, pp. 7-45.

the evolving interdependence between public and private actors acting cross-border altogether.

There is another key-question: ‘Are there some origins of TL?’ Certainly there are some such origins. This paper’s second operative goal is to introduce the reader to the origin(s) of TL. The future lawyer (and former student, my note) must know and understand these origins. In light of such understanding, if any, the chance for the future lawyer to understand the TL’s evolutionary nature might occur. The never ending evolutionary nature of the TL itself finds its roots in the never ending (or maybe ending, my note) nature of the so-called ‘world society’.

To sum up, in 1956 Professor Jessup introduced the international lawyers (former students from the 1950s, my note) to the reality arising out of TL itself. As of 2020, the professors of law must introduce transnational students to TL and to its evolving nature. As suggested by this paper’s title, I am going to mainly approach only the origins of TL. Its evolutive nature might be the core idea of my future research papers.

3. Operative Approach. Its Non-academic and Practical Dimension

Is there a need for any international lawyer to become a transnational one? As long as the Post-Westphalian Age lasts, certainly it is. What does it mean ‘transnational lawyer’? What does it mean ‘international lawyer’? It is less appropriate to conceptualize either the ‘international’ or ‘transnational’ lawyer. I suggest not focusing on definitions, if any. I would instead suggest focusing on what is actually doing either the ‘international’ or the ‘transnational’ lawyer.

The international lawyer deals with the legal problems that are logically international by nature. For instance, the legal problems arising out of the relationships between States or organizations of States require the legal advice of an international lawyer; that is the lawyer whose expertise focuses on the (public) international law issues only. Unlike the international lawyer, the transnational lawyer logically deals with transnational legal issues only. Any legal issue is transnational by nature if it involves the approaches familiar to public and private law issues altogether, respectively the approaches familiar to international and domestic law altogether. Furthermore, any legal issue is also transnational if it involves public and private actors altogether, if such distinction (public/private actors) still exists or even substantially ever existed. For instance, the legal issues arising out of the relationships between public actors (e.g., States, organizations of States) acting either *jure gestionis* or *jure imperii* and their private counterparts (individuals or corporations)

acting *jure gestionis* only are hybrid by nature and require the legal advice of a particular lawyer. This is the transnational lawyer, whose expertise focuses on the public and private international law rules altogether and on any other rules, be it or not normative by nature; these rules address logically any transnational issues arising out of any transnational situation. In other words, the clients need the legal advice of transnational (public law) lawyers in the following cases: the aforementioned public actors acting *jure imperii* are entering contractual relationships with private actors that are logically acting *jure gestionis* only, in the light of a treaty; the clients need the legal advice of transnational (private law) lawyers when the aforementioned public actors acting *jure gestionis* are entering contractual relationships with private actors that are logically acting *jure gestionis* only, in the absence of any treaty concluded by those public actors and the State that the private actors are belonging to. All such ideas are going to be briefly reminded maybe one more time throughout this paper.

A human rights case requires the expertise of a transnational lawyer who is able to manage the interplay between international law and domestic law, or/and the interplay between public actors (States) and the private actors (the individuals) that are directly suing the States.

Furthermore, an investment case is purely transnational when the investor-State dispute is not resolved by diplomatic means; an investment case is a purely international case when the same dispute is solved between the States by diplomatic protection or by war. Any investment case requires the expertise of a transnational lawyer who is able to manage – as to the applicable law for instance, the interplay, if any, between the law of the Contracting State and the rules of international law as may be applicable.[1] In other words, a typical transnational (investment) dispute involves public and private legal issues altogether, State or/and States, corporation and/or individual investor. The mixture of legal issues and actors performing business activities requires and involves a particular legal framework which is also a mixture of rules (domestic/international, public/private rules). The legal mixture arises when in a particular investment dispute Romanian law, Swiss law, English law and international public law, for instance, are to be applied altogether. To sum up, any investment case might be assessed as an expression of the Post-Westphalian Age that we are living today. The aforementioned reasoning proves its availability in any other transnational case, be it or not investment dispute, respectively human rights dispute.

[1] See, for instance, art. 42 of the Convention on the Settlement of Investment Disputes between States and National of Other States, hereinafter 'ICSID Convention (1965)'.

For the time being, the legal mind of the students and of (future) lawyers is fully divided. The division arises out of the way of law teaching in Law Schools. The law teaching is firmly divided in public law and private law, domestic law and international law, *hard* law and *soft* law and so on. The law teacher of our days (still) direct the mind of the students towards the firm and strict distinction between public (domestic) actors and private (domestic) actors, respectively between public (international) actors and private (international) actors and so on. The profound interaction between such legal domains and actors is taught in a way to remind that only States or mainly States are dealing with cross-border situations. The latter idea and the aforementioned strict and firm division amount to the Westphalian logic only.

Today, the Post-Westphalian logic extents to other ideas.

Firstly, the interaction is more profound in a way that the individuals and or/corporations are not anymore the objects of international law. They were becoming full (even primary, my note) subjects of international law.[1]

Secondly, when the States, individuals and corporations are assessed as actors of international law in a particular hierarchical way, we are still remaining in the area of the international law itself. In the light of such hierarchical way, individuals and corporations are called ‘secondary actors of international law’. The secondary actors cannot directly sue the States. Only the States that the secondary actors belong to, can sue by way of diplomatic protection other States on behalf of the secondary actors themselves; in other words, the latter actors must appellate to their States in order to obtain the satisfaction of their claims against other States. When the States, individuals and corporations are assessed in the so-called ‘horizontal way’, we are in the area of TL itself. Under the ‘umbrella’ of TL, the secondary actors become, let’s say it straight, primary actors of international law; consequently, the ‘new’ primary actors of international law can directly sue the States without the help of their State(s) exercising the diplomatic protection. Such possibility exists because of the contemporaneous horizontalization of all subjects of international law, be they States, organizations of States, individuals, corporations and so on. The so-called ‘horizontalization’ fully helps the former secondary actors of international law; that is mainly the individuals and/or corporations acting cross-border(s). As already stated, they do not need anymore any diplomatic protection of ‘their’ States to sue other States.

[1] Professor Jessup agreed with Professor Scelle ‘that States are not the only subjects of international law’, on the one hand; on the other hand, Professor Jessup did not agree with the French Professor ‘that the individuals are the only subjects’ of the international law. See Philip C. Jessup, *Transnational Law*, cited above, p. 3.

The aforementioned profound interaction suggests, at least in its 'horizontal' dimension, that the Post-Westphalian logic continues its road and blurs up the strict and firm division between the public/private law, international/domestic law, public law and private law actors. In any transnational situation, such division becomes inevitably less strict and firm. It is difficult - almost impossible - for any student and lawyer to successfully deal with any transnational situation if it remains educated in the light of the aforementioned strict and firm divisions that are very familiar to the Westphalian logic.[1] As already pointed out, the Post-Westphalian logic, which permeates our lives in the first quarter of the 21st century, involves a never-ending cross-border interaction between public and private actors and their activities, respectively between public and private rules.[2] Such cross-border interaction is a fact, even an undeniable fact. Therefore, any international lawyer must become, in some instances, a transnational one. The private (and) commercial origin of TL might help him understand TL and its structural availability. The latter availability amounts to a sort of evolutionary nature of TL itself; scholars all over the word lively described the latter nature in the last period of time.

4. The Private (and) Commercial Origins of TL

In the 1950s, Professor Jessup (mainly) framed TL in the dimension familiar to (public) international law. The universality of the human problems, the power to deal with the human problems, the choice of law governing the human problems have been, therefore, contemplated through the lens of (public) international law only. In other words, Professor Jessup's

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[1] The international legal order arising out the Peace of Westphalia was 'based on sovereign, independent, territorially defined States who tried to maintain political independence and territorial integrity'. It is easy to notice that the Westphalian system of international law was based on the system of sovereign States. In the light of such core idea of the Westphalian system, the Permanent Court of International Justice ruled in the 1927 *S.S. Lotus Case*: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims'. See Edith Brown Weiss, "The Rise or the Fall of International Law?", *Fordham Law Review*, vol .69 (2000), p. 345 available at: https://ir.lawnet.fordham.edu/flr/vol69/iss2/2, last visited on 20 December 2020. See also William Tinning, "Globalisation and Legal Scholarship" and M.S. Janis, "Sovereignty and International Law", both cited above. Last, but not least, it has been suggested to assess the Peace of Westphalia (1648) as 'the advent of traditional international law based on principles of territoriality and state autonomy'. See Harold Hongju Koh, "Why Do Nations Obey International Law?", cited above, p. 2607.

[2] It seems that the international legal order arising out the Post-Westphalian Age framed the concept of the nation-market or of the State-market. It also seems that the Post-Westphalian Age regards the concept of 'nation-state' as political vestige. I dare to state that notwithstanding the fact that the Post-Westphalian Age amounts to a universal dimension, not all the States are enjoying the peculiarities of such Age. This idea could be developed on the occasion of drafting future research papers.

premonitory ideas on TL mainly amounted to the investment (and) public level of international law encompassing the public and private actors' cross-borders activities. Especially after the Second World War, the business community employed the methods of TL in order to expand its private (and) commercial activities all over the world. Consequently, such community mainly attached to TL various private and purely commercial goals. I dare to state that we are living today in the middle of the medieval origins of TL; such medieval origins are purely private and commercial. *In other words, the medieval birth of TL is purely private and commercial.*

I am going to point out that the so-called 'transnational commercial law' - that is the (old) *lex mercatoria*[1] - constitutes the first idea of transnationalism drafted by human beings (the medieval merchants themselves). It should be noted that the medieval (old) *lex mercatoria* was transnational in the exclusive meaning that the merchants' activities were developed beyond the territories where the local medieval sovereigns - to whom those merchants belonged to - exercised and exerted their political power; such territories are going to constitute, at least in Europe, one main element of the organization of the future European nation-States. Under that meaning, the medieval 'transnational' equates the meaning of the future positivist term 'inter-national'; in other words, the so-called 'medieval law of merchants' is to be assessed as transnational because it is purely cross-border, as it develops beyond the territories of the local medieval sovereigns. Furthermore, I am also going to not neglect certain issues regarding the (new) *lex mercatoria* evolving mainly after the Second World War. I am doing that because the

[1] There is also a new *lex mercatoria* arising out vigorously after the Second World War. The new version of *lex mercatoria* encompasses the practices and principles governing international business transactions and greatly influences the international commercial arbitration proceedings, be they *ad hoc* or institutional. See Francesco Galgano, "The New Lex Mercatoria", *Ann. Surv. INT'L & COMP.L.* vol. 2 (1995) p. 99 and Friedrich Juenger, "The Lex Mercatoria and Private International Law", *Louisiana Law Review,* vol. 60, no. 4 (2000), p. 1133. These latter authors are also quoted by Mathias Reiman, "From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum", cited above, p. 45 (footnote 21). The decline of the nation-States is followed by the rise of the markets. The primacy, if any, of the markets is embedded 'in the idea of a new *lex mercatoria* (law merchant), a transnational body of substantive rules created not by States but by the needs and practices of commerce and applied by international (commercial, my note) arbitration'. See Ralf Michaels, Nils Jansen, "Private Law Beyond the State? Europenization, Globalization, Privatization", *The American Journal of Comparative Law*, volume 54, number 4 (fall 2006), pp. 843-890. It should be reminded that Lord Mansfield, the father of the (old) law merchant, introduced comity into English law. See Joel R. Paul, "The Transformation of International Comity", *Law and Contemporary Problems,* vol. 71 (Summer 2008), p. 19-38, available at: https://scholarship.law.duke.edu/lcp/vol17/iss3/2, last visited on 20 December 2020.

nowadays liberal-internationalists lawyers[1] are usually employing the devices of the truly liberal-internationalist (legal/non-legal) framework; such framework un-doubtfully encompasses and even develops itself around the (new) *lex mercatoria*.

First of all, I am going to address the ***oldest*** *lex mercatoria* as pointed out even implicitly by the Roman jurists. This version of *lex mercatoria* constitutes the first idea of transnationalism 'drafted' by the human reason only. The ***oldest*** *lex mercatoria* was transnational in the exclusive meaning also that the Roman and foreign merchants' activities were developed beyond the territory of each Roman Empire's province. The private (and) commercial origins of the ***oldest*** *lex mercatoria* amount to the *jus gentium.* In other words, unlike the medieval TL's birth, *the pre-medieval birth of TL is not purely private (and) commercial; it amounts also to the patterns of the jus gentium* (the truly ancestor of the future positivist international law).

The novelty provided by my paper consists of the contemplation of three versions of *lex mercatoria*: the ***oldest,*** the *old* and the *new lex mercatoria.* The latter two versions are the ones most addressed by the doctrine worldwide. The ***oldest*** one is almost forgotten. We are going to see that the ***oldest*** *lex mercatoria* is a truly constitutive part of the *jus gentium* (the truly ancestor of the future positivist international law).

For the time being, I am just slightly contemplating another idea. In the light of the worldwide development, if any, of the neo-liberal doctrinal ideology, a fourth version of the *lex mercatoria* might arise*;* that is the (possible) **newest** *lex mercatoria*. Such latter version amounts to the re-rise of the merchants' truly common sense. In light of their business common sense, the merchants do not anymore need either their trade practices or usages, or international (and) commercial positivist law, respectively domestic (and) positivist private laws (including commercial law, my note) regulating their cross-border activities; the domestic (and) private laws display specific cross-border dimensions. The core of such displaying involves the idea that such laws regulate cross-border activities in the light of the 'nationalized' conflict of laws rules. The merchants' common sense can cause the fall of the positivist

[1] The so-called 'progressive' side of the liberal-internationalist lawyers sustains and/or recognizes that 'the (public) law or (private) law realm were two sides of the same coin of contractual governance'. See Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction", *Fordham Urb. Law Journal* vol. 28 (2001), p. 1611; Carol Harlow, "'Public' and 'Private' Law: Definition without Distinction", *Mod. Law Review*, vol. 43 (1980), pp. 241, 249. Both latter authors are quoted by Peer Zumbansen, "Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law", *Comparative Research in Law & Political Economy,* Research Paper No. 13/2008, footnote 2010 at p. 35, available at http://digitalcommons.osgoode.yorku.ca/clpe/187, last visited on 20 December 2020.

hard and *soft* commercial positivist law (including trade practices and usages 'listed' by inter-governmental, or international organizations, or non-governmental organizations). In other words, the ***newest*** *law mercatoria*, as not yet here, or never to come, suggests the return of the neo-liberal merchants to the Age of worldwide non-law; the latter non-law amounts to the merchants' human reason itself. Such non-commercial and cross-border 'law' reminds us of one of the constitutive parts of the *jus gentium*; that is the ***oldest*** *lex mercatoria* governing the business contracts concluded by the Roman merchants and foreign merchants, and whose effects occurred beyond the territory of each Roman Empire's province. I recommend to focus on such reminder in the light of the idea that some Roman jurists and philosophers (*e.g.*, Cicero) mixed the *jus gentium* and the 'law' of the nature (the natural law itself). Anyway, the drawing of the so-called 'magic circle' of *lex mercatoria* - encompassing the ***oldest***, the *old,* the *new* and the *newest* one version - can be fully closed and/or ended.

Not very long time ago, it had been doctrinally stated that the 'law of nations' (*jus gentium*) encompassed natural law, rules of mercantile and maritime law concerning private transactions and the rules concerning (public, my note) transactions between sovereigns (be they medieval political structures and later future sovereign States, my note),[1] exerting the political authority over their territories. The latter type of rules amounts to the future concept of 'rules of inter-national law'. As already pointed out, the notion of 'inter-national' had been coined by Jeremy Bentham in 1789; the same notion has been largely adopted by the later positivist theory of international law. The rules governing those transactions are inter-national (and also trans-national) by nature because they are operating cross-border, respectively beyond the territories of the sovereigns themselves. In other words, the notions of 'inter-national' and 'trans-national' are synonyms in the case of the (public, my note) transactions made by the medieval sovereigns and later by the sovereign States.

[1] See Harold J. Berman, "World Law", Fordham International Law Journal vol. 18 (1994), p. 1617, available at: https://ir.lawnet.fordham.edu/ilj/vol18.iss5/4, last visited on 20 December 2020. This author suggests that even the term 'transnational law' is misleading because it does not properly encompasses the interactions within the emerging world society; furthermore, the word 'transnational' refers back to the era of sovereign national States (…)'. Therefore, Harold J. Berman suggested that the term 'transnational law' might be replaced by the concept of 'world law'. The doctrinal statement of professor H. Jolowicz drafted in the 1950s should not be neglected: '(…) the *jus gentium,* the origin of international law, which applied to all persons, Roman or foreign, generally governed commercial relations (…)'. See Herbert Felix Jolowicz, "Roman Foundations of Modern Law", pp. 38-39, as quoted by Joel R. Paul, "The Isolation of Private International Law", 7 *Wisconsin International Law Journal*, vol. 7 (1988), p. 149, available at: http://repository.uchastings.edu/faculty_scholarship/630, last visited on 20 December 2020.

The second abovementioned type of rules amounts not to the *old* but to the ***oldest*** *lex mercatoria*. As already pointed out, the ***oldest*** *lex mercatoria* logically addressed the business (commercial, my note) activities developed by Roman and foreign merchants beyond the territory of each Roman Empire's province. Furthermore, the ***oldest*** *lex mercatoria* logically operated cross-border the provinces of the Roman Empire. The ***oldest*** *(and pre-medieval) lex mercatoria* had been not the 'product' of the human (Roman, my note) mind, but of the human nature itself. It is truly impossible to attach the latter nature to the citizens of only any empire, be it or not the Roman one, or to the citizens, if any, living outside any empire, or to the 'citizens' living outside the global empire, if any, or to the foreigners. The human nature is logically attached to the human beings irrespective of their political and legal attachment to any kind of empire. I would recall the abovementioned idea: *the pre-medieval birth of TL is not purely private (and) commercial; it amounts also to the patterns of the jus gentium* (the truly ancestor of the future positivist international law). And I recall also that *jus gentium* that the Romans dreamed of had been structured and fragmented in the aforementioned three constitutive elements; the pre-medieval transnational commercial law, hereinafter 'p-m TcL', governing cross borders transactions concluded by Romans and the foreign merchants, was one of these constitutive elements. It is easy to notice that the ancestor (the *jus gentium* itself) of the future positivist international laws 'lived', at least pursuant to the Romans' view, in a fragmented way. I simply take note of such fragmentated life of the *jus gentium*. Today, the fragmentation of (positivist, my note) international law caused the so-called 'postmodern anxieties'.[1]

The core idea of the latter fragmentation is deeply linked, in my view, to the 'privatization' of international law itself;[2] 'privatization' often involves 'the replacement of formally legislated State law at the international level by a contractual law created by international (even private, my note) actors themselves'[3] under the aegis of inter-governmental and international organizations. In other words, 'international law is becoming privatized in the sense that individuals are agents and subjects of international law';

[1] See Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law*, vol. 15 (2002), pp. 553-579.

[2] The 'privatization' covered also the (domestic) private laws enacted by the nation-states. The main actors of such 'privatization' are NGOs, multinational corporations and individuals. In the light of this sui generis development- that is the 'privatization of private laws', the so-called 'transnational legal science' and the privately created orders fully emerged in the arena. See Ralf Michaels, Nils Jansen, "Private Law Beyond the State? Europenization, Globalization, Privatization", cited above, pp. 868-871.

[3] See Eric Loquin, Laurence Ravillon, "La volonté des operateurs vecteur d'un droit mondialisé", in Eric Loquin & Catherine Kessedjian (eds.), *La mondialisation du droit*, Paris, Litec, 2000, pp. 91-132.

furthermore, the individuals from nowadays challenge, under the umbrella of the so-called 'multinational corporations and parastatal enterprises', the 'distinctions of public and private transactions'.[1] This idea - that individuals are not anymore, at least after the Second World War, objects but subjects of international law - had been previously stated by Professor Jessup in its seminal Storrs Lecture called 'Transnational Law' (1956). It should be reminded that 'the judgments of the Tokyo and Nuremberg denied the idea that international law is for States only'.[2] The fragmentation of positivist international law notwithstanding 'liberalism and globalization did not bring about coherence, to the contrary' as famous Professor Koskenniemi and (former) Assistant Professor Leino put it; such incoherence finds its goal by replacing 'the structure provided by the East-West confrontation with a kaleidoscopic reality'.[3]

In my (in)famous vision, the fragmentation of positivist international law does not necessarily amount to post-modern anxieties. I state that for at least one reason: TL understood this time only as methodological device is able to manage the so-called 'horizontal way' of the international law's way of nowadays living.[4] Otherwise speaking, the incoherence, if any, brought by various fragments of positivist international law (*e.g.,* commercial fragment, investment fragment, human rights fragments and so on) can become coherence in light of a particular methodological device; that is TL itself, which professors of international law, including Professor Koskenniemi, can

[1] See Joel R. Paul, "Holding Multinational Corporations Responsible under International Law", Hastings International Law & Comparative Law Review, vol. 24 (2001), p. 285, available at https://repository.uchastings.edu/faculty_schlarship/623, last visited on 20 December 2020. See also Joel R. Paul, "The Isolation of Private International Law", cited above, p. 149.

[2] See Harold Hongju Koh, "Why Do Nations Obey International Law", cited above, p. 2615 (footnote 64).

[3] This (incoherent, my note) kaleidoscopic reality enables the competing (public mainly, my note) actors to struggle in order to create 'competing normative systems often expressly to escape from the structures of diplomatic law - though perhaps more often in blissful ignorance about it'. See Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", cited above, p. 559. The authors recall the case of the World Trade Organization and even quote Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?"*, American journal of International Law*, vol. 95 (2001), p. 538.

[4] In light of such international law's horizontal way of living, individuals, corporations - true actors of international law - can directly sue the States. Such private actors can do so because so-called 'vertical' hierarchy between States and the other subjects of international law itself has been eradicated. the case of public investment disputes is relevant: it is not anymore necessary that States bring disputes on behalf of their investors through the employment of diplomatic protection. Therefore, their investors do not need anymore the help of their States to sue the so-called 'receiving States' (the States where the investments are made, my note). In other words, there is no hierarchy between States and individuals, respectively between States and multinational corporations under the ICSID Convention (1965). See Florian Grisel, "Transnational Law in Context. The relevance of Jessup's Analysis for the Study of 'International' Arbitration", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 186-196.

use to put order in the kaleidoscopic world of current international law. Furthermore, the fragmentation of positivist international law does not frighten me because of the short life of international law in its positivist version. Prior to the so-called ‘positivist account’ of international law, the non-positivism reality of international law emerged and evolved.[1] Such reality had been framed in the patterns of the *jus gentium* living in fragmented ways. The ‘history’ of *jus gentium* living fragmented is longer than the history of the positivist international law living, at least after the Second Word War, in a fragmented way.

The fragmentation of the *jus gentium* (the truly ancestor of the future positivist international law) did not damage *jus gentium* itself. Such ancestor thrived in the past ages. It thrives also today because of the way in which the fragmentation of the positivist international law works. Professor Koskenniemi reminded us that such fragmentation involves a ‘diluted normativity through *jus cogens* and *soft law'*; the fragmentation involves also the replacement of ‘formal (international) legislation by informal normative (international, my note) practice’[2] and, I dare to add, by informal normative ‘legislation’. Nonetheless, the informality of the new fragmented positivist international law does not constitute properly speaking a failure of the international law itself. It is not a true failure because such informality reminds us of the *jus gentium* that is … informal by its very nature. Therefore, the fragmentation of positivist international law - that is not properly managed by TL -, drives us to the informality as designed by the *jus gentium* - the truly ancestor of positivist international law itself. The star of *jus gentium* is shining again in the post-post-modern age that we are living today. ‘Post-post-modern Age’ means the return to the pre-modern Age of the international law’s stage; that is the stage of the *jus gentium.* Post-modern anxieties are becoming post-post-modern serenities familiar to the *jus gentium* only, even implicitly reloaded.

In my, maybe this time famous, vision, the aforesaid second type of rules[3] extents to the roots of the transnational medieval legal framework, that is, the roots of the medieval transnational commercial law, hereinafter ‘mTcL’. Such framework is trans-national because it addresses the cross-border private and commercial transactions deployed by the merchants. This time also the

[1] As to the idea that positivism is more a methodology than a theory, see Alex Mills, “The Private History of International Law”*, International and Comparative Law Quarterly*, vol. 55, issue 1 (January 2006), pp. 1-50.

[2] See See Martti Koskenniemi, Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties”, cited above, p. 559.

[3] The structure of *jus gentium* encompasses natural law, rules of merchant and commercial law and (the future positivist, my note) international law. See Harold J. Berman, “World Law”, cited above, p. 1617.

notions of 'inter-national' and 'trans-national' are synonyms. Such synonymy is reached because the merchants (truly private actors) deployed their business beyond the territory they belonged to. We are going to see that, in light of the current investment (public) international law, the meaning of 'trans-national' is not necessarily confined to the nature of the investment activity, which is cross-border by nature. Such meaning is also attached to the fact that a cross-border situation involves different actors that are also different by nature (*e.g.,* States acting *jure imperii,* private and commercial companies, individuals). In other words, any investment international activity is transnational not only because of its cross-border nature but also because of its mixed nature of the actors involved in this activity; furthermore, any investment international activity is also transnational in the meaning that involves rules of different nature (international law be it *hard* or *soft*, domestic laws, religious laws, if any, and so on) governing such activity. To sum up, the aforementioned second type of rules constitute the core of the old law merchant (old *lex mercatoria*, my note) – a truly 'private law based not on any single national law but on mercantile customs generally accepted by trading nations'.[1] As to the first type of rules, it seems that, in the positivist approach, natural law is not law at all.

In the Middle Age, the (old) *lex mercatoria* vigorously thrived despite the lack of any 'codification' of it. Such *sui generis* codification is familiar only to the new *lex mercatoria*. Mainly after the Second World War, the new *lex*

[1] See Harold J. Berman, Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)", *Harvard International Law Journal*, vol. 19 (1978), pp. 221, 224-29. Unlike the old *lex mercatoria* which is based mainly on mercantile customs, the new *lex mercatoria* is (mainly, my note) based, at least pursuant to some French lawyers and professors, on the general principles of law. See Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", *Arbitration International*, volume 17, no. 1 (2001), pp. 59-71. This author suggests distinguishing cross-border customs/usages from the general principles of law. Furthermore, the same author recalls an early instance of an award rendered on the basis of general principles of law; that is the award rendered in the case Lena Goldfields Ltd. v. USSR (2 September 1930). This case law has been discussed by Van Vechten Veeder, "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas", *International & Comparative Law Journal*, vol. 47 (1998), p. 747.

mercatoria has been revived;[1] the liberal-internationalist School of thought encouraged this revival under the 'umbrella' of specific *sui generis* lists encompassing general principles of trade laws and/or cross-border usages. The Westphalian logic was afraid of the (old) *lex mercatoria* because of its suggested volatility and autonomy from the sovereign (and territorial, my note) nation-State.[2] That is why such latter logic framed the (new) *lex mercatoria* in the content of various lists (for instance, the List comprising the UNIDROIT Principles of international commercial contracts) amounting to a particular private 'codification', be it *hard* law (international

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[1] Jessup's notion of TL revived the doctrinal debates surrounding the rediscovery of the old *lex mercatoria* in the light of the settings familiar to the new *lex mercatoria*. See Antoine Duval, "What Lex Sportiva Tells You about Transnational Law", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 269-293. 'Codification' has been accomplished either by *hard* law (*e.g.,* international conventions), either by *soft* law means (*e.g.,* model laws, restatement, standard contract forms). The latter type of 'codification' includes, for instance, UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), or UNIDROIT Principles of International Commercial Contracts. See Daniela Caruso, "Private Law and State-Making in the Age of Globalization"*, New York University Journal of International Law and Politics*, vol. 39, no.1 (2006), Boston Univ. School of Law Working Paper No.06-09, available at SSRN: https://ssrn.com/abstract=900106, last visited on 20 December 2020. Some foreign scholars suggest that (private/commercial law) transnationalism amounts (only) - or simply amounts - to the process of harmonization of the legal systems; such process evolves under the umbrella of international law. See Roy Goode, Herbert Kronke, Ewan McKendrick (eds.), *Transnational Commercial Law. Texts. Cases and Materials,* second edition, Oxford University Press, 2015, pp. 191-214. In my view, such authors are not aware of the core idea familiar to the so-called theory of 'transnational law'; the latter concept does not encompass the commercial area only. Such authors are lacking the openness to see that transnational commercial law is to be distinguished from international trade (or commercial) law; (only) the international trade law logically harmonizes the different legal conceptions in the field of trade law; that is the goal of the international law irrespective of the field (labour law, investment law, human rights law and so on) that we are talking about. The idea of 'transnational, even commercial, law' cannot neglect the ideological core background of TL itself; that is, for instance, to manage the overlapping of different legal orders in the same normative space; or, to manage the overlapping of various actors (public/private) deploying their overlapping activities in the transnational situations. Indeed, some TL's devices – such as specific 'codifications' (*e.g.,* UNIDROIT Principles on international commercial contracts) are harmonizing the general rules of such contracts developed in various legal systems. Such harmonization is to be regarded as a subsequent and recent TL goal; the underlying core idea of TL is not to provide for harmonization. In other words, the initial and core goal of the TL amounts to the efforts developed to successfully fulfil the aforementioned management. My view is to be developed in future work research papers.

[2] Furthermore, the Westphalian logic regarded mainly the (old*) lex mercatoria* as a truly threat. See Bernardo M.Cremades, Steven L.Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions", *B.U. International Law Journal,* vol. 2 (1984), p. 317. As to the field of (public) international law, it has been stated that 'typical matters (of public international law, my note), such us the law of the sea, international boundary disputes, State responsibility for injury to aliens, or use of international rivers, even refer to arbitration, are not considered *lex mercatoria,* because they most obviously depend on 'sensitive political considerations' and require recourse to 'diplomatic skills''. See Covington & Burling LLP, *Public International Law* (2006), available at http://www.cov.com/download/contentbrochures/publicinternationallaw.pdf, last visited on 20 December 2020

conventions) or *soft* law (model commercial laws, commercial restatements, standard commercial contract forms).[1]

In the light of such various and suggested lists, the States, grown up in the spirit of the Westphalian logic, maintained their control over the merchants and their 'laws'. It had been possible to still exert the aforementioned control for the reasons stated below. The lists embodying the (*new*) *lex mercatoria* have been mainly enacted by the States themselves under the aegis of the international inter-governmental (UNIDROIT), or inter-State (United Nations) organizations. Even when such lists have been enacted under the aegis of the international and purely private organizations (International Chamber of Commerce, Paris, hereinafter 'ICC Paris'), the States did not lose their control over the enactment of different versions of the (new) *lex mercatoria*. It should be reminded that States fully, even though implicitly, 'participate' in the quasi-legislative activity of the ICC Paris through the merchants (truly stakeholders of the International Chamber of Commerce) as organized in business associations; these merchants logically 'belong' to those States. In the light of the transnationalism doctrine, the States themselves acting *jure gestionis*[2] are in a full need of the (new) *lex mercatoria* especially when they are acting as such. Under the ICC Paris Rules of arbitration,[3] transnationalism allows the merchants to directly sue the States acting *jure gestionis* in purely commercial business; therefore, the disputes between these States framed as purely commercial actors and their private,

[1] See Sandeep Gopalapan, "The Creation of International Commercial Law: Sovereignty Felled?", *San Diego International Law Journal*, vol. 5 (2004), pp. 267, 396.

[2] *Acta jure gestions* are to be regarded as private and merchant-like, commercial acts and dealings of any government of any State.

[3] At the time of drafting this paper, ICC Paris approved and released the so-called '2021 Rules of Arbitration', hereinafter '2021 ICC Rules', replacing the 2017 ICC Rules of Arbitration, hereinafter '2017 ICC Rules'. The 2021 ICC Rules are scheduled to officially come into force and replace the 2017 ICC Rules on January 1, 2021. The 2021 ICC Rules address and/or update topics related to multi-party arbitrations, party representations, and disclosure of external funding. Furthermore, the 2021 ICC Rules provide for some powers of the ICC Court to appoint all members (of the panels, my note) itself with a view to prevent unequal treatment of the parties, on the one hand, unfairness that may negatively influence the validity of any arbitral award, on the other hand. Indeed, under new paragraph 9 of the Article 12, the ICC Court enjoys the power, in exceptional cases, to appoint each member of the tribunal. Such power might be exercised, I admit, in exceptional situations that are rare by their nature, even if a different parties' method of appointment is envisaged in the content of the arbitration agreement. Furthermore, the rationale of such power amounts to the need of avoiding any appointment method that may seriously affect the validity of any final and binding arbitral award rendered by the panel, as envisaged in the content of the arbitration agreement. For the time being, I modestly suggest to the ICC Court and its stakeholders to reflect more on the last version of paragraph 9 of the Article 12. In commercial settings, arbitration and dealings, the principle of party autonomy should be fully respected. That is not my idea but the core idea of the liberal internationalism that inspired the birth of the ICC Court itself. Therefore, I modestly suggest to the ICC Paris a particular way of behaviour; that is to successfully experience the benefits of the originalism. It worth it!

respectively commercial (business, my note) counterparts (business companies, my note) are also purely commercial disputes.

The (old) *lex mercatoria* should not be regarded only as the first (and humanly created) version of transnationalism.[1] It should also be viewed as a true source of the first privately created legal order. That is the private legal order created by the medieval merchants in order to develop 'their world' across-border(s), irrespective of their, let us say, territorial (even functional, my note) affiliation.[2] The energetic core of the first version of transnationalism was so high that over the time its influence overwhelmed not only the communities of the merchants doing business worldwide. For instance, transnational sport law (*lex sportiva*),[3] transnational construction law *(lex constructionis*),[4] transnational internet law (*lex digitalis*)[5] successfully evolve today their patterns in various transnational communities and settings (the domains of sport, construction and internet etc).

In the Middle Ages and prior to the birth of the Westphalian logic, mainly the territorial approach on law thrived. Multiple political authorities, at least across Europe, enacted multiple laws conflicting with each other. Merchants performed their business activities across multiple European and not European territories. Which law applied to their transactions performed on

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[1] For the purpose of my statement, 'transnationalism' shall be mainly understood as it facilitates the coexistence of the (old) *lex mercatoria* and other rules issued by local political authorities on the territories where the merchants (the 'parents' of the (old) *lex mercatoria*) initiated, respectively developed their commercial relationships.

[2] There are also (old) normative orders arising out of privately and religiously created orders such as Sharia (regarded as a modern transnational law), or the Chinese term guanxi. See Richard P. Appelbaum, William L. F. Felstiner, Volker Gessner, *Rules and Networks*, Hart Publishing, 2001. In the area of cross-border diamond trade, the rules and dispute resolutions regulations privately enacted in the area of diamonds industry shall not be neglected. See Lisa Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", J. *Legal Studies* vol. 21 no. 1 (1992), p. 115; see also Barak Richman, "How Communities Create Economic Advantage: Jewish Merchants in New York", Law & Soc. Inquiry, vol. 31, no.2 (2006), p. 383. The aforementioned doctrine has been also quoted by Ralf Michaels, Nils Jansen, "Private Law Beyond the State? Europenization, Globalization, Privatization" (footnote 126).

[3] The institutional actors of such transnational privately legal order are FIFA and the Court of Arbitration for Sport. As to the concept of 'non-State authority' in the area of sport, see Franck Latty, "FIFA and Human Rights in Quatar", in Horatia Muir Watt, Lucia Bíziková, Agatha Brandão de Oliveira, Diego P.Fernández Arroyo, *Global Private International Law. Adjudication without frontiers,* Edward Elgar Publishing, 2019, pp.152-160. See also Antoine Duval, "What Lex Sportiva Tells You about Transnational Law", cited above, in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 269-293.

[4] See, for instance, the FIDIC contractual standard forms (General Conditions), be it in its yellow, red or silver version and so on.

[5] See the cases *Yahoo! v. LICRA* and *Microsoft – Ireland* cases. As to the doctrine, see Paul Schiff Berman, "Conflicts of Law and the Challenge of Transnational Data Flows", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 240-268.

the territories led by different political European and not European authorities? Merchants did not want to enter the Italian scholarly debates of the 12th century amounting to the division of the law in territorial laws and personal laws; the medieval conflict of laws had been mainly resolved in the light of such division. That's why the merchants 'enacted' their transnational (cross-border, my note) 'law'; that is the (old) *lex mercatoria* emerging alongside the plural and various, respectively territorial and personal (mainly religious, my note) laws.[1]

The (old) *lex mercatoria* of the Middle Ages had been based on the mutual trust of merchants. The latter trust amounted to the legitimation of the (old) *lex mercatoria.*[2] The business medieval people stated, even tacitly, their trust with regard the vitality of the (old) *lex mercatoria*. In doing so, the medieval business people mainly employed the cross-border medieval trade customs. The functionality itself as detached from the territorial logic of the Westphalian State constitutes the vitality of this privately created legal order

[1] I recall that the Westphalian approach of law has been based on the division of legal orders in domestic and international. The (old) *lex mercatoria* emerged alongside the national and international legal order; the (old) *lex mercatoria* and the new (and 'institutionalized') *lex mercatoria* have been regarded as 'the idea of the so-called 'tiers droit''. See Alain Pellet, "La lex Mercatoria, Tiers ordre juridique? Remarques ingénues d'un internationaliste de droit public", in *Souveraineté Étatique et Marchés Internationaux à la fin du siècle, Mélanges en l'honneur de Philippe Kahn,* Paris, Litec, 2000, pp. 53-74.

[2] The legitimation of the (new) *lex mercatoria* is connected to/derives from the notions of 'Rough Consensus and Running Code'. See Graf-Peter Calliess, "The Making of Transnational Contract Law", *Indiana Journal of Global Legal Studies*, vol. 14, iss. 2 (2007), article 12, pp. 476 and 479, available at https://www.repository.law.indiana.edu/ijgls/vol14/iss2/12, last visited on 20 December 2020. This author suggests that the (new) *lex mercatoria* 'is conceived as an autonomous legal system beyond the nation-State'. Such new version of transnational private law is based on 2 (two) key-elements: first, the general legal principles amounting 'to the core of national legal systems as explored by functional legal comparison (e.g., the UNIDROIT Principles)'; second, 'the trade customs of international (cross-border, my note) merchants as expressed in standardized contract terms (e.g., the INCOTERMS or model contracts forms of ICC, or of other business organizations, my note)'.

emerged in the domain of cross-border medieval business.[1] Such trust designs the non-territoriality of the first version of transnationalism humanly designed. Otherwise speaking, the (old) *lex mercatoria* has been created and enforced cross-border voluntarily. It has become fully functional irrespective of the territories where the medieval merchants deployed their commercial activities.

In other words, the commercial realities suggest that the communities of merchants, be they from the Middle Ages or from nowadays, are to be mainly, even exclusively, regarded as communities of interest rather than communities of (territorial) places. The communities of interest amount to the so-called 'functional normative spaces' as detached from the notion of territoriality.[2] Such functional normative spaces gave birth to the medieval law merchant (the (old) *lex mercatoria*). The latter 'law' has been originally conceived as a language for imagining the alternative world of the merchants themselves.[3] For instance, one piece of such alternative privately commercial and transnational language is the concept of the bill of exchange. Indeed, in 1842 it had been clarified by way of a specific ruling that 'the bill of exchange rules as deriving from *lex mercatoria* constituted part of the 'general common

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[1] 'The notion itself of 'transnational law' designates a non-territorial order, of which the agents of an economic power diffused across the globe are the subjects'. See François Rigaux, *Droit Public et droit privé dans les relations internationales,* Paris, A. Pédone, 1977, as quoted and translated by Antoine Duval, *supra* note 1 at page 13, p. 272. Rigaux assessed TL as law without the State. This idea is similar to the idea of Gunther Teubner, *Global Bukovina: Legal Pluralism in the World-Society* (1996), *Global Law without a State,* Guenther Teubner (ed.), Dartmouth, 1996, pp. 3-28, available at: https://ssrn.com/abstract=896478, last visited on 20 December 2020. Ralf Michaels does not consider so. See for instance his articles published in 2007, 2009, 2010, such as "The True Lex Mercatoria: Law Beyond the State", *Indiana Journal of Global Legal Studies*, vol.1, iss.2, article 11, pp. 447-468, available at: https://www.repository.law.indiana.edu/iggls/vol14/iss2/11, last visited on 20 December 2020; "Global Legal Pluralism", *Annual Review of Law & Science*, vol. 5 (2009), pp. 1-35, and "The Mirage of Non-State Governance", *Utah Law Review* (2010), pp. 31-45. Antoine Duval also reminds us other 2 (two) issues. First, it reminds us that Rigaux proclaimed the existence of 3 (three) legal orders in the following domains: canonical domain, sporting domain and international economic domain. Secondly, it reminds us the work of Berthold Goldman regarding the (new) *lex mercatoria.* The latter author assesses (new) *lex mercatoria* as ''receptacle' for the principles shared among national laws and a 'melting pot' of the specific rules called for by international trade, to international commercial disputes'. See Berthold Goldman, "Frontières du droit et 'lex mercatoria'*", Archives de Philosophie du Droit*, vol. 9 (1964), pp. 177-192.

[2] Any community of interests constitutes the core of any diaspora. See Paul Schiff Berman, "From International Law to Law and Globalization", cited above, pp. 510, 515. In this latter author's vision, the incorporation of social customs and practice (including commercial practice, my note) proves 'the most obvious example of State law's recognition of non-State law-making'. Today, the (new) *lex mercatoria* constitutes a particular and undeniable version of such non-State law-making.

[3] The current global studies firmly suggest, at least in the context related to the topic 'law and globalization', that 'law is not anymore a coercive command of sovereign power, but a language for imagining alternative future worlds'. See Paul Schiff Berman, "From International Law to Law and Globalization", cited above, p. 534.

law' to be interpreted by federal courts sitting in diversity jurisdiction'.[1] The first privately and humanly created legal order - that is the (old) *lex mercatoria* -, finds its roots in the concept of a 'borderless universal trade law of nations (of merchants, my note)'.[2] As already pointed out, the roots of the medieval rules of mercantile and maritime law concerning cross-border private transactions are to be found in the ancestor of the international law - namely the law of nations. It should be reminded that Lord Mansfield, the 'father' of (English) commercial law and Justice Story contemplated the law merchant (the (old) *lex mercatoria*, my note) 'as border-transgressing and as a genuinely denationalized body of law'.[3]

It seems appropriate to suggest a comparison between TL's most recent versions (the old *lex mercatoria* and the new one). We are going to see that these recent versions resemble and differentiate each other. Such comparison shall finally encompass a brief remark regarding the ***oldest*** *lex mercatoria* and the *newest lex mercatoria,* if any.

Firstly, both leges *mercatoria* resemble each other because they are transnational by nature; 'transnational' should be understood in the meaning that the old and the new leges *mercatoria* 'regulate' or address cross-border activities involving private/commercial actors only, including States acting only *jure gestionis*. This is the case of transnational commercial (and private) law. Unlike the old *lex mercatoria*, the new one as emerged after the Second World War began to 'regulate' and/or even address cross-border activities involving private/commercial and public actors altogether. In the light of the treaties, the States acting *jure imperii* began to enter particular commercial/business contracts with private entities. This time, the new *lex mercatoria* became transnational not exclusively because the activities of the actors involved were developed cross-border; such version became

[1] See *Swift v. Tyson,* 41 US (16 Pet.) 1 (1842). This case-law is quoted by Harold Hongju Koh, "Why Transnational Law Matters", *Penn State International Law Review*, vol. 24, no. 4, article 4, available at: http://elibrary.law.psilr/vol24/iss4/4, last visited on 20 December 2020. It seems that this scholar refers only to the (new) *lex mercatoria*. I presume the availability of such idea in the light of (old) *lex mercatoria* also. The aforementioned scholar suggests that 'we need to teach more transnational law, not just transnational legal process, but also transnational legal substance'. Furthermore, Professor Koh suggests the existence of 2 (two) dimensions of the transnational legal substance, hereinafter 'TLS'. There is a private TLS encompassing, for instance, the (new) l*ex mercatoria,* international finance, international banking law, law of cyberspace; there is also a public TLS encompassing, for instance, the law of global democracy, the law of global governance, the law of transnational crime, the law of transnational injury, the law of transnational markets, the law of transnational dispute resolution.

[2] The revival of this concept has been proclaimed through various works of the business (commercial) lawyers after World War II. See Berthold Goldman, "Frontières du droit et 'lex mercatoria'", cited above, as quoted by Peer Zumbansen, "Transnational Law", in Jan Smiths (ed.), *Encyclopaedia of Comparative Law*, Edward Elgar Publishing, 2006, pp. 738-754.

[3] See Peer Zumbansen, "Transnational Law", cited above, p. 746.

transnational because of the mixture of the actors' nature (public and private altogether). This is the case of transnational investment (and public) law[1] that employs the new *lex mercatoria* under the 'umbrella' of investment (and public, my note) law; therefore, the new *lex mercatoria* acquired a new dimension; that is a public law dimension.

Second, both *leges mercatoria* are denationalized by nature; only such nature allows the universalism. The old *lex mercatoria* is to be regarded as genuine body of 'law' consisting of trade customs and principles of law applied in private and commercial areas only. Unlike the old *lex mercatoria*, the new one is contemplated not necessarily and exclusively as an enlarged body of law (international public and private law, any other rules) as Professor Jessup seemed to put it. In the last period of time, the new *lex mercatoria* is contemplated more as a tool of legal theory, or as a tool related to the legal process, or as a methodological tool. These tools are employed for the management of interactions between international law and domestic ones and any other rules, be they *hard* or *soft,* as occurred in cross-border situations involving different actors by their nature (public and/or private). In its 'capacity' of device familiar to the legal theory, or of device familiar to the legal process, or of device familiar to the methodological tool, the new *lex mercatoria* can be employed not only in private law, but also in public law areas (public international law litigation, or human rights litigation). It should be reminded that Professor Jessup apparently employed TL as body of law originally regulating only public international law issues.[2] It is easy to notice that the new *lex mercatoria* can constitute a particular body of law, or a particular tool of legal theory, or a particular legal process, or a particular methodological tool; therefore, the new *lex mercatoria* has been designed

[1] There is no doubt that international investment law is assessed today purely as a version of TL. See Nicolàs M. Perrone, "International Investment Law as Transnational Law", *TLI Think!*, Paper no. 05/2020, available at https://ssrn.com/abstract=3523632, last visited on 20 December 2020.

[2] These public international law issues amount mainly to the investment activities involving the States - acting *jure imperii* - and other actors, be they public or private. Therefore, in its seminal essay simply called 'Transnational Law' (1956), Professor Jessup anticipated the future investment (public) international law; such latter branch of international (public) law had been mainly embodied in the 1960s in the ICSID Convention (1965). See *supra* note 18. It shall not be forgotten that Professor Jessup's TL has been subsequently assessed in the light of 3 (three) approaches: the approach of transnationalized legal traditionalism, the approach of transnationalized legal decisionism and the approach of transnational socio-legal pluralism. See Craig Scott, "'Transnational Law' as Proto-concept: Three Conceptions", vol. 10 (2009), *German Law Journal*, p. 877, available at: http://www.germanlawjournal.com/article.php?id=1147, last visited on 20 December 2020

either to regulate private/commercial and public areas altogether or to be employed in private/commercial and public settings altogether.[1]

Thirdly, the aspiration to universality constitutes the ideological feature of both *lex mercatoria*, be it old and new. The old *lex mercatoria* did not practically experience such aspiration. It seems that the merchants lacked the abilities to put in practice the universalism; or the merchants were not interested in such theoretical topic. Unlike the old *lex mercatoria,* the new one as revived after the Second World War under the 'aegis of the liberal-internationalist doctrine' put in practice the universalism. It seems that the nation-States themselves were paradoxically interested in helping the new *lex mercatoria* to amount to the so-called 'true *lex mercatoria'*; that is the law merchant beyond the State, not without the State, on the one hand, and 'an emerging global commercial law that freely combines elements from national and non-national law', on the other hand.[2] Otherwise speaking, the nation-States did not lack the abilities to put in practice the universalism with a view to revive the new *lex mercatoria*. These abilities have been nurtured by the liberal-internationalists that changed the nation-States' behaviour in the international arena. I stated above the word 'paradoxically' for at least one reason: in the past, nation-States were usually and logically interested in promoting their legal 'products' (national laws or international laws binding by their consent, my note) which are not logically again conceived to be detached from the nation-States themselves. However, after the end of the Cold War, the nation-States entered a new logic, by promoting a commercial 'law' detached from their national legal order. The core of such detachment is based on the liberal-internationalist doctrine that fully permeated the structure of the nations-States after the Second World War.

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[1] As to the idea that the shift to law and globalization blurred the distinction between public and private international law, see Paul Schiff Berman, *supra* note 16, at 520-522. Furthermore, as to the idea that the legal realists do not accept the distinction between public and private domestic law, 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 (2016), p. 161, available at: https://scholarship.law.uci.edu/ucijil/vol1/iss1/8 , last visited on 20 December 2020

[2] See, for instance, the article published by Ralf Michaels in 2007, *supra* note 5 at page 15, pp. 447-468. It seems to me that the author considers the (true) *lex mercatoria* as nothing else than the global commercial law. In my view, it is more cautious to not equate the *lex mercatoria,* even 'true', to the so-called 'global (commercial) law'. My idea is to be developed in my future research papers. Anyway, it appears that the notions of 'global law' and 'transnational law' are quite different. The so-called 'global law' consists of 'the universal legal norms that are being created and diffused globally in different legal domains'; TL consists of 'the legal norms that cross borders and thus apply to parties located in more than one jurisdiction, but may or may not be global in nature'. See for instance, Gregory Shaffer, "Transnational legal process and State change: opportunities and constraints", *IILJ* Working Paper 2010/4, pp. 1-43, available at www.iilj.org, last visited on 20 December 2020.

Therefore, this (new) commercial 'law' is the new *lex mercatoria* detached also from the Westphalian model of the world.[1] Anyway, in the light of the above-mentioned ideas, the so-called discipline, if any, 'TL' 'as a combination of public and private law, international and domestic law is understood as universal and plural at the same time'.[2] Still, one should not forget not to mix up the new *lex mercatoria* and the so-called 'new *new* lex mercatoria', respectively the so-called (my suggestion) 'the newest lex mercatoria'. The new *lex mercatoria* 'reflects the functional differentiation of world society; it is a law for commerce, not for merchants (as it was the old *lex mercatoria*, my note)'.[3] In my opinion, the new *new lex mercatoria* amounts to the post-modern transnational commercial law; the new *new lex mercatoria* is to be assessed as an advanced stage of the new *lex mercatoria* emerged after the Second World War. Both new and new *new lex mercatoria* are logically based on the core idea of the denationalized commerce. Such latter idea evolves its 2 (two) versions. The first dimension (the new *lex mercatoria*) focuses on the merchants only; in my view, that is the subjective approach of the denationalized commerce. The second idea (the new *new lex mercatoria*) focuses on the commerce itself; in my view, that is the objective approach of the denationalized commerce. The newest *lex mercatoria*, if any, amounts to the post-post-modern transnational commercial 'law', namely the 'law' of the worldwide merchants' common sense. The post-post-modern transnational commercial 'law' truly constitutes the oldest *lex mercatoria*, may be fully reloaded; otherwise speaking, the future *lex mercatoria,* that is the post-post-modern *lex mercatoria*, constitutes the revived (commercial) past embodied by the oldest *lex mercatoria* itself. As already stated, the so-called 'magic circle' of *lex mercatoria* can be closed. It can be closed because

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[1] In the first quarter of the 21st century, 'a shift from what we called a Westphalian model of the world to a globalized understanding of the world' smoothly occurred. See Ralf Michaels, "Law and Globalisation: Law Beyond the State"*,* in Reza Banakar, Max Travers (eds.), *Law and Social Theory*, 2nd edition, Hart Publishing, 2013, pp. 287-303, as quoted by Ralf Michaels himself in "Transnationalizing Comparative Law" (2015), available at https://scholarship.law.duke.edu/faculty_scholarship/3563, last visited on 20 December 2020.

[2] Under the umbrella of TL, 'presumed universal (international) law is always partial - because it remains distinct from domestic law, but also because it interacts with domestic circumstances in site-specific ways. Global law is always plural but interconnected: local law transcends boundaries and interacts with law elsewhere in complex ways'. See Ralf Michaels, "Beyond Universalism and Particularism in International Law- Insights from Comparative Law and Private International Law" (Online Symposium: Anthea Roberts' *Is International Law International?*), Boston University Law Review Online, vol. 99 (2019), pp. 18-21.

[3] The notion of 'the new *new lex mercatoria'* had been doctrinally contemplated by Ralf Michaels, "The True Lex Mercatoria: Law Beyond the State", cited above, p. 466 in light of a specific writing, namely the writing of Gunther Teubner, *Global Bukovina: Legal Pluralism in the World-Society*, cited above, pp.3-28.

the oldest *lex mercatoria* 'opens' the circle; the newest *lex mercatoria* 'finishes' it.

The circle is perfectly described, as the oldest and the newest *lex mercatoria* are relying on the same core basis. That is the so-called 'merchants' common sense'. In other words, the true source of both *lex mercatoria,* be it the oldest or the newest, is the merchants' common sense. The oldest *lex mercatoria* is based on such common sense because of its status. Let us recall that the oldest *lex mercatoria* is a constitutive part of the *jus gentium* that was mixed up, according at least to Cicero, with the 'law' of nature. The common sense is the underlying idea of *jus gentium*; the common sense is logically the underlying idea of the oldest *lex mercatoria* that is a constitutive part of the *jus gentium* itself. I have already stated why the newest *lex mercatoria* - a truly post-post-modern transnational commercial 'law' -, is based on the merchants' common sense. I just only note that the post-post-modern worldwide merchants employ their common sense with a view to detach their business activity from any 'regulation' provided by the post-modern *lex mercatoria*, thus creating the new *lex mercatoria* evolved subsequently to the Second World War.

To sum up, one should conclude that the ***oldest*** *lex mercatoria* had been 'conceived' as transnational through the geographical lens only; it lacked the methodological approach. The old *lex mercatoria* had been also conceived by the medieval merchants as transnational through the geographical lens only; it lacked also the methodological approach. The new *lex mercatoria* had been conceived by the modern business community as transnational through the extra-geographical lens. Afterwards, it acquired a methodological approach especially in the light, for instance, of the investment and (public, my note) international law. The ***newest*** *lex mercatoria,* if any, lacks both the geographical and methodological approaches. It lacks these approaches because of the core idea of the ***newest*** *lex mercatoria,* if any, concentrating the post-post-modern merchants' common sense and human reason. Such common sense and human reason can be assessed neither geographically nor methodologically. The 'lights' and/or the 'shadows' of globalization encourage the lack of the abovementioned approaches. Furthermore, these 'lights' and/or 'shadows' are blurring up the distinction between cross-border commercial law and cross-border non-commercial law; at least this distinction remains, generally speaking, entirely symbolical. It should be also noted another idea, on the volatile meaning of the so-called notion of

‘globalization’.[1] Such latter compression of time and space amounts to a lack of distinction between the ‘public’ and ‘private’ life of international law itself.[2] Otherwise speaking, the international law in the post-post-modernity reminds all of us of its ancestor usually called *‘jus gentium’* by the Romans. *Jus gentium* did not experience the distinction between public and private international law.[3]

5. Final Remarks

The post-post-modernity that we are living today reminds all of us that TL, at least in its commercial approach and origin(s), is neither old or new, nor oldest or newest. Under the ‘umbrella’ of post-post-modernism, it is frankly about TcL; in other words, it is TcL just like that. The newest *lex mercatoria,* if any, shares the same core idea which the oldest *lex mercatoria*, namely the worldwide merchants’ common sense in doing business. Furthermore, the newest *lex mercatoria* is a ‘law’ beyond the nation-States; it lives without the nation-States but not without the worldwide merchants’ common sense.[4] Furthermore, it fully lives within the so-called ‘world commercial society’. Because of the aforementioned same core idea, the so-called ‘circle, if any, of post-post-modern TL’, as regarded this time in its exclusively commercial

[1] Let the readers be reminded of the suggested meaning of the notion of ‘globalisation’, ‘understood here as the specific compression of time and space which coincides with late modernity’. See Anthony Giddens, *The Consequences of Modernity,* Cambridge, Polity Press, 1991, pp. 63-65.

[2] Joseph Story, universalist by his very nature, fully trusted the unity of international law (public and private altogether). Still, Joseph Story shared a specific and positivist approach to territorial jurisdiction. Such parochial character to territorial jurisdiction ‘sowed the seeds for the isolation of private international law from the body of public law’. That is a paradoxical situation: Story’s universalism amounts to the isolation of the private ‘element’ of international law from the ‘public’ element of international law itself. See Joel R. Paul, ““The Isolation of Private International Law”, cited above, p. 161. In the first quarter of the 21st century, the distinction between public and private international law remained also symbolically. It remained as such because of the neoliberal ideology powerfully arising out of the emerging realities occurring after the end of the Cold War. The latter ideology ‘asserts the superiority of private law in regulation of international commerce’. See Claire Cutler, “Artifice, Ideology and Paradox: The Public/Private Distinction in International Law”, *Review of International Political Economy*, vol. 4 issue 2 (1997), pp. 261-285. I dare to affirm that the superiority, if any, of private law, covers all its ‘legal’ components, including (even mainly) the so-called ‘soft law’ amounting to the relative normativity. In the age of neoliberalism, this kind of relativity is permeating the international and domestic settings altogether; furthermore, this kind of relativity amounts to the mixture of international and domestic settings. In other words, each of these settings is losing its clear and firm identity under the ‘umbrella’ of transnationalism.

[3] The so-called origin of international law, that is the *jus gentium,* had been applicable to all persons (including the merchants, my note) and ‘generally covered commercial relations’. See Joel R. Paul, “The Isolation of Private International Law”, cited above, p. 156.

[4] In Ralf Michaels’ vision, the new *lex mercatoria* – that is the ‘true’ *lex mercatoria,* is a ‘law’ beyond the State, but not without the State. See Ralf Michaels, *supra* note 2 at page 18, pp. 447-468. I recall that the ‘true’ *lex mercatoria* is familiar to the neo-liberal doctrinal ideology emerged in the neo-liberal post-modernity.

dimension, is fully and perfectly closed. Such perfect 'circle' is to be also regarded as an appropriate vehicle driving us 'to understand law in (post-post-modern, my note) context'.[1]

The latter context does not meet anymore various substantive and formal separations. Separations such as the one between public and private international law, as firmly emerged in the time following the Peace of Westphalia (1648); or the one of public and private law emerged under the auspices of the Modern (Liberal, my note) Age of Industrialization; or the 'vertical' and substantive separation of public and private actors emerged under the auspices of the same Age of Industrialization (this latter one substantively undermined under the auspices of the post-modern (neoliberal, my note) Age of Digitalization; or the substantive and formal 'horizontal', and/or 'vertical', and/or 'heterarchical' separation between all the constitutive elements of the (post-post, my note)-modern law as a whole arising out of the post-post-modern realities from nowadays. The latter realities are to be regarded as the core of the so-called 'Age of common sense' that the merchants are seeking to fully live today.

In other words, the post-post-modern (and commercial, my note) Age should be regarded as the Age of true merchants' common sense. The merchants' common sense amounts to the 'law' of nature involving the universality of *jus gentium*. Under the 'umbrella' of their common sense, if any, there are neither 'horizontal'/'vertical' nor 'heterarchical' separation between normative and non-normative realities.[2] Ironically in an apparent way,[3] only the post-post-modern nowadays context drives us to the past. In the past I am finding the ancestor of the positivist international law; that is *jus gentium* itself. Therefore, the post-post-modern Age of law meets at any point in that circle's perimeter the first Age of the 'law' (*jus gentium* itself). *Jus gentium*

[1] On the occasion of conceptualizing 'economic law', the words '(…) understanding as law in context' had been employed. See Peer Zumbansen, "What is Economic Law?", *TLI Think!* Paper 20/2020, available at SSRN: https://ssrn.com/abstract=3660836 or http://dx.doi.org/102139/ssrn3660836, last visited on 20 December 2020. In the 2010s, I, myself, spread the idea of 'Understanding (commercial) law in (post-post-modern) context)'. Such idea constitutes the core of my doctrinal idea or, to put it more directly, of my doctrinal ideology of the scholarly pragmatism living in my writings.

[2] I doctrinally 'borrowed' the idea of 'three-dimensional' from Friedrich Juenger's studies and articles on the issues regarding conflict of laws and the so-called 'challenges of Europeanization'. See Christian Joerges, "The idea of a three-dimensional conflicts law as constitutional form", *RECON* Online Working Paper 2010/05, URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html, last visited on 20 December 2020. See also Christian Joerges, "The Challenges of Europenization in the Realm of Private Law: A Plea for a New Legal Discipline", (2004), available at SSRN: https://ssrn.com/abstract=635387 or http://dx.doi.org/10.2139/ssrn.635387, last visited on 20 December 2020.

[3] I worded 'ironically in an apparent way' as, in my vision, the whole mankind constitutes a truly perfect and round 'circle'.

did not experience either ‘horizontal’/‘vertical’, or ‘heterarchical’ separation amond its constitutive elements. The post-post-modern Age of commercial law embodied in the newest *lex mercatoria* also does not experience such separation(s); the ‘circle’ of the mankind and its newest but oldest commercial ‘law’ – that is the newest *lex mercatoria*, is perfectly closed. Such perfection is based on a paradox: the oldest and newest dimensions of *lex mercatoria* are living at the same time in light of normative, respectively non-normative realities altogether.

The lack of the aforementioned separation(s), including ‘vertical’ separation, does not preclude the legal scholars to be and remain scientifically objective when analysing transnationalism or internationalism or nationalism trends in legal thinking. As far as I am concerned, notwithstanding my inherent subjectivity, I am striving to do my utmost; that is to objectively be and remain so through drafting my research papers, including the present one.

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The Application of International Law to Cyber Operations: Some Brief Remarks on Sovereignty, Use of Force and Attribution

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Abstract: *This paper reveals some concrete controversies related to the application of international law in cyberspace. The three main issues studied in this paper describe the manner in which the principle of state sovereignty interacts with cyberspace, potential problems related to the principle related to the prohibition of the use of force and the main hurdles that need to be surpassed for an act performed in cyberspace to be attributed to a state.*

Key-words: *Attribution; cyber operations; cyberspace; sovereignty; use of force*

Introduction

The exponential growth of cyber operations[1] and the implication of various actors performing in cyberspace, be it states, individuals, international organizations or corporations, are gradually affecting national security.[2] Several international organizations, heads of state, private entities or non-governmental organizations, confirm that we face a contemporary proliferation of illegal acts performed in cyberspace.[3] On the date of 29 June 2021, the United Nations High Representative for Disarmament Affairs, participating at the first open debate on maintaining peace and security in cyberspace before the Security Council, concluded that *"ICT threats are*

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[1] Julian Jang-Jaccard, Surya Nepa , *A survey of emerging threats in cybersecurity,* Journal of Computer and System Sciences, Volume 80, Issue 5, 2014.

[2] Herbert Lin, *Attribution of Malicious Cyber Incidents: From Soup to Nuts*, *Columbia Journal of International Affairs,* Hoover Institution Aegis Paper Series on National Security, Technology, and Law, 2016, p. 21

[3] Scott Shackleford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, Berkeley Journal of International Law, Vol. 27, 2009, p. 209.

increasing, but efforts are also under way to address them".[1] Further, on the 23rd of June 2021, the European Commission concluded that there is a *"rising number of serious cyber incidents impacting public services, as well as the life of businesses and citizens across the European Union."*[2]

In this context, various discussions are currently held on the applicability of international law in cyberspace, including within the United Nations Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security[3] or within the Open-ended Working Group on Developments in the field of information and telecommunications in the context of international security.[4]

On the 12th of May 2021, the Presidential Administration of the United States of America issued the *"Executive Order on Improving the Nation's Cybersecurity",* which contains the following conclusion:

> *"The United States faces persistent and increasingly sophisticated malicious cyber campaigns that threaten the public sector, the private sector, and ultimately the American people's security and privacy."*[5]

Representatives of France,[6] Germany[7] or China[8] further confirm the need to properly address cyber threats. Illustratively, the Federal Government of Germany has published, in March 2021, a Position Paper on the Application of International Law in Cyberspace, through which it concluded that *"cyber activities have become an integral part of international relations",*[9] while the National Defense Strategy of Romania refers to cyber tactics in the following terms:

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[1] Available at https://www.un.org/press/en/2021/sc14563.doc.htm

[2] Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3088

[3] Available at https://www.un.org/disarmament/group-of-governmental-experts/

[4] Available at https://www.un.org/disarmament/open-ended-working-group/

[5]https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/

[6] A white paper endorsed by the French Government concluded that *"Dans le même temps, les menaces identifiées en 2008 – terrorisme, cybermenace, prolifération nucléaire, pandémies… – se sont amplifiées. La nécessité d'une coordination internationale pour y répondre efficacement s'impose chaque jour davantage"*, p. 7, available at http://www.livreblancdefenseetsecurite.gouv.fr/pdf/le_livre_blanc_de_la_defense_2013.pdf.

[7] https://www.enisa.europa.eu/media/news-items/german-cyber-security-strategy-2011-1

[8] Cai Cuihong, *Cybersecurity in the Chinese Context: Changing Concepts, Vital Interests, and Prospects for Cooperation*, China Quarterly of International Strategic Studies, 2015, p. 472-473

[9] The Federal Government of Germany, Position Paper, On the Application of International Law in Cyberspace, March 2021, p. 1, available at: https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf

"Indications of security threats will be increasingly felt throughout the entire society as hostile actors multiply their combat tactics and interferes in states' domestic affairs, including by means of cyber and other hybrid tactics"[1]

There is little to no disagreement with respect to the recent proliferation of cyber-attacks, or regarding the need for international cooperation and multilateralism to address the threats posed within cyberspace, while few contest the role that international law has towards enhancing global cybersecurity.[2] In this context, the relevance of international law for enhancing cybersecurity has been labeled as being of *"critical importance"*[3] in addressing information and technology, internationally. However, more and more voices are currently advocating for the inadequacy of certain existing norms of contemporary international law[4] or, more drastically, their failure to maintain peace within the cyber realm.[5] Calls for specific regulations, prescribing certain vital areas of cyberspace are on the rise.[6]

The scope of this paper is to identify some relevant issues regarding the application of international law in cyberspace with respect to sovereignty, the use of force and attribution. This paper is the first part of wider endeavor, which intends to pinpoint the relevance of interpreting and applying certain concepts, traditional for international law, in cyberspace. Illustratively, the first section addresses sovereignty and the potential convolution of the concepts of "digital sovereignty" and "tech sovereignty". The second section addresses the manner in which the concept of "force" performed in cyberspace might (or might not) have the same meaning as "force" performed in the real world. Finally, the third section addressed attribution in cyberspace

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[1] Presidential Administration of Romania, National Defence Strategy 2020-2024,Bucharest, 2020, p. 19, available at: https://www.presidency.ro/files/userfiles/National_Defence_Strategy_2020_2024.pdf

[2] https://www.un.org/disarmament/update/the-application-of-international-law-in-cyberspace-state-of-play/

[3] The Federal Government of Germany, Position Paper, On the Application of International Law in Cyberspace, March 2021, p. 1, available at: https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf

[4] Michael Fischerkeller, *Current International Law Is Not an Adequate Regime for Cyberspace*, available at https://www.lawfareblog.com/current-international-law-not-adequate-regime-cyberspace ;

[5] Nori Katagiri, *Why international law and norms do little in preventing non-state cyber attacks*, Journal of Cybersecurity, Volume 7, Issue 1, 2021.

[6] Jurgen Feick, Raymund Werle, *Regulation of Cyberspace*, in Robert Baldwin, Martin Cave, Martin Lodge, "The Oxford Handbook of Regulation", 2010; Hassan Bashir, Mohammad Sadegh Nasrolahhi, *A Comparative Study for Regulating the Filtering in the US, the EU and China: Proposals for Policy Making in Iran*, Journal of Cyberspace Studie, Volume 2, Issue 1, 2018;

and some of the difficulties of applying the existing international lagal framework to cyber operations.

1. Sovereignty

The relationship between cyberspace and sovereignty has been developing ever since the Internet was born, as a medium.[1] On the face of it, the exponential digitalization of society might seem to push the concept of sovereignty to its limits.[2] Recently, the subject of sovereignty in cyberspace, linked with the proliferation of cyber threats, led to the conclusion that cyberattacks have become the number one global threat, *"listed within the 2013, 2014, 2015 and 2016 Worldwide Threat Assessments conveyed annually to Congress by the Director of National Intelligence."*[3] In this context, the manner in which states manifest their sovereignty in cyberspace and the terminology used by policy makers seem to need further clarification.

The principle of sovereignty is regulated through art. 2(1) of the Charter of the United Nations, which prescribes that the UN is *"based on the sovereign equality of all its Members"*.[4] Among the essential prerogatives of sovereignty is the right to regulate in the public interest,[5] or, properly called, jurisdiction to prescribe. However, several debates exist regarding the manner in which the law operates in cyberspace.[6] In this sense, subjective[7] and objective[8] territorial jurisdiction pose certain limitations in cyberspace and, further, the application of extraterritoriality through traditional jurisdictional norms performed through the active or passive personality tests,[9] is not

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[1] Milton Mueller, *Sovereign and Cyberspace, Institutions and Internet Governance*, Essay derived from the 5th Anual Vincent and Elinor Ostrom Memorial Lecture, given at the University of Indiana, October 3rd, 2018, p. 1, available at: https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/10410/5th-Ostrom-lecture-DLC.pdf?sequence=1&isAllowed=y

[2] Julia Pohle, *Digital Sovereignty, Internet Policy Review*, Journal of Internet Regulation, Vol. 9., Issue 4, 2020, p. 2.

[3] Cynthia Ayers, *Rethinking Sovereignty in the Context of Cyberspace*, The Cyber Sovereignty Workshop Series, Center for Strategic Leadership, U.S. Army War College, 2016, p. 1.

[4] Available at https://www.un.org/en/about-us/un-charter/chapter-1

[5] Inga Martinkute, *Right to Regulate in the Public Interest: Treaty Practice*, JusMundi, 2021, available at: https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest

[6] Timothy Wu, *Cyberspace Sovereignty? – The Internet and the International System*, Harvard Journal of Law and Technology, Vol. 10, no. 3, 1997, p. 648; Francois Delerue, "Cyber Operations and International Law", Cambridge University Press, 2020, p. 4.

[7] Jean-Baptiste Maillart, *The limits of subjective territorial jurisdiction in the context of a cybercrime*, Academy of European Law, Trier, 2018, p. 2.

[8] Darrel Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, Michigan Telecommunications and Technology Law Review, Volume 4, Issue, 1, p. 72.

[9] Ibid.

entirely suitable for the modern characteristics of cyberspace. Targeting,[1] universality,[2] or protective tests[3] share the same fate.

In order to address the issues related to the manifestations of sovereignty in cyberspace, unsurprinsgly, new terminology seems to emerge. For example, the German Presidency of the EU Council, addressing the Four Goals for the Digital Sector, refers to the concept of *"digital sovereignty",* in the following terms:

> *"1. Europe is to gain more digital sovereignty*
>
> *This presupposes a well-developed digital infrastructure which is at once resilient, sustainable and democratic. The idea is to put in place a digital economic area that meets these criteria."*[4]

The European Council on Foreign Relations seems to confirm this view, by concluding that, for the policy makers in Europe, digital sovereignty is part of "*a larger struggle that they face to maintain their capacity to act and to protect their citizens in a world of increased geopolitical competition."*[5] The quest for the digital sovereignty of the European Union is reflected in the EPRS Ideas Paper issued under the auspices of the European Parliament, which confirms that, in order to reach the goal of enhancing Europe's strategic autonomy in cyberspace, the Union should *"update and adapt a number of its current legal, regulatory and financial instruments"*.[6] However, the same document seems to assimilate the notion of digital sovereignty with technological sovereignty.[7] Addressing the same issue, but from a different angle, Ursula von der Leyen, the President of the European Commission, in her op-ed entitled *"Shaping Europe's Digital Future"* concluded her piece, referring to the concept of *"tech sovereignty"*, in the following terms:

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[1] Dan Jerker Svantesson, *Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation*, International Data Privacy Law, Volume 5, Issue 4, 2015

[2] Darrel Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, Michigan Telecommunications and Technology Law Review, Volume 4, Issue, 1, p. 72.

[3] Elena Lazăr, Dragoș Costescu, Dreptul European al Internetului, Hamangiu, 2021, p. 168.

[4] Available at https://www.eu2020.de/eu2020-en/news/article/digitalziele-eu2020/2405548

[5] Available at https://ecfr.eu/publication/europe_digital_sovereignty_rulemaker_superpower_age_us_china_rivalry/

[6] Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf

[7] Ibid. The paper contains the following relevant distinction: *"The notion of 'technological'* ***or*** *'digital sovereignty' has recently emerged as a means of promoting the notion of European leadership and strategic autonomy in the digital field."* (emphasis added)

"I sum up all of what I have set out with the term 'tech sovereignty'. This describes the capability that Europe must have to make its own choices, based on its own values, respecting its own rules."[1]

Even if these concepts (technological and digital) have certain common features, they are not identical, nor should they be construed as such. In this context, their interchangeable use might not an effective endeavor addressing the interaction between sovereignty and cyberspace. The Internet is not cyberspace.[2] Neither should the digital be confused with the technological, in the same manner in which the kitchen should not be confused with its appliances. In other words, the digital is an element of the toolkit through which states may optimize their use of technology, along with other elements, analogue material. From this perspective, the notion of tech sovereignty seems more appropriate, as it includes, to a certain degree, the notion of digital sovereignty. These terminological clarifications should be the first step in addressing the manner in which sovereignty manifests in cyberspace, with all its characteristics.

Briefly, digital sovereignty means that states should have the ability to control their own digital existence and experience, of their own cyber destinies.[3] Consequently, one expression of sovereignty is the ability to respond to cyber threats, including with force.

2. The prohibition of the use of force

The application of the norms regarding the prohibition of the use of force, as established through article 2(4) of the Charter of the United Nations, shares the same fate as attribution in cyberspace: it is surrounded by uncertainty. Perhaps one of the most pressing issues regarding the use of force in cyberspace relates to the terminology used, especially because its interpretation lacks uniformity.[4]

For example, several confusions exist regarding the meaning attributed to the concepts of cyber-attack, cyber-warfare, and cyber-crime.[5]

[1] Ursula Von der Leyen, *Shaping Europe's Digital Future*, Brussels, 19 February 2020, p. 3, available at: https://ec.europa.eu/commission/presscorner/detail/en/AC_20_260

[2] Ananda Mitra, Rae Lynn Schwartz, *From Cyber Space to Cybernetic Space: Rethinking the Relationship between Real and Virtual Spaces*, Journal of Computer – Mediated Communication, Volume 7, Issue 1, 2001.

[3] Sean Fleming, *What is Digital Sovereignty and why is Europe so interested in it?*, World Economic Forum, 15 march 2021, available at: https://www.weforum.org/agenda/2021/03/europe-digital-sovereignty/

[4] Oona Hathaway, Rebecca Crootof, Philip Levitz, Nix Haley, Aileen Nowlan, William Perdue, Julia Spiegel, *The Law of Cyber-Attack*, California Law Review, 2012, p. 823.

[5] Ibid, 821.

Illustratively, some authors define the notion of cyber-attack as being *"efforts to alter, disrupt, degrade or destroy computer systems or networks or the information or programs on them."*[1] Others refer to the following definition:

> *"A cyber-attack consists of any action taken to undermine the functions of a computer network for a political or national security purpose"*[2]

Certain states have adopted guidelines or regulations through which they intend to clarify the conceptualization of the notion of cyber-attacks. For example, the Dictionary of Military and Associated Terms of the Department of Defense of the United States of America, as per January 2021, defines the notion of "cyberspace attack", as such:

> *"Actions taken in cyberspace that create noticeable denial effects (i.e., degradation, disruption, or destruction) in cyberspace or manipulation that leads to denial that appears in a physical domain, and is considered a form of fires"*[3]

While the above-mentioned quote considers that certain operations performed within cyberspace have a destructive potential and, in certain conditions, equate them to using fire, the French Government seems to undertake a slightly different path, which links the concepts of "cyber-attack" and "cybercrime". In this sense, the French Government mentions that the former may target individuals but also companies or administrations, with the purpose of obtaining personal information or in order to exploit it or resell it.[4] As such, it could be concluded, at least from this approach that a cyber-attack could, in fact, target an individual *and* a state. Nevertheless, the Strategy of France regarding the Defense of the Security of Systems and Information confirms the amplitude of the damage potentially caused through a cyber-attack, both to the lives of people and for the infrastructures of states,[5] leading to the conclusion that a cyber-attack is usually performed against a state, while a cybercrime is generally preformed against an individual.

Even if, in general, cyber operations to not reach the threshold of gravity to assimilate them to the use of firepower, the activities performed in

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[1] Matthew Waxman, *Cyber Attacks as Force under UN Charter Article 2(4)*, Columbia Law School, Scholarship Archive, Faculty Publications, 2011, p. 43

[2] Oona Hathaway, Rebecca Crootof, Philip Levitz, Nix Haley, Aileen Nowlan, William Perdue, Julia Spiegel, *The Law of Cyber-Attack*, California Law Review, 2012, p. 826.

[3] DOD Dictionary of Military and Associated Terms, as of January 2021, p. 55, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf

[4] Available at https://www.gouvernement.fr/risques/cybercriminalite

[5]https://www.ssi.gouv.fr/uploads/IMG/pdf/2011-02
15_Defense_et_securite_des_systemes_d_information_strategie_de_la_France.pdf

cyberspace can, at times, morph into cyberwarfare.[1] What is the threshold that should be applied in this respect is not clear-cut. A proper application of the concept of "force" is thus relevant, especially because a (cyber) armed attack may be linked with the use of (cyber) force. Article 2(4) of the UN Charter prescribes that all member of the UN shall:

> *" [...] refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."*[2]

However, there is no definition, provided under the Charter, to clarify the notion of force and its implications. In this respect, the International Court of Justice has issued several judgments through which it determined how the use of force is construed. The Court, in the Advisory Opinion related to the *Legality of the Threat or Use of Nuclear Weapons* concluded that the provisions of the UN Charter related to the prohibition of the use of force, i.e. article 2(4), article 51 and article 42, *"do not refer to specific weapons"*[3] and that the mentioned provisions apply to *"any use of force, regardless of the weapons employed"*.[4] Another relevant finding of the International Court of Justice regarding the use of force was issued in the Military and Paramilitary Activities in and against Nicaragua, in which the Court concluded that certain actions may not constitute an armed attack but may constitute use of force.[5] The Tallinn Manual 2.0, through Rule 69 attempts to clarify the application of the above mentioned interpretation in cyberspace by linking force with its external effects righter than its internal characteristics, in the following terms:

> *"a cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of the use of force"*[6]

As such, when assessing the use of force in cyberspace, the effects and scale of the action are more relevant than the material (or the weapon) used. Even if the definition used by the Tallinn Manual 2.0. seems to reflect, to a

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[1] Francois Delerue, "Cyber Operations and International Law", Cambridge University Press, 2020, p. 55.

[2] Available at https://www.un.org/en/about-us/un-charter/chapter-1

[3] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para 39, p.

[4] Ibid.

[5] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, para. 210, p. 110.

[6] Michael Schmitt (ed.), "Tallinn Manual 2.0. on the International Law Applicable to Cyber Operations", Cambridge University Press, 2017, p. 330.

certain degree, the conceptualization specific to general international law, some commentators suggest that it might be more appropriate to develop a set of new norms that would better address cyber operations.[1]

3. Attribution

One of the critical[2] and tedious[3] issues in international law today is the attribution of illegal acts in cyberspace. Attribution in cyberspace is, indeed, essential because *„most responses to cyber operations cannot be deployed without attribution"*.[4] To further complicate the issue, potential answers to questions as to how to attribute an action, and to whom (or to what) are surrounded by uncertainty.[5]

Technical difficulties are, perhaps, most visible. The anonymity of cyberspace, enhanced by the ease with which a perpetrator can hide her IP address[6] or the identification of operations performed through multiple systems (or networks), located in different jurisdictions[7] are examples that entangle the possibility to pin point actions or perpetrators and, finally, to attribute the actions performed by said perpetrators to a state.

Legal difficulties are also present. Perhaps among the most complicated is the reconciliation of the traditional approaches regarding attribution, confirmed by international courts and tribunals or by international bodies involved in the codification and progressive development of international law with the ever-evolving complexity of certain operations performed in cyberspace. General public international confirms that for an act to be attributable to a state, the aggrieved party should perform the "effective control test", as adopted by the International Court of Justice in the Military and Paramilitary Activities in and against Nicaragua,[8] or the "overall control

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[1] Jurgen Feick, Raymund Werle, *Regulation of Cyberspace*, in Robert Baldwin, Martin Cave, Martin Lodge, "The Oxford Handbook of Regulation", 2010.

[2] Nicholas Tsagourias, , *Cyber Attacks, Self-Defence and the Problem of Attribution*, Journal of Conflict and Security Law, Oxford University Press, 2012, p. 233.

[3] Florian Egloff, Max Smeets, *Publicly attributing cyber attacks: a Framework,* Journal of Strategic Studies, Routlege (2021), p 1.

[4] Francois Delerue, "Cyber Operations and International Law", Cambridge University Press, 2020, p. 51.

[5] Dan Efrony, Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, American Journal of International Law, 2018, p. 633

[6] Duncan Hollis, *An e-SOS for Cyberspace*, Harvard International Law Journal, Vol. 52, Nr. 2, 2011, p. 398

[7] Karin Bannelier, Theodore Christakis*, Cyber Attacks, Prevention – Reactions: The Role of States and Private Actors*, Les Cahiers de la Revue Défense Nationale, Paris, 2017, p.15.

[8] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

test", as adopted by the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Tadic.[1] The International Law Commission, through its Articles on Responsibility of States for Internationally Wrongful Acts has codified, through articles 4 to 11 the manner in which conduct is generally attributed to states in international law.[2] However, the above-mentioned conceptual framework might prove difficult to apply *mutatis mutandis* to cyber operations.

Several opinions exist regarding the process of attributing acts performed within cyberspace. In this respect, Francois Delerue describes three main components, or three main steps, that should be undertaken in order to attribute the act: *'attribution to a machine, attribution to a human and attribution to a state'*.[3] Other authors describe the process in different terms and consider that machine attribution, specific perpetrator attribution and adversary attribution are the standards that should be met, when addressing the same issue.[4] Further, two-pronged classifications exist, classifying attribution as either technical or human.[5] Other views have been expressed in the sense that the first step in order to achieve attribution is to determine the cyber-weapon, i.e. to determine the instrument through which the illegal act has been committed, the state from which the act has been committed and, finally, the person.[6]

What is generally accepted today is that attribution for cyber operations implies the identification of the entity that is responsible for a cyberattack[7] or a cybercrime or any other malicious activities performed in cyberspace. Nevertheless, it is yet to be observed whether the current existing norms of international law are sufficient to address the various issues posed by the traditional framework of attribution.

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[1] Tadić (IT-94-1), United Nations, International Criminal Tribunal for the former Yugoslavia

[2] https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

[3] Francois Delerue, "Cyber Operations and International Law", Cambridge University Press, 2020, p. 55.

[4] Florian Egloff, Max Smeets, *Publicly attributing cyber attacks: a Framework,* Journal of Strategic Studies, Routlege (2021), p. 3; Herbert Lin, *Attribution of Malicious Cyber Incidents: From Soup to Nuts*, Columbia Journal of International Affairs, Hoover Institution Aegis Paper Series on National Security, Technology, and Law, 2016, p. 21

[5] Earl Boebert, *A survey of challenges in attribution*, National Academy of Sciences, Proceedings of a Work-shop on Deterring Cyber Attacks: Informing Strategies and Developing Options for U.S. Policy, 2010, pp. 41-54

[6] Jawwad Shamsi, Sherali Zaedally, Fareha Sheikh, and Angelyn Flowers, *Attribution in Cyberspace: Techniques and legal implications*, Security And Communications Networks, 2016, available at: https://onlinelibrary.wiley.com/doi/epdf/10.1002/sec.1485

[7] Abdulakir Bilen, Bedri Ozer Ahmet, *Cyber Attack Method and Perpetrator Prediction Using Machine Learning Algorithms*, Peer Journal of Computer Science, Volume 7, 2021.

Conclusion

The scope of this paper was not to clarify any of the pressing issues posed by the application of international law in cyberspace but, rather, to reveal them. This article pinpointed a series of controversies related to the manner in which certain concepts generally accepted under public international law interact with the specifics of cyberspace.

International law applies in cyberspace.[1] This conclusion is supported by the vast majority of stakeholders, be them states, policy makers, scholars, international lawyers or representatives of international organizations. Nevertheless, a contemporary trend seems to emerge, which concludes that certain key concepts prescribed through the existing norms of international are insufficient for addressing precise cyber operations. In this sense, the President of the European Commission concluded that the digital transition of Europe may require legislation "where appropriate".[2] This conclusion is relevant not only for Europe but for enhancing global cybersecurity, in line with the specific provisions of the United Nations Charter and the fundamental norms of international.

[1] Francois Delerue, "Cyber Operations and International Law", Cambridge University Press, 2020, p. 13

[2] Ursula Von der Leyen, *Shaping Europe's Digital Future*, Brussels, 19 February 2020, p. 3, available at: https://ec.europa.eu/commission/presscorner/detail/en/AC_20_260

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Legal Implications of Outer Space Warfare
- Part II -

Andreea ZALOMIR[*]

Abstract: *As demonstrated in the first part of the present article,*[1] *the outer space is facing an increased militarization. Space-faring nations are competing in this novel environment to assert supremacy and, thus, secure advantages on Earth. As a result, the prospects of an incoming outer space conflict are higher with each technological advancement and launch. Not only governmental agencies, but also private actors are increasingly active in this spatial endeavour.*

According to the Outer Space Treaty, state parties should conduct their activities in outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations.[2] *The beginning and conduct of warfare are strictly regulated by international legal norms and, thus, a potential conflict unfolding in outer space must also abide by these rules.*

The purpose of the present paper is to analyze the jus ad bellum and jus in bello norms and interpret them in light of the specificities posed by a potential outer space warfare. The article takes into consideration the distinct weapons, actors and effects of such a conflict and will attempt to adapt the existing rules to this novel state confrontation environment.

Key-words: *use of force; self-defence; combatant; armed attack; legitimate military objective*

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[1] The first part of the article can be found here < http://rrdi.ro/no-23-january-june-2020/ >.

[2] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, United Nations General Assembly Resolution 2222(XXI), 1966 *(The Outer Space Treaty),* Art. III.

1. Introduction

The so-called ”Space Age” opened up in a time when the international community was divided into two competing ideological spheres, namely the free, democratic world, led by the United States of America, and the communist states with the USSR at the forefront.[1] The USSR's successful launch of the first man-made object into outer space, in 1957, on a background of persistent nuclear threats, emphasized the military opportunities and challenges this new environment might present.[2] The space race between the two Cold War powers brought significant technological and scientific developments, benefiting the entire mankind, from weather to telecommunications and navigation satellites. Nevertheless, over the five decades of ideological conflict, the military component was persistently present in all space endeavours.[3]

Presently, despite the international space law prescribing for international cooperation in matters pertaining to outer space and the apparent harmonious collaboration of different space-faring nations as illustrated, for instance, by the International Space Station, the prospect of a conflict originating or being conducted in space has not dimmed.[4] On the contrary, the policies and behaviour of space-faring states contour a confrontational future for outer space, as demonstrated in the first part of the present article.[5] Either to exercise deterrence, to assume an aggressive posture or both, the United

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[1] Cheng, Bin, *Studies in International Space Law*, Clarendon Press Oxford, 1997, p. 70; European Space Agency, ”Sputnik – 60 years of the space age”, <https://www.esa.int/About_Us/ESA_history/Sputnik_60_years_of_the_space_age >, last visited on 15/06/2020; National Aeronautics and Space Administration (NASA), “Sputnik and the Origins of the Space Age”, < https://history.nasa.gov/sputnik/sputorig.html >, last visited on 05/05/2020.

[2] Robert Preston, Dana Johnson, Sean Edwards, Michael Miller, Calvin Shipbaugh, *Space Weapons Earth Wars,* Project Air Force, RAND, 2002, p. 9; Isabella Diederiks-Verschoor, Vladimir Kopal, *An Introduction to Space Law,* Kluwer Law International, 2008, p. 2; Alan Steinberg, ”Weapons in Space: The Need to Protect Space Assets”, *Astropolitics: The International Journal of Space Politics and Policy*, 10:3, 26 November 2012, pp. 248 – 267, p. 250.

[3] Robert Preston, Dana Johnson, Sean Edwards, Michael Miller, Calvin Shipbaugh, *Space Weapons Earth Wars,* Project Air Force, RAND, 2002, p. 9; John Pike, “The military uses of outer space”, *SIPRI Yearbook: Armaments, Disarmament and International Security*, 2002, pp. 613 – 664, p. 613; Francisc Lyall, Paul Larsen, *Space Law. A Treatise,* Second Edition, Ashgate, 2009, p. 507; Alan Steinberg, ”Weapons in Space: The Need to Protect Space Assets”, *Astropolitics: The International Journal of Space Politics and Policy*, 10:3, 26 November 2012, pp. 248 – 267, p. 250; Frans Von der Dunk, “International space law*”,* in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 29-126, p. 44;

[4] Isabella Diederiks-Verschoor, Vladimir Kopal, *An Introduction to Space Law,* Kluwer Law International, 2008, pp. 95 – 96; Frans Von der Dunk, “International space law*”,* in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 29-126, pp. 113-115.

[5] First part of the article can be found here < http://rrdi.ro/no-23-january-june-2020/>;

States, Russia, China and their allies seem to have re-opened the race for space, now with much more financial and technological resources than fifty years ago. Moreover, the private corporations are assuming an active stance in this competition, proof being the recent successful collaboration between NASA and SpaceX to launch a manned flight to the International Space Station.[1] This is the first time in nine years when NASA astronauts launch from American soil, thus ending US's dependency on Russia for space launches.[2]

Consequently, the question is what does this mean in terms of legal implications? Is the current current space law framework, read in conjunction with the existing norms of public international law, appropriate to cover warfare in outer space? This second part of the article will attempt to analyse the rules regulating the initiation and conduct of warfare, as well as interpret and adapt them to the particular characteristics of a conflict unfolding in space. In the following paragraphs, the paper will approach issues such as the characterization of a military space operation as an "armed attack", the *Caroline* criteria triggering the right to self-defence and the legality of an anticipatory or pre-emptive action in self-defence, as well as the definition of combatant in the context of outer space warfare and other aspects pertaining to the conduct of hostilities in this novel environment.

2. The Jus ad Bellum Regime in Outer Space Warfare

"We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind (...)"[3]

This is how the Charter of the United Nations debuts, foreshadowing the main goal of the organization. In accordance with article 1(1) of the Charter, the first purpose of the United Nations is the maintenance of international peace and security and, subsequently, the adoption of any collective measures aimed at preventing any threats to peace and suppressing any acts of aggression.[4] The consequence of the above mentioned article is that the use of force is

[1] NASA, "NASA Astronauts Launch from America in Historic Test Flight of SpaceX Crew Dragon", 30 May 2020, < https://www.nasa.gov/press-release/nasa-astronauts-launch-from-america-in-historic-test-flight-of-spacex-crew-dragon >, last visited on 16/05/2020.

[2] NASA, "NASA Astronauts Launch from America in Historic Test Flight of SpaceX Crew Dragon", 30 May 2020, < https://www.nasa.gov/press-release/nasa-astronauts-launch-from-america-in-historic-test-flight-of-spacex-crew-dragon >, last visited on 16/05/2020.

[3] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Preamble.

[4] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Art. 1(1).

prohibited, as per Article 2(4) of the Charter,[1] which outlaws any threat or use of force perpetrated by a state against "the territorial integrity or political independence" of another state.[2] Throughout its jurisprudence, the ICJ held that Article 2(4) is the pillar on which the entire Charter regime rests, as well as the codification of a rule of customary international law.[3]

One drawback of the rule on the prohibition of the use of force enshrined in the Charter stems from the lack of a precise definition as to what "force" entails. Therefore, recourse must be had to the interpretative methods provided by the Vienna Convention on the Law of Treaties (VCLT).[4] According to Article 31, apart from the textual interpretation, the meaning of a certain term included in a treaty can also be derived from the object and purpose of the agreement, including its context.[5] Moreover, the *travaux preparatoires* are one of the elements that can be taken into consideration when interpreting a treaty.[6] The Preamble of the Charter mentions among the purposes of the UN the maintenance of international peace and security and ensuring that "armed forces shall not be used, save in the common interest".[7] Article 39 allows the Security Council to take measures under Chapter VII only in situations of "a threat to the peace, breach of the peace, or act of aggression".[8] Other provisions of the UN Charter also suggest a clear distinction between measures involving the use of force and those falling short of it. For instance, Article 41 prescribes that the UN Security Council has the power to take "measures not involving the use of armed force" which "may include complete or partial interruption of economic relations", while Article 51 prescribes that the occurrence of an "armed attack" is a prerequisite for a state's right to self-defence.[9] Additionally, the documents drafted in the

[1] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Art. 2(4).

[2] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Art. 2(4).

[3] Case Concerning Armed Activities on the Territory of Congo *(Democratic Republic of Congo v. Uganda*), Judgement, ICJ Reports 2005, p. 168, para. 148; Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 190; Andrew Garwood-Gowers, "Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy", *23 Aust YBIL 51* 2004, p. 53; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 86; Nicholas Tsagourias, "Non-state actors in international peace and security. Non-state actors and the use of force", in ed. by Jean d'Aspermont, *Participants in the International Legal System. Multiple Perspectives on non-state actors in international law,* Routledge Research in International Law, 2011, p. 326.

[4] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS vol. 1155, p. 331, Art. 31.

[5] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS vol. 1155, p. 331, Art. 31.

[6] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS vol. 1155, p. 331, Art. 32.

[7] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Preamble, Art. 1(1).

[8] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Art. 39.

[9] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Arts. 41, 51.

process of concluding the UN Charter reveal that a proposal lodged by the delegation of Brazil to cover economic coercion within the scope of Article 2(4) has been rejected, with 26 votes against and only 2 in favour.[1] Therefore, extending the scope of Article 2(4) to economic coercion would go against the object and purpose of the treaty and, also, would be in contradiction with the intention of the drafters.

In conclusion, the term "force" shall cover only aggressive actions of a military nature. The ICJ concurred with this idea when it concluded that the US's arming and training of the *contras* in Nicaragua amounted to an illegal use of force, while mere funding did not.[2] Additionally, a significant number of scholars expressed their support for this approach.[3] As such, actions such as denying a country's access to satellite data obtained from foreign sources, used as a tool for economic coercion, would not fall under the scope of the prohibition on the use of force. At most, it can be a violation of the principles of international cooperation, freedom of access and exploration and the right to benefit from such endeavours enshrined in the Outer Space Treaty.[4]

The first use of space for purely military purposes was during the operation Desert Storm (1990 – 1991).[5] Systems based in outer space provided navigational, weather-related, missile defence, surveillance and reconnaissance, communications and target support to land forces.[6]

More than 1 800 active satellites were orbiting the Earth in 2018, while nine countries and one international organization have the capabilities for

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[1] San Francisco Conference Documents (1945), Docs. 527, 559; Albrecht Randelzhofer, "Article 2(4)", in ed. by Bruno Simma et al., *The Charter of the United Nations: A Commentary,* Vol. 1.1, Oxford University Press, 2002, p. 112; Lee Buchheit, "The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations", *University of Pennsylvania Law Review*, vol. 122, no. 4, 1974, pp. 983 – 1011.

[2] Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 228.

[3] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 88; James Crawford, *Brownlie's Principles of Public International Law,* 8th Edition, Oxford University Press, 2012, p. 747; Albrecht Randelzhofer – "Article 2(4)", in ed. by Bruno Simma et al., *The Charter of the United Nations: A Commentary",* Vol. 1.1, Oxford University Press, 2002, pp. 112, 124; Malcolm Shaw, *International Law,* 7th Edition, Cambridge University Press, 2014, pp. 815 – 816.

[4] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966, Arts. I, III, X, XI, XII.

[5] Ricky Kelly, Major, USAF, *Centralized Control of Space. The Use of Space Forces by a Joint Force Commander,* Air University Press, Maxwell Air Force Base, Alabama, 28 June 1993, p. 1; Jeffrey Caton, *Joint Warfare and Military Dependence on Space,* National Defense Univ Washington DC Inst for National Strategic Studies, 1996.

[6] Ricky Kelly, Major, USAF, *Centralized Control of Space. The Use of Space Forces by a Joint Force Commander,* Air University Press, Maxwell Air Force Base, Alabama, 28 June 1993, p. 1; Jeffrey Caton, *Joint Warfare and Military Dependence on Space,* National Defense Univ Washington DC Inst for National Strategic Studies, 1996.

independent launching.[1] As outer space becomes more crowded, tensions rise among the states, which, in turn, leads to the weaponization of space.

In May 2019, Russian President Vladimir Putin stated that the "preservation of strategic stability and military parity" depends on Russia's capability to "effectively resolve security tasks in outer space" and to acquire "military and dual-purpose spacecraft".[2] The United States' answer was the establishment of the independent Space Force, a military structure tasked with organizing, training and equipping space forces.[3] France followed the same direction when President Emmanuel Macron announced his country would begin to develop an anti-satellite laser weapon and armed satellites.[4]

These declarations are substantiated by the actual behaviour of states and the actions undertaken. According to a 2019 report prepared by the United States Defence Intelligence Agency, states are developing more and more space weapons, with increasing degrees of technical capabilities.[5] Apart from jamming systems intended to disrupt the functioning of satellites, both Russia and China own anti-satellite (ASAT) systems capable of disrupting, degrading or completely damaging adversaries' satellites.[6] Russia's Aerospace Forces received a laser weapon system with the potential of being used for ASAT missions.[7] President Putin characterized it as a "new type of strategic weapon", whereas the Russian Defence Ministry underlined its capability of "fighting satellites in orbit".[8] The Chinese People's Liberation Army (PLA) owns a ground-based ASAT missile, capable of targeting

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[1] Ricky Kelly, Major, USAF, *Centralized Control of Space. The Use of Space Forces by a Joint Force Commander,* Air University Press, Maxwell Air Force Base, Alabama, 28 June 1993, p. 1; Jeffrey Caton, *Joint Warfare and Military Dependence on Space,* National Defense Univ Washington DC Inst for National Strategic Studies, 1996; Currently, China, India, Iran, Israel, Japan, Russia, North Korea, South Korea, the United States and the European Space Agency have the capabilities for independent spacecraft launching.

[2] Kremlin Press Centre, "Meeting with Defence Ministry leadership and defence industry heads", 16 May 2019, < http://en.kremlin.ru/events/president/news/60538 >, last visited on 23/05/2020; Michael Peel, Christian Shepherd, Aime Williams, "Vulnerable satellites: the emerging arms race in space", 13 November 2019, Financial Times, < https://www.ft.com/content/a4300b42-f3fe-11e9-a79c-bc9acae3b654 >, last visited on 23/05/2020.

[3] United States Space Force, "About US Space Force", < https://www.spaceforce.mil/About-Us/About-Space-Force >, last visited on 23/05/2020.

[4] Taylor Dinerman, "Space weapons are proliferating fast: should we accept it", *The Space Review,* 4 November 2019, < https://www.thespacereview.com/article/3824/1 >, last visited on 25/05/2020.

[5] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, p. 7.

[6] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, pp. 21, 29.

[7] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, p. 29.

[8] Tom O'Connor, "Russia's Military Has Laser Weapons That Can Take Out Enemies In Less Than A Second", *Newsweek*, 12 March 2018, < https://www.newsweek.com/russia-military-laser-weapons-take-out-enemies-less-second-841091 >, last visited on 25/05/2020; United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, p. 29.

satellites stationed in the low-earth orbit.[1] Both Iran and North Korea, through their developments in the field of intercontinental ballistic missiles (ICBM) technologies, have the potential of developing similar ground-based ASAT systems.[2] In terms of orbital threats, Russia, China and the United States continue to research and develop dual-use capabilities.[3]

Satellites presumably intended for inspection and service could have the capacity to transform into a weapon and damage or destroy another country's satellite by approaching it on orbit.[4] For instance, in 2017, Russia launched one such satellite, which reportedly displayed a behaviour inconsistent "with on-orbit inspection activities or space situational awareness capabilities".[5] Reportedly, Russia runs a co-orbital ASAT system program since 2011 under the code name "Burevestnik".[6] Japan announced its intention to develop its own ASAT capabilities during this decade.[7] China, India, the United States and Russia also conducted tests of their ASAT systems, the first two successfully managing in deliberately destroying two of their own satellites that were out of function.[8]

In conclusion, there is a trend towards the weaponization of outer space, which does not breach the Outer Space Treaty since it only prohibits the placement of nuclear weapons or weapons of mass destruction.[9] However, the Outer Space Treaty provides that states must act in outer space in

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[1] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, p. 29, p. 21.

[2] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, p. 29, pp. 31-32.

[3] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, pp. 22, 29.

[4] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, pp. 22, 29.

[5] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, pp. 22, 29.

[6] Theresa Hitchens, "Russia Builds New Co-Orbital Satellite: SWF, CSIS Say", *Breaking Defense*, 4 April 2019, < https://breakingdefense.com/2019/04/russia-builds-new-co-orbital-satellite-swf-csis-say/ >, last visited on 25/05/2020.

[7] Taylor Dinerman, "Space weapons are proliferating fast: should we accept it", *The Space Review*, 4 November 2019, < https://www.thespacereview.com/article/3824/1 >, last visited on 25/05/2020.

[8] Phil Stewart, "US Studying India anti-satellite weapons test, warns of space debris", *Reuters*, 27 March, 2019, < https://www.reuters.com/article/us-india-satellite-usa/u-s-studying-india-anti-satellite-weapons-test-warns-of-space-debris-idUSKCN1R825Z >, last visited on 25/05/2020; United States Space Command Public Affairs, "Russia tests direct-ascent anti-satellite missile", 15 April 2020, <https://www.spaceforce.mil/News/Article/2151733/russia-tests-direct-ascent-anti-satellite-missile>, last visited on 25/05/2020.

[9] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966, Art. IV.

accordance with international law, including the UN Charter.[1] As a result, the employment of any of the weapons described above against the space objects of another state would constitute a violation of Article 2(4) of the UN Charter. Consequently, it is necessary to establish the conditions for invoking Article 51 of the UN Charter following an attack directed at or in outer space. A lack of clarity as to the prerequisites for triggering the right to self-defence might lead to either an abuse of the Charter's provision or to an infringement of a state's right to take measures aimed at countering an aggressive act. The following sub-chapter will address the main elements necessary for a state's right to self-defence and their interpretation in the context of outer space warfare.

2.1 The Right to Self-Defence

The right to self-defence and the conditions necessary for invoking it are part of customary international law and their expression is to be found in the exchange of letters between the British authorities and the US Secretary of State following the 1837 *Caroline* incident.[2] The ICJ acknowledged this customary nature in its jurisprudence.[3] Article 51 of the UN Charter crystallizes this right, as the Member States' lawful entitlement to use force in self-defence if they are victims of an "armed attack", one of the exceptions to the absolute prohibition on the use of force.[4] This inclusion of the right to self-defence in an international agreement does not mean that it ceased to exist under customary international law. In the *Nicaragua Case* judgment, the

[1] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966, Art. III.

[2] The *Caroline* incident of 1837 took place during the Mackenzie Rebellion against the British governing in Upper Canada. The American population along the border sympathized with the rebels and supplied them with materials and men using the steamboat Caroline. The British retaliated by setting the vessel on fire and, thus, killing or injuring several American citizens. United Kingdom claimed the act was done in self-defence, while the Americans denounced it as a breach of sovereignty. Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 185; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 44; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 148; Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, p. 339; Malcolm Shaw, *International Law,* 7th Edition, Cambridge University Press, 2014, p. 820; Jan Klabbers, *International Law,* Cambridge University Press, 2013, p. 193.

[3] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 94; International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Adv. Opinion, ICJ Reports 2004, p. 136 , para. 87; Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 181.

[4] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Arts. 2(4), 51.

ICJ concluded that “it cannot (…) be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law (…) customary international law continues to exist alongside treaty law”.[1] Regardless whether a custom and treaty provision are identical or not, they continue to be equally applicable.[2] Consequently, the right to self-defence falls under the scope of both customary law and Article 51 of the UN Charter.

The customary rule of self-defence and the treaty provision regulate areas that “do not overlap exactly”, therefore the present sub-chapter will analyse and interpret the criteria enshrined in both sources.[3] The first element to be discussed is the requirement of “armed attack” and whether outer space aggressive acts fall within its scope.

2.1.1 “Military space operations” as an “armed attack”

Article 51 of the UN Charter, read in conjunction with Article 2(4), prescribes as the first prerequisite for triggering the right to self-defence the existence of an armed attack perpetrated by a state against the territorial integrity or political independence of another state.[4] However, both provisions are silent as to the nature of the “armed attack” and its interpretation rests in the ICJ jurisprudence.

In determining the scope of the concept of “armed attack”, the ICJ firstly relied on the UN GA Resolution on the Definition of Aggression.[5] Article 1 of the document outlines a definition for the acts of aggression in line with Article 2(4) of the UN Charter.[6] The difference rests in the fact that the former does not include “threats” as falling within the scope of an act of aggression.[7]

[1] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 176.

[2] International Court of Justice, North Sea Continental Shelf Cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment, ICJ Reports 1969, p. 3, para. 63; International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, paras. 176 – 177.

[3] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 176.

[4] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Arts. 2(4), 51.

[5] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 195; International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 53; International Court of Justice, Case Concerning Armed Activities on the Territory of Congo *(Democratic Republic of Congo v. Uganda),* Judgement, ICJ Reports 2005, p. 168, para. 146.

[6] United Nations, *United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression*, 14 December 1974, Art. 1.

[7] United Nations, *United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression*, 14 December 1974, Art. 2.

Article 3 of the resolution lists invasion or attack, military occupation, bombardment, blockade of ports or coasts, attacks on land, sea, or air forces among acts characterized as aggressive.[1] A state allowing another state to use its territory for the perpetration of an attack against a third state or the sending by or on behalf of a state of irregular forces with the purpose of carrying out an armed attack against another state are also examples of aggression, as defined by the UN General Assembly Resolution.[2] Therefore, the level of gravity inferred from the definition of the acts of aggression constituted the basis for ICJ's similar threshold established for "armed attacks".[3]

In regards to the scale that the armed attack must reach, the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* held that, in order to invoke the right to self-defence, the attack must go beyond a "mere frontier incident".[4] Through this finding, the Court established a gravity threshold by stating that the right to self-defence can be triggered only by "the most grave forms of the use of force" as opposed to "lesser grave forms".[5] The ICJ reiterated the so-called *"Nicaragua gap"* in the *Oil Platforms* judgment.[6] Judge Simma opposed the Court's findings in his Separate Opinion to the aforementioned judgment. He implied that States should have the right to take strictly defensive military action even against attacks that fall below the gravity threshold.[7] Yoram Dinstein also criticized the Court for including all frontier incidents in the "lesser uses of force" category.[8] In his opinion, every attack that results in serious consequences must qualify as an "armed attack" within the meaning of Article 51.[9] Presently, it is generally accepted that an "armed attack" also constitutes an

[1] United Nations, *United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression*, 14 December 1974, Art. 3(a) – (d);

[2] United Nations, *United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression*, 14 December 1974, Art. 3(e) – (g);

[3] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 178.

[4] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 195.

[5] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 191.

[6] International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, paras. 51, 62; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 147; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 89.

[7] Separate Opinion of Judge Simma to *Case Concerning Oil Platforms* (Islamic Republic of Iran v. USA), Judgment, ICJ Reports 2003, p. 290.

[8] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 195.

[9] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 195.

act of aggression.[1] The gravity threshold established by the ICJ is applicable and will be used for the purposes of this paper. This approach is necessary in order to prevent abuses of Article 51 of the UN Charter.

In the context of outer space warfare, allowing a state to respond in self-defence for a temporary disruption in the functioning of a satellite, which did not have serious consequences, would potentially mandate a disproportionate response. As a result, a state should be allowed to act in self-defence following an aggressive act in outer space only if it is the victim of an attack qualifying as a *"most grave form of the use of force"*.

In cases of actions falling below the threshold, many states invoked the right to self-defence as a response to an "accumulation of events".[2] This approach entails that incidents qualifying as "lesser uses of force" reach the necessary threshold to trigger self-defence if taken together.[3] The ICJ seemed to allow in its jurisprudence the applicability of this theory, despite not specifically confirming it.[4] International Law Commission (ILC) Special Rapporteur, Professor Roberto Ago declared himself in favour of self-defence taken in response to an accumulation of events as long as it complies with the requirement of proportionality.[5] Nevertheless, practice does not lead to the conclusion that the accumulation of events theory is generally accepted. As such, it is important to note that Israel has used it in order to justify its operations in Jordan, Egypt and Syria during the Arab-Israeli conflicts. Further, the United Kingdom also used the accumulation of events theory in 1964, for the operation targeting Harib Fort in Yemen.[6] However, the

[1] Nico Krisch, "Article 39", in Bruno Simma et al., *The Charter of the United Nations: A Commentary,* 3rd Edition, Oxford University Press, 2013, p. 1293.

[2] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 155; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 89.

[3] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 155; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 89.

[4] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 231; International Court of Justice, Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria *(Cameroon v. Nigeria: Equatorial Guinea intervening*), Judgement, ICJ Reports 2002, p. 303, para. 323; International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 64; International Court of Justice, Case Concerning Armed Activities on the Territory of Congo *(Democratic Republic of Congo v. Uganda),* Judgement, ICJ Reports 2005, p. 168, para. 146.

[5] Robert Ago, "The internationally wrongful act of the State, source of international responsibility (part 1)", Addendum to the *8th Report on State Responsibility by the Special Rapporteur*, 32nd Session of the ILC (1980), UN Doc. A/CN.4/318/Add.5 – 7, *Yearbook of the International Law Commission*, 1980, Vol. II (1) para. 121.

[6] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 51.

Security Council has criticized these acts, and labelled them as being disproportionate and, thus, unlawful.[1] Even if the applicability of the "accumulation of events" theory is controversial, the ICJ did not dismiss it decisively. Perhaps the Court has undertaken this approach because the theory provides a solution to the so-called *Nicaragua gap*, by allowing victim states to take defensive action even against acts falling below the threshold established by the Court. Nevertheless, caution must be paid to avoid any abuse of Article 51 of the UN Charter. The cumulated events should reach a level of gravity that justifies their collective characterization as a "most grave form of the use of force". As such, the standard determined by the Court in the Nicaragua case should not necessarily be limited at one grave incident, but could also be reached through a series of incidents, of a "lesser" gravity.

Nevertheless, the use of force in the outer space might imply certain relevant distinctions. Commentators have concluded that the intentional destruction of a country's satellite by another country, either through ASAT systems or through on-orbit weaponized satellites would amount to an "armed attack" and, thus, would authorize an action in self-defence.[2] The first argument supporting this statement stems from an analogy between outer space and the international law of the sea, which provides that an attack against a ship in the high seas shall qualify as an attack against the territory of the flag state.[3] The ICJ upheld this position in the *Oil Platforms* judgment.[4] Moreover, the Court did not dismiss the possibility that *"the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'"*.[5] Consequently, an intentional, destructive attack against a military

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[1] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 51.

[2] Fabio Tronchetti, "Legal aspects of the military uses of outer space", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 331 -381, p. 355.

[3] Alan Vaughan Lowe, *"*Self-Defence at Sea*",* in ed. by William Eliott Butler, *The Non-Use of Force in International Law,* Martinus Nijhoff, 1989, pp. 185, 188; Efthymios Papastavridis, *The Interception of Vessels on the High Seas. Contemporary Challenges to the Legal Order of the Oceans,* Bloomsbury Publishing, 2014, pp. 151 – 152; Fabio Tronchetti, "Legal aspects of the military uses of outer space", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, p. 355.

[4] International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 64.

[5] International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 72.

satellite is an “armed attack” as within the scope of Article 51 of the UN Charter and triggers the right to self-defence of the state of registry.[1]

The second argument supporting the characterization of an aggressive act against a satellite as an “armed attack” relies on one of its potential effects. Such an attack might increase the victim’s vulnerability on Earth since militaries are now heavily relying on data provided by surveillance satellites and on communication facilitated by them.[2] The targeted state would be unable to obtain strategic military information concerning, for instance, missile attacks or coordinate its land, maritime or air forces, thus increasing the possibility of also becoming the victim of a traditional act of aggression. Consequently, an act of aggression against a satellite can be interpreted as an attack against the territorial integrity or political independence of the state of registry, thus falling within the scope of “armed attack”. An attack against a satellite might seem a rather mild action in comparison with invasion, blockades or bombardment. Nevertheless, the intentional destruction of a state’s satellite by another state bears a significant importance in the present context of technological development and reliance on space assets. Additionally, as was already mentioned in the article, the purpose is to interpret the existing rules of international law in the context of outer space warfare. This entails an adaptation to the specificities of this new environment, the types of weapons employed and the gravity scale of consequences, which might ensue from such an attack.

The first issue arising from this analysis refers to armed attacks against commercial satellites. In order to shed light on this problem, we will resort, once more, to the analogy with the international law of the sea and to the ICJ judgment in the *Oil Platforms Case.* The Court did not explicitly dismiss the idea that an attack against a commercial vessel might qualify as an “armed attack” within the scope of Article 51.[3] Moreover, the Court concluded that the various instances cited by the United States as giving rise to its right to self-defence against Iran fell below the threshold of “armed attack” solely on

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[1] Fabio Tronchetti, “Legal aspects of the military uses of outer space”, in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, p. 355; Dale Stephens, ”Increasing Militarization of Space and Normative Responses”, in ed. by Venkata Rao, V. Gopalkrishnan, Kumar Abhijeet, *Recent Developments in Space Law: Opportunities and Challenges”,* Springer, 2017, pp. 91-106, p. 97; Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 2016; Jackson Nyamuya Maogoto, Steven Freeland, “Space Weaponization and the United Nations Charter Regime on Force: A Thick Legal Fog or a Receding Mist?”*, The International Lawyer*, Vol. 41, No. 4, Winter 2007, pp. 1091 – 1119, p. 1111.

[2] United States Defence Intelligence Agency, *Challenges to Security in Space,* January 2019, p. 7.

[3] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 217; Geir Ulfstein, ”How International Law Restricts the Use of Military Force in Hormuz”, *Blog of the European Journal of International Law,* 27 August 2019, < https://www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz/ , last visited on 28/05/2020.

the basis of their gravity, not because the targets performed commercial activities.[1] However, an attack on a single commercial vessel might not suffice to trigger the right to self-defence, since the Court admitted this possibility only in cases of attacks perpetrated against *military* vessels and the UN GA Declaration on the Definition of Aggression limits its application to aggressive acts against "fleets".[2] Consequently, a state may invoke the right to self-defence as a response to attacks against commercial vessels flying its flag only if, taken cumulatively, they reach the necessary level of gravity as to be characterized as an instance of the "most grave form of use of force".[3] The same test should be applicable to attacks against commercial satellites. Multiple attacks of a state against the commercial satellites registered with another state, regardless whether the government or a private corporation launched them, might trigger the right to self-defence if they bear consequences of sufficient gravity. For instance, repeated aggressive acts against commercial communication satellites might impair the efficient functioning of the emergency services of a state, thus affecting its security interests.[4]

The same *"accumulation of events"* theory would be applicable to acts of jamming or cyber-attacks against a satellite. A single such instance would be insufficient to trigger the right to self-defence. However, multiple disruptive acts of grave consequences would mandate the state of registry to act under Article 51 of the UN Charter.

In conclusion, an attack performed by a state against a space object registered with another state can fall within the scope of an "armed attack" as prescribed by Article 51 of the UN Charter as long as it reached the necessary gravity threshold, either on its own or as an accumulation of events. The next step

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[1] International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 64.

[2] International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 72; United Nations, *United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression*, 14 December 1974, Art. 3(d); Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 217; Geir Ulfstein, "How International Law Restricts the Use of Military Force in Hormuz", *Blog of the European Journal of International Law,* 27 August 2019, < https://www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz/ , last visited on 28/05/2020.

[3] Geir Ulfstein, "How International Law Restricts the Use of Military Force in Hormuz", *Blog of the European Journal of International Law,* 27 August 2019, < https://www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz/ , last visited on 28/05/2020.

[4] The Organization for Economic Co-operation and Development, "Monitoring Global Threats: The Contribution of Satellite Technologies", 5 November 2012, <https://www.oecd.org/futures/space/OECD%20Space%20Forum%20Brochure%20-%20Global%20threats%20and%20satellites.pdf >, p. 3, last visited on 27/05/2020; Hearing before the Strategic Forces Subcommittee of the Committee on Armed Services House of Representatives, "Space and US National Power*",* 109th Congress, 2nd Session, 21 June 2006, p. 61.

part of the present article will deal with the rules of attributing responsibility to states for internationally wrongful acts and their reconciliation with the role of the private industry in space – related operations.

2.1.2 Responsibility of states for outer space "armed attacks". The private industry conundrum

Article 2(4) of the UN Charter prohibits the threat or use of force in the international relations established among member states of the UN, thus conferring a state-centred nature to this norm.[1] The ICJ discussed the right to self-defence in several cases and suggested that the legitimacy of an action in self-defence depends upon the attribution of the armed attack to a state, thus adopting a narrow interpretation of this right.[2] In the *Construction of a Wall Advisory Opinion,* the Court noted that Article 51 of the UN Charter recognizes *"the existence of an inherent right of self-defence in the case of armed attack by one State against another State".*[3] State involvement and attribution are also central in the judgments rendered in the *Nicaragua Case* and *Armed Activities Case.*[4]

The ILC Articles on Responsibility of States for Internationally Wrongful Acts provide the proper framework to assess whether an act is attributable to a state. A state is responsible for attacks committed by one of its organs, whatever function it exercises and whatever position it occupies.[5] The ILC, in its commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, mentions that this rule has a broad scope and includes state organs at all levels, including regional and local.[6] Relevant

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[1] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Art. 2(4).

[2] Malcolm N. Shaw, *International Law,* 7th Edition, Cambridge University Press, 2014, p. 823; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 131.

[3] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Adv. Opinion, ICJ Reports 2004, p. 136, para. 139.

[4] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 195; International Court of Justice, Case Concerning Armed Activities on the Territory of Congo *(Democratic Republic of Congo v. Uganda),* Judgement, ICJ Reports 2005, p. 168 , para. 147; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, pp. 130, 202.

[5] International Law Commission, "Responsibility of States for Internationally Wrongful Acts", 2001, *UN GA Resolution 56/83*, 12 December 2001, Art. 4.

[6] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries", *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, Commentary (6) to Article 4.

issues concerning attribution and, thus, the legality of an action in self-defence arise if an entity not having the status of state organ perpetrates an attack against a state. However, the ILC Articles on State Responsibility cover such instances as well. Firstly, a state is responsible for acts committed by entities endowed with governmental authority by the law of that state, as long as the entity ”is acting in that capacity in the particular instance”.[1] Such entities include private corporations entitled to exercise governmental functions.[2] One such example is represented by private security firms contracted by the state to provide prison guards or perform arrests following a judicial sentence.[3] Article 7 of the ILC Articles on State Responsibility provides that the conduct of organs of the state or of entities exercising governmental authority is attributable to the state even if it comprises *ultra vires* acts or acts which contravene instructions.[4] However, the entity must act in its official capacity, the provision excluding purely private conduct from its scope.[5]

Secondly, even if an act is perpetrated by an entity not falling within the scope of Articles 4 and 5, it can still be attributable to a state as long as it is directed or controlled by that state.[6] Therefore, a ”specific factual relationship” must exist between the private entity engaged in the conduct and the state.[7] The ICJ in the *Nicaragua Case* established a threshold for the level of control that triggers the state attribution necessary to act in self-defence. The Court held that for an armed attack to be attributable to a state and give rise to international responsibility, *”it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.*[8] Therefore, the

[1] International Law Commission, ”Responsibility of States for Internationally Wrongful Acts”, 2001, *UN GA Resolution 56/83*, 12 December 2001, Art. 5.

[2] International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries”, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001), Commentary (2) to Article 5.

[3] International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries”, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, Commentary (2) to Article 5.

[4] International Law Commission, ”Responsibility of States for Internationally Wrongful Acts”, 2001, *UN GA Resolution 56/83*, 12 December 2001, Art. 7.

[5] International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries”, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, Commentary (7) to Article 7.

[6] International Law Commission, ”Responsibility of States for Internationally Wrongful Acts”, 2001, *UN GA Resolution 56/83*, 12 December 2001, Art. 8.

[7] International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries”, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, Commentary (1) to Article 8.

[8] Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14*,* para. 115.

involvement of the state must go beyond mere financing or provision of weapons and logistical support.[1] A victim state can invoke self-defence against another state for an act perpetrated by non-state actors only if they acted under the instructions and control of the latter.[2] The final instance when an act of a non-state actor is attributable to a state is when that state acknowledges and adopts the conduct as its own.[3] In this case there is an *ex-post* attribution through either conduct or words, which must be clear and unequivocal.[4]

This discussion on state attribution and the possibility to act in self-defence against attacks perpetrated by non-state actors bears a significant importance in the context of outer space warfare. Private corporations are no longer acting as mere contractors to states, but are becoming active players in space.[5] Companies such as SpaceX, Blue Origin, Virgin Galactic, Lockheed Martin in the United States and Arianespace, Airbus DS, Thales Alenia Space, Eutelsat in Europe launch and operate satellites, rockets and develop technologies for space shuttle missions.[6] According to Article VI of the OST, state parties are internationally responsible for national activities conducted in outer space, regardless whether governmental or non-governmental entities perform them.[7] Professor Bin Cheng links international responsibility of states for outer space activities with the concept of jurisdiction, thus concluding that states exercising jurisdiction over a space object and any personnel on board shall bear international responsibility for wrongful acts.[8] Article VIII of the OST provides that the state of registry retains jurisdiction

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[1] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 195.

[2] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 221.

[3] International Law Commission, "Responsibility of States for Internationally Wrongful Acts", 2001, *UN GA Resolution 56/83*, 12 December 2001,Art. 11.

[4] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries", *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, Commentaries (1), (8) to Article 11.

[5] General Rapporteur Jean-Marie Bockel, "The Future of the Space Industry" General Report, Parliamentary Assembly, Economic and Security Committee, *173 ESC 18 E fin*, 17 November 2018, p. 2.

[6] General Rapporteur Jean-Marie Bockel, "The Future of the Space Industry" General Report, Parliamentary Assembly, Economic and Security Committee, *173 ESC 18 E fin*, 17 November 2018, p. 2, pp. 2-4

[7] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966, Art. VI.

[8] Bin Cheng, *Studies in International Space Law,* Calrendon Press, Oxford, 1997, p. 639.

and control over launched objects and the personnel on board.[1] Consequently, the state of registry would incur responsibility for acts committed by governmental or non-governmental entities in outer space. However, attribution of an internationally wrongful act to a state requires a certain degree of involvement in its commission or, at least, adoption of the act as its own, as it has been discussed above. Considering these facts, the ILC Articles on State Responsibility remain the basis for establishing attribution of an armed attack in outer space.

It is undisputable that a victim state can act in self-defence if another state, through its official organs, destroys one or more of its satellites or as a response to an accumulation of events bearing consequences similar to an armed attack. However, if the attack originates from the launching facilities or from a space object owned by a private corporation, one must apply the rules of attribution.

First of all, if the private corporation is a contractor for a state, tasked with performing governmental activities such as launching or operating military satellites, any act of aggression it perpetrates will be attributed to the state in question. The lack of specific instructions to perpetrate the attack bears no consequence. Secondly, even if the private entity does not enjoy governmental functions, but acts on behalf or under the instructions of a state, that particular conduct is attributable to the state. There is a special situation arising from this rule in the context of outer space warfare. As the present article previously discussed, some corporations prefer to register their space objects with a state that does not have the necessary capabilities to exercise the required control and supervision of their activities as prescribed by the Registration Convention, in a similar move to the ”flag of convenience” practice.[2] If the private corporation acts on behalf or under the control of another state, then the attack would not be attributable to the state of registry. The latter would only have breached its obligation of ensuring proper supervision and control to guarantee respect of international law norms, but would not be responsible of a potential violation of Article 2(4).[3] Therefore, the victim state would be entitled to take action in self-defence against the private corporation, for instance by attacking its launching facilities located on the territory of the state of registry, without violating the sovereignty of

[1] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966, Art. VIII.

[2] United Nations, *Convention on Registration of Objects Launched into Outer Space (The Registration Convention),* United Nations General Assembly Resolution 3235 (XXIX), 1974

[3] Bin Cheng, *Studies in International Space Law,* Calrendon Press, Oxford, 1997, pp. 638 – 639.

that state.[1] However, any action against terrestrial or extra-terrestrial assets of the non-involved state of registry would qualify as an armed attack. Finally, the aggressive conduct of a private corporation against the space assets of a state would be attributable to the state that explicitly acknowledges and adopts the act as its own.

The broader interpretation of the right to self-defence entails that states can take lawful action against aggressive acts perpetrated by non-state actors, which are non-attributable to a state. Security Council Resolutions 1368 and 1373 provide the first argument in support of this position. These documents recognize the right of states to react in self-defence against terrorist attacks perpetrated by non-state actors and non-attributable to states.[2] Judge Kooijmans and Judge Simma used this evidence in their Separate Opinions to *Armed Activities* to justify their opposition towards the judgment of the Court.[3] The advisory opinion delivered in the *Construction of a Wall* met the same criticism from Judge Kooijmans[4] and Judge Buergenthal.[5]

A significant number of scholars also support this broad interpretation of self-defence.[6] The theory of the legality to use self-defence against non-state actors for attacks non-attributable to a state has amplified especially since the

[1] Dire Tladi, ”The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle”, 107 *American Journal of International Law*, 2013, pp. 570, 572; Mary Ellen O’Connell,“Dangerous Departures”, 107 *American Journal of International Law*, 2013, pp. 380, 393.

[2] United Nations, *United Nations Security Council Resolution 1368,* S/RES/1368, 2001; United Nations, *United Nations Security Council Resolution 1373,* S/RES/1373, 2001.

[3] Separate Opinion of Judge Kooijmans to the Case Concerning Armed Activities on the Territory of the Congo *(Democratic Republic of Congo v. Uganda),* Judgment, ICJ Reports 2005, para. 25; Separate Opinion of Judge Simma to the Case Concerning Armed Activities on the Territory of the Congo *(Democratic Republic of Congo v. Uganda),* Judgment, ICJ Reports 2005, para. 11.

[4] Separate Opinion of Judge Kooijmans to the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Adv. Opinion, ICJ Reports 2004, pp. 219 – 234, para. 35.

[5] Declaration by Judge Buergenthal to Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Adv. Opinion, ICJ Reports, 2004, para. 6.

[6] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 204; Cristopher Greenwood, ”International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq”*, San Diego International Law Journal* 7, 2003, p. 17; Ed. by Larissa Van den Herik, Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges,* Cambridge University Press, 2013, p. 394; Christian Tams, James Gerard Devaney, “Applying Necessity and Proportionality to Anti-Terrorist Self-Defence”, 45 *Isr.L.Rev*. 91 2012, p. 93; Nicholas Tsagourias, ”Non-state actors in international peace and security. Non-state actors and the use of force”, in ed. by Jean d’Aspermont, *Participants in the International Legal System. Multiple Perspectives on non-state actors in international law,* Routledge Research in International Law, 2011, p. 329; Monica Hakimi, “Defensive Force against Non-State Actors: The State of Play”, *Int’L. Stud*. 91 (2015): 1-31, p. 7; Amos Enabulele, “Use of Force by International/Regional Non-State Actors: No Armed Attack, No Self-Defence”, 12 *Eur. J.L. Reform* 209, 2010, p. 214; Tarcisio Gazzini, “A response to Amos Guiroa: Pre-Emptive Self-Defence Against Non-State Actors?” 13 *J. Conflict & Sec. L*. 25 2008, p. 27; Gelijn Molier, Afshin Ellian, David Suurland, *Terrorism: Ideology, Law and Policy,* Republic of Letters Publishing, 2011, p. 310.

contemporary threats posed by terrorist groups following the 9/11 attacks. The US used this justification to start the *Operation Enduring Freedom* and for the bombing of Baghdad, Israel for the attacks in Lebanon against Hamas, Turkey for the action against PKK in Iraq and, more recently, the international coalition for its actions against Daesh in Syria and Iraq.[1]

There are three grounds related to the role of the territorial state and each of them allows the victim state to use self-defence against the non-state actor acting from that particular state. Firstly, the territorial state harbours or supports the non-state actor or lost governmental authority in the area from which the attacks are launched.[2] Secondly, the territorial state is unable or unwilling to take measures against the non-state actor.[3] Thirdly, the non-state actor operates from the territory of a failing state.[4]

For the purpose of this analysis, the author of the present paper will assume that a private corporation conducting space activities will become rogue and act similar to a terrorist group. A victim state may take action in self-defence following an attack against its space assets perpetrated by the non-state actor, either by choosing a terrestrial or extra-terrestrial target. For instance, attacking the launching facility of the private corporation will not qualify as a violation of Article 2(4) of the UN Charter as long as the state on whose territory is located falls within one of the three scenarios mentioned above. The same is applicable for an attack perpetrated against one of the corporation's space objects. If the state of registry is unable or unwilling to control the activity of that asset, is a failed state or knowingly supports the activities of the corporation without adopting them, such an attack would constitute a lawful manifestation of self-defence. However, an attack against the territorial state or the state of registry's assets would amount to an unlawful use of force.

Following this discussion on the rules of attribution and responsibility of states for armed attacks and their regulatory power on the use of self-defence,

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[1] Amos Enabulele, "Use of Force by International/Regional Non-State Actors: No Armed Attack, No Self-Defence", 12 *Eur. J.L. Reform* 209, 2010, p. 214; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, pp. 196-197; Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play", *Int'L. Stud.* 91 (2015): 1-31, p. 20; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 115.

[2] Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play", *Int'L. Stud.* 91 (2015): 1-31, p. 8; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 38.

[3] Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play", *Int'L. Stud.* 91 (2015): 1-31, p. 8; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 38.

[4] Gelijn Molier, Afshin Ellian, David Suurland, *Terrorism: Ideology, Law and Policy,* Republic of Letters Publishing, 2011, p. 320; Albrecht Randelzhofer, "Article 51", in ed. by Bruno Simma et al., *The Charter of the United Nations: A Commentary,* Oxford University Press, 2002, p. 802.

the next part of the present article will analyse the final two criteria necessary for the lawfulness of an action undertaken under Article 51 of the UN Charter: necessity and proportionality.

2.1.3 The *Caroline* Criteria

Apart from the existence of an "armed attack", its attribution to a state or, according to the broader interpretation, its role as territorial state in the perpetration of an aggressive act by non-state actors, the legality of an action in self-defence depends on two additional factors. The *Caroline* incident, which represents the expression of customary international law on self-defence, concluded that necessity and proportionality are the relevant standards that should be met.[1] This entails that an action taken in response to an armed attack must be necessary to eliminate the danger and proportional to the initial aggressive act.[2] These two criteria are cumulative in the sense that if an action falls short of one of them, it does not qualify as self-defence but as a retaliatory and unlawful act.[3] In the *Nicaragua Case,* the ICJ explicitly upheld the application of necessity and proportionality under customary international law, despite the UN Charter's omission in mentioning them as criteria for self-defence.[4] The Court reiterated the *Caroline* formula also in the *Nuclear Weapons Advisory Opinion* and in the *Oil Platforms Case.*[5]

Necessity means that the victim state has "no choice of means" to respond or avert the attack.[6] In other words, an action in self-defence is lawful only if it

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[1] See page 5.

[2] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 150; Donald R. Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, p. 339.

[3] Katherine Slager, "Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program", 38 *N.C.J. Int'l L. & Com. Reg.* 267 2012 – 2013, p. 286.

[4] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 176.

[5] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, para. 41; International Court of Justice, Case Concerning Oil Platforms *(Islamic Republic of Iran v. USA),* Judgment, ICJ Reports 2003, p. 161, para. 75.

[6] Webster Statement (1841).

is the *only* possible option to address efficiently the aggressive act.[1] This is the expression of the relationship between forcible and non-forcible unilateral responses.[2] Usually, it is not mandatory for a victim state responding to an ongoing attack to firstly resort to non-forcible measures before an action in self-defence.[3] However, if the initial attack has already occurred but further aggressive actions are expected, the victim state might incur the obligation to resort to other measures before acting in self-defence.[4] Consequently, the requirement of necessity does not oblige the state to exhaust all possible non-forcible actions to avert an attack, but only those that can reach the same outcome as self-defence.[5]

Proportionality entails that a balance should exist between the intensity and the scope of the self-defence conduct and the threat posed by the attack.[6] This is the main perspective applied today and international law recognizes the "superior right" of the victim state to avert the armed attack.[7] Thus, the

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[1] Roberto Ago, "The internationally wrongful act of the State, source of international responsibility (part 1)", Addendum to the *8th Report on State Responsibility by the Special Rapporteur*, 32nd Session of the ILC (1980), UN Doc. A/CN.4/318/Add.5 – 7, *Yearbook of the International Law Commission*, 1980, Vol. II (1), para. 120; Christian J. Tams, James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Isr.L.Rev.* 91, 2012, p. 96; Ed. by Larissa Van den Herik, Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges,* Cambridge University Press, 2013, p. 380; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 60; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 45.

[2] Christian J. Tams, James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Isr.L.Rev.* 91, 2012, p. 96; Ed. by Larissa Van den Herik, Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges,* Cambridge University Press, 2013, p. 380.

[3] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 45.

[4] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 45.

[5] Roberto Ago, "The internationally wrongful act of the State, source of international responsibility (part 1)", Addendum to the *8th Report on State Responsibility by the Special Rapporteur*, 32nd Session of the ILC (1980), UN Doc. A/CN.4/318/Add.5 – 7, *Yearbook of the International Law Commission*, 1980, Vol. II (1), para.120; Christian J. Tams, James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Isr.L.Rev.* 91, 2012, p. 96; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 60.

[6] Christian J. Tams, James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Isr.L.Rev.* 91, 2012, p. 102; Ed. by Larissa Van den Herik, Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges,* Cambridge University Press, 2013, p. 388; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 64; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 62; Bethlehem in *Chatham House Principles* (2005), p. 53; Greenwood in *Chatham House Principles (2005),* p. 53; Lowe in *Chatham House Principles (2005),* p. 54; Shaw in *Chatham House Principles (2005),* p. 55.

[7] Christian J. Tams, James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Isr.L.Rev.* 91, 2012, p. 102; Ed. by Larissa Van den Herik, Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges,* Cambridge University Press, 2013, p. 388.

response taken in self-defence might exceed the initial armed attack, but should not go beyond what is necessary to restore the *status quo ante.*[1] The ICJ upheld this position in its decision in the *Nuclear Weapons Advisory Opinion*, which did not exclude the use of nuclear weapons for the strict purpose of self-defence in extreme circumstances when *"the very survival a state would be at stake"*.[2] Additionally, in order to comply with the requirement of proportionality, any collateral damage incurred must be essential to achieve the defensive scope of self-defence.[3] The ICJ concurred with this idea in the *Nicaragua Case* and in the *Nuclear Weapons Advisory Opinion.*[4]

As the present paper already discussed and demonstrated, an aggressive act perpetrated against the space assets of a state can qualify as an "armed attack" within the scope of Article 51 of the UN Charter. This mandates the victim state to act in self-defence regardless whether the act is attributable to a state or not. However, if a non-state actor perpetrates the attack without any control or direction from a state, the territorial state or the state of registry's behaviour should fall within one of the scenarios allowing an action in self-defence. Additionally, the conduct in self-defence should also fulfil the criteria of necessity and proportionality in order to be lawful. Attacking the launching base from where ASAT weapons are deployed in space is both necessary, since it would deprive the aggressor of its capabilities, as well as proportional in terms of physical and economic consequences and the geographical target. However, the victim state must be cautious not to inflict excessive casualties. For instance, if the launching base is located near a heavily populated area, the victim state must carefully assess whether the military advantage following the action in self-defence outweighs the potential civilian casualties. This assessment would also limit the type of weapons employed. If a state were victim to an attack by an on-orbit weaponized satellite, its destruction would constitute a necessary action to eliminate the danger. However, in terms of proportionality, the self-defence action should not excessively interfere with the space activities of third states or cause damage

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[1] Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 61.

[2] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, para. 105.

[3] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, para. 105.

[4] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, p. 14, para. 237; International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, para. 30.

to their space objects.[1] Generally, it is preferable to act in self-defence against ground targets, such as stations, even as a response to uses of force in space perpetrated by enemy satellites.[2]

Another particular instance is when a state is victim of an attack perpetrated by non-state actors and non-attributable to any state. In this case, a lawful action in self-defence would expressly target the assets of the non-state actor. Thus, if a private actor destroyed a state's satellite(s) or persistently damaged its space assets, the victim state should only attack the launching bases, missiles, satellites or any other capabilities possessed by that private actor. Any action against the territorial state's assets, both in space or on Earth, would fall short of the requirements of necessity and proportionality and would constitute a violation of Article 2(4) of the UN Charter.

2.1.4. Would anticipatory or pre-emptive self-defence be justified?

The *Caroline* formula provides that a state has the right to self-defence if the necessity to act is "instant, overwhelming, leaving no choice of means, and no moment of deliberation".[3] Therefore, it emphasizes the *imminence* of the attack as a prerequisite for triggering the right to self-defence.[4] As a result, a significant number of scholars support the idea that, under customary international law, *anticipatory self-defence* is permissible and lawful, thus allowing states to act in self-defence before the armed attack has actually occurred.[5] They substantiate this position based on the *"inherent right"*

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[1] Fabio Tronchetti, "Legal aspects of the military uses of outer space", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 331 -381, p. 356.

[2] Fabio Tronchetti, "Legal aspects of the military uses of outer space", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 331 -381, p. 356.

[3] Webster Statement (1841).

[4] Tarcisio Gazzini, "A response to Amos Guiroa: Pre-Emptive Self-Defence Against Non-State Actors?", 13 *J. Conflict & Sec. L.* 25, 2008, p. 29; Katherine Slager, "Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program", 38 *N.C.J. Int'l L. & Com. Reg.* 267 2012 – 2013, p. 275; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 56.

[5] Tarcisio Gazzini, "A response to Amos Guiroa: Pre-Emptive Self-Defence Against Non-State Actors?", 13 *J. Conflict & Sec. L.* 25, 2008, p. 28; Cristopher Greenwood, "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq", *San Diego International Law Journal* 7 2003, p. 15; William O'Brien, *The Conduct of Just and Limited War,* Greenwood Publishing Group, 1981, p. 133; Anthony Clark Arend, "International Law and the Preemptive Use of Military Force", 8 *The Washington Quarterly*, 2003, p. 94; Ian Brownlie, *International Law and the Use of Force by States,* Oxford University Press, 1963, p. 257.

wording found in Article 51 of the UN Charter.[1] In his Dissenting Opinion to the *Nicaragua Case,* Judge Schwebel criticized the Court's restrictive interpretation of Article 51 of the UN Charter and declared his support for the lawfulness of anticipatory self-defence.[2] The ICJ did not express its opinion on the legality of this broader interpretation in neither of the two Advisory Opinions concerned with the legitimacy of the use of force.[3]

State practice in this regard is inconsistent, most states preferring to adopt a broader definition of "armed attack" rather than invoking anticipatory self-defence.[4] Illustrative of this position are Israel's attacks against Syria, Jordan and Egypt, US's conduct during the Cuban missile crisis and France, UK and US's patrolling of the "no-fly" zones in Iraq.[5] Even though all these instances seem manifestations of anticipatory self-defence, each state argued that they have already been victims of an armed attack.[6] Only the 1981 Israeli attack on Iraq and the 1986 US attack on Libya were explicitly justified as anticipatory self-defence.[7] The UN Security Council criticized the former as being a violation of the UN Charter and failed to reach consensus on the latter.[8]

However, even some of the scholars who strongly oppose the lawfulness of anticipatory self-defence admit that in certain cases it might be allowed. This

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[1] Katherine Slager, "Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program", 38 *N.C.J. Int'l L. & Com. Reg*. 267 2012 – 2013, p. 282; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 58; Rosalyn Higgins, "The Attitude of Western States Towards Legal Aspects of the Use of Force", in ed. by Antonio Cassese, *The Current Legal Regulations of the Use of Force,* Martinus Nijhoff Publisher, 1986, p. 435.

[2] Dissenting Opinion of Judge Schwebel to Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*), Judgment, ICJ Reports 1986, para. 347.

[3] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226; International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Adv. Opinion, ICJ Reports 2004, p. 136; Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, pp. 345-346.

[4] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 161.

[5] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, pp. 162 – 163.

[6] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, pp. 162 – 163.

[7] Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, p. 343; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, pp. 163-164; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 57; Andrew Garwood-Gowers, "Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy", *23 Aust YBIL 51* 2004, p. 55.

[8] United Nations, *United Nations Security Council Resolution 487*, UN SCOR, 37th sess, 228th mtg, UN DOC S/RES/487, 1981; Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, p. 345.

is the so-called "interceptive self-defence" and entails a greater level of imminence of the armed attack.[1] The difference between anticipatory and interceptive self-defence is that the former is in response to a mere "forseeable" attack whereas the latter seeks to counter an ongoing attack, including an incipient one.[2]

The concept of *pre-emptive self-defence* has been developed in the *National Security Strategy of the United States of America* issued in September 2002 by President Bush.[3] It is clear from the wording of the document that the intention was to broaden the scope of anticipatory self-defence as to include attacks uncertain in terms of time and place.[4] The formulation is strongly conflicting with the "instant" and "overwhelming" nature of the threat prescribed by the *Caroline* criteria. The US is advancing three main arguments in support of the legality of pre-emptive self-defence.[5] The first one is related to the emergence and proliferation of weapons of mass destruction; the second argument touches upon the rise of non-state actors and "rogue states" on the international plain; and the third one argues the inefficiency of traditional self-defence methods in combating these groups.[6] US reiterated its commitment towards pre-emptive self-defence in the *National Security Strategy of the United States of America* released in 2006.[7]

Some scholars support the doctrine developed by the US and reason that the "imminence" requirement must be nowadays regarded in the light of the

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[1] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, p. 55; Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 172;

[2] Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 191.

[3] President of the United States of America, "The National Security Strategy of the United States of America", September 2002, http://www.state.gov/documents/organization/63562.pdf , last visited 28/05/2020, pp. 6, 15-16; Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, p. 346; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 221; Andrew Garwood-Gowers, "Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy", *23 Aust YBIL 51* 2004, p. 56.

[4] President of the United States of America, "The National Security Strategy of the United States of America", September 2002, http://www.state.gov/documents/organization/63562.pdf , last visited 28/05/2020, p. 15.

[5] Andrew Garwood-Gowers, "Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy", *23 Aust YBIL 51* 2004, p. 58.

[6] Andrew Garwood-Gowers, "Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy", *23 Aust YBIL 51* 2004, p. 58.

[7] President of the United States of America, "The National Security Strategy of the United States of America", March 2006, < https://www.state.gov/documents/organization/64884.pdf > last visited 28/05/2020, p. 23.

development of weapons and emergence of terrorist groups.[1] The rationale behind supporting the doctrine is that an attack perpetrated by non-state actors is harder to foresee and it might have devastating effects especially if weapons of mass destruction are employed. Therefore, effectiveness of a response in self-defence would be defeated.[2] However, most of the academics strongly oppose such an expansion of the scope of self-defence on the basis that it would lose its defensive scope and become a retaliatory measure instead.[3]

In terms of state practice, the concept of pre-emptive self-defence did not find much support. The first state to invoke a right of pre-emptive self-defence has been the US as justification for its *Operation Enduring Freedom* in Afghanistan in response to the 9/11 attacks.[4] The international community approved US's action through the adoption of Security Council Resolutions 1368[5] and 1373[6]. This consensus among states ceased to exist when US begun *Operation Iraqi Freedom* in 2003. The difference between the two operations consisted in the fact that *Enduring Freedom* came as a response to the 9/11 attacks whereas *Iraqi Freedom* was not triggered by any threat, not even an imminent one. Despite the fact that forty-five states declared their willingness to support US both military and politically, none of them did this on the basis of pre-emptive self-defence.[7] Moreover, three out of five P5 UN members, namely France, Russia and China, plus Germany openly criticized the actions

[1] Cristopher Greenwood, "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq", *San Diego International Law Journal* 7 2003, p. 16; Michael Reisman,"Editorial Comment: Assessing claims to revise the laws of war", 97 *American Journal of International Law*, 2003, p. 7.

[2] Cristopher Greenwood, "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq", *San Diego International Law Journal* 7 2003, p. 16; Michael Reisman,"Editorial Comment: Assessing claims to revise the laws of war", 97 *American Journal of International Law*, 2003, p. 7.

[3] Andrew Garwood-Gowers, "Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy", *23 Aust YBIL 51* 2004, p. 68; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 216; Tarcisio Gazzini, "A response to Amos Guiroa: Pre-Emptive Self-Defence Against Non-State Actors?", 13 *J. Conflict & Sec. L.* 25, 2008, p. 30; Yoram Dinstein, *War, aggression and self-defence,* Cambridge University Press, Cambridge, 2011, p. 183; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* Oxford University Press, Oxford, 2010, pp. 62-63; Elizabeth Wilmshurst,"Anticipatory self-defence against terrorists", in ed. by Larissa Van den Herik, Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges,* Cambridge University Press, 2013, p. 358.

[4] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 208; Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism", 24 *U. Queensland L.J.* 337, 2005, p. 340; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 115.

[5] United Nations, *United Nations Security Council Resolution 1368,* S/RES/1368, 2001.

[6] United Nations, *United Nations Security Council Resolution 1373,* S/RES/1373, 2001.

[7] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013,, p. 221.

undertaken by US and UK.[1] In the end, even US and UK recognized the controversy of pre-emptive action and justified their operation as authorized by Security Council Resolution 1441 and, later on, as humanitarian intervention.[2]

The above discussion reveals that, while anticipatory self-defence in response to an imminent attack might be permissible under customary international law, pre-emptive self-defence is not allowed under any circumstances. Such a broad interpretation would lead to gross abuses of Article 51 of the UN Charter and some states would hide their aggressive conduct under the blanket of self-defence.

However, in the context of outer space warfare the applicability of anticipatory self-defence should be accepted. Modern technology for destroying space assets might lead to devastating consequences both in space and on Earth, affecting not only the victim state but also third parties.[3] Delaying a self-defence response might frustrate the purpose of a defensive action and the restoration of the *status quo* might become impossible. Moreover, launching an ASAT missile is far more rapid than deploying and moving troops on the ground or navies at sea. Thus, the threat is imminent and overwhelming as within the scope of the *Caroline* formula. Necessity and proportionality are still applicable to assess the legality of anticipatory self-defence. The response should not go beyond what is necessary to neutralize the aggressive act and prevent the negative consequences. For instance, if a state has reliable information that another state deployed an on-orbit weaponized satellite with the intention of attacking one of its assets, it can act in self-defence by destroying the satellite or the terrestrial control base. Such an aggressive act would not mandate, for instance, the deployment of ground forces or aerial bombardment of targets unrelated to the launching and control of the satellite.

This concludes the analysis of the *jus ad bellum* legal framework and its applicability to conflicts unfolding in outer space. So far, the article demonstrated that an attack against the space assets of another state might constitute an "armed attack" within the scope of Article 51 of the UN Charter and clarified the distinction between international responsibility under OST

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[1] Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013,, p. 220; Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 118.

[2] Matthias Schmidl, *The Changing Nature of Self-Defence in International Law,* Nomos, 2009, p. 119; Christine Gray, *International Law and the Use of Force,* Third Edition, Oxford University Press, 2013, p. 221.

[3] Francis Lyall, Paul Larsen, *Space Law: A Treatise,* Ashgate, 2009, p. 528.

and attribution of an internationally wrongful act to a state. Additionally, it discussed the elements necessary for the lawfulness of an action in self-defence. The next part will address the rules of international humanitarian law and their regulatory power over outer space warfare.

3. Jus in Bello Spatialis

The law of armed conflict *(jus in bello)* or international humanitarian law comprises the body of rules and principles governing the conduct of hostilities with the aim of "mitigating the human suffering caused by war".[1] It finds expression in both customary international law and treaty law, which codified most of the rules regulating the means and methods of warfare.[2] International humanitarian law is divided in two branches, namely the "Hague law" regulating the means and methods employed during armed conflicts, and the "Geneva law", which provides protection to persons not taking part in hostilities or those rendered *hors de combat.*[3] In its case law, the ICJ held that the Hague Regulations and the four Geneva Conventions with their two Additional Protocols *"have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law".*[4] It is important to emphasize that any state engaged in a conflict must adapt its conduct during warfare to international humanitarian law rules, regardless whether it is the aggressor state or the state acting in self-defence according to *jus ad bellum.*[5]

[1] Frits Kalshoven, Liesbeth Zegveld, *Constraints on the Waging of War. An Introduction to International Humanitarian Law,* 3rd Edition, ICRC, 2001, p. 12; Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 22; Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 1.

[2] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 6; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, *Introduction;* Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 23.

[3] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, pp. 9-10; Malcolm N. Shaw, *International Law,* 7th Edition, Cambridge University Press, 2014, pp. 848 – 849.

[4] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, pp. 226, 256.

[5] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 4.

Despite the fact that international humanitarian law does not specifically address outer space conflicts, its applicability is unquestionable.[1] This is inferred from Article III of the OST, which provides for the obligation of all states parties to conduct their activities in outer space in accordance with the rules and principles of international law.[2] Consequently, the prohibition on the use of weapons of mass destruction entails that no space object carry such load and attack a manned space vehicle, a space station or target the Earth.[3] However, considering the particularities of a conflict in the extra-terrestrial space, not all rules find application in this context.[4] The present part of the article will interpret the most relevant rules and principles pertaining to international humanitarian law in light of the specificities of an outer space war. Firstly, the discussion will focus on the characterization of aggressive military space operations as international or non-international armed conflicts.

3.1 "Military space operations" as international or non-international armed conflicts

The prerequisite for the application of international humanitarian law norms is the existence of an armed conflict, as highlighted in the Common Article 2 of the Geneva Conventions.[5] The first paragraph of the article states that the provisions of the Convention shall apply to any instances of "declared war" or "any other armed conflict" arising between two or more Contracting Parties.[6] While the two notions may seem to be synonymous, their scope differs. According to the International Committee of the Red Cross (ICRC) Commentaries to Common Article 2, "declared war" has a limited scope and

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[1] Fabio Tronchetti, "Legal aspects of the military uses of outer space", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 331 -381, p. 358; Setsuko Aoki, "Law and military uses of outer space", in ed. by Ram Jakhu, Paul Stephen Dempsey, *Routledge Handbook of Space Law,* Routledge, 2017, pp. 197 – 224, p. 221.

[2] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966, Art. III.

[3] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, pp. 255, 256, 259.

[4] Fabio Tronchetti, "Legal aspects of the military uses of outer space", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, p. 358.

[5] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Geneva, 12 August 1949, Art. 2; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* Geneva, Art. 2; *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949, Art. 2; *Convention (IV) relative to the Protection of Civilian Persons in Time of War,* Geneva, 12 August 1949, Art. 2; Crowe and Weston-Scheuber (2013), p. 10.

[6] Geneva Convention (I), Art. 2(1); Geneva Convention (II), Art. 2(1); Geneva Convention (III), Art. 2(1); Geneva Convention (IV), Art. 2(1).

covers only instances of aggression where at least one of the belligerents issued a declaration of war.[1] Even if such a declaration is not followed by the use of armed force between belligerents, international humanitarian law still applies, thus conferring protection to enemy nationals finding themselves on the territory of the opposing state.[2] The concept of "armed conflict" is wider and does not depend on formalities such as the declaration of war.[3] In this case, the factual existence of an armed conflict prevails over the formal recognition of such a state of play.[4] This aspect bears a particular importance, since, after the conclusion of the UN Charter, states have seldom had recourse to formal declarations of war.[5] Even if none of the parties to the conflict acknowledges the existence of a state of war, humanitarian law still applies if the factual evidence proves the reality of the hostile actions between the parties.[6] The applicability of *jus in bello* to armed conflicts short of a formal declaration of war is supported by decisions of the UN ad-hoc international criminal tribunals tasked with prosecuting war crimes and crimes against humanity committed in Yugoslavia (ICTY) and Rwanda (ICTR).[7] The ICTY in the *Prosecutor v. Milutinović* and *Prosecutor v. Blaškić* cases also reiterated the determination of the existence of a state of war solely based on the factual proofs, regardless whether the belligerents acknowledge it.[8]

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[1] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[2] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[3] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[4] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[5] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[6] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[7] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski,* Case No. IT-04-82-T, Judgment, 10 July 2008, para. 174; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 603.

[8] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić,* Case No. IT-05-87-T, Judgment, 26 February 2009, para. 125; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tihomir Bla[ki],* Case No. IT-95-14-T, Judgment, 3 March 2000, para. 82.

According to the ICTY Appeals Chamber judgment in the *Prosecutor v. Tadić* case, *"an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".*[1] The Tribunal upheld this interpretation in the *Prosecutor v. Kunarać* case.[2] The definition recognizes both types of armed conflict, according to the nature of the belligerents involved. "Resort to armed forces between States" characterizes an international armed conflict, while the existence of "protracted violence" between non-armed groups and governmental forces or solely among "organised armed groups" within a state is the feature of non-international armed conflicts.[3] An international armed conflict is present even if only one state unilaterally uses force against another state, which cannot or does not respond in self-defence.[4] In terms of the actors involved in the conduct of hostilities, the International Criminal Court (ICC) held in the *Bemba* case that *"an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State".*[5] Consequently, the existence of an international armed conflict does not depend on the use of regular armed forces as long as the actors involved are acting on behalf of the state according to the rules on state responsibility. Moreover, international jurisprudence and a significant number of scholars support the idea that the armed conflict among states does not have to reach a certain level of intensity to trigger the

[1] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadić a/k/a "Dule",* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

[2] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 55-56.

[3] Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 11.

[4] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016

[5] International Criminal Court, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo,* Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statue on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 223

applicability of international humanitarian law.[1] What is required for the existence of an international armed conflict is intention on behalf of one of the belligerents.[2] A mere frontier incident triggered by a misunderstanding cannot be qualified as such.[3] However, if the victim states decides it is necessary to act in self-defence or if a state intentionally provoked the incident, then it can be qualified as an international armed conflict.[4]

Considering the fact that the present article addresses jus ad bellum, a regime applicable only to international armed conflicts, the international humanitarian law analysis in the context of outer space warfare will also be limited to international armed conflicts for purposes of consistency.

An attack against the space object of a state, through either an ASAT weapon or an on-orbit weaponized satellite, can be considered an armed attack in the sense of *jus ad bellum.*[5] Therefore, such aggressive acts in outer space can also qualify as "a resort to armed force between States" as within the scope of the *Tadić* definition. Additionally, in contrast to the regime regulating the legality of the use of force, which requires a certain level of gravity to trigger the right to self-defence, international humanitarian law is applicable regardless of the intensity of the conflict. Moreover, the ICRC Commentary on Common Article 2 states that those cyber operations having the same effect as a kinetic attack would also constitute an international armed conflict.[6] Consequently, even a cyber-attack against the satellite or the

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[1] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga",* Case No. IT-96-21-T, Judgment, 16 November 1998, para. 184; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadić a/k/a "Dule",* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; International Criminal Court, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para. 207; Hans Peter Gasser, "International humanitarian law. An introduction", in ed. by Hans Haug, *Humanity for All: The International Red Cross and Red Crescent Movement,* Henry Dunant Institute, 1993, pp. 510 – 511; Eric David, *Principes de droit des conflits armés,* 5th Edition, Bruylant, 2012, p. 122; Dino Kritsiotis, "The Tremors of Tadić", *Israel Law Review*, Vol. 43, 2010, pp. 262-300, pp. 278 – 279; Andrew Clapham, "The Concept of International Armed Conflict", in ed. by Andrew Clapham, Paola Gaeta, Paola, Marco Sassoli, *The 1949 Geneva Conventions: A Commentary,* Oxford University Press, 2015, pp. 3-26, pp. 13-16; Michael Schmitt, "Classification of cyber conflict", *Journal of Conflict and Security Law*, Vol. 17, No. 2, 2012, pp. 245 – 260, p. 240.

[2] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 152.

[3] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 152.

[4] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 152.

[5] See Part 2.1.1

[6] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

launching facility of a state might trigger the application of international humanitarian law as long as it leads to the destruction of civilian or military assets or to the death or injury of members of the armed forces or civilians.[1] For the purpose of maintaining the space-centric approach of the present paper, the destruction, death or injury following a cyber-attack should occur in space or the attack should target a space asset. One such example would constitute a cyber-attack aimed at hijacking the commands of the launching and control facility of a state transmitted to a manned space vehicle. Such an aggressive act has the potential of endangering the life of the personnel on board and, thus, may qualify as an international armed conflict.

Having established the international character of an outer space conflict for the purposes of the present article, the following sub-chapter will discuss the status of astronauts during the conduct of hostilities.

3.2 Legal Status of Astronauts in Outer Space Warfare

The cornerstone of international humanitarian law is the principle of distinction between combatants and civilians, thus obliging the belligerents to distinguish between persons included in the first category, whom are lawful targets, and those falling within the second category, who "enjoy general protection against dangers arising from military operations".[2] In the *Nuclear Weapons Advisory Opinion,* the ICJ held that the principle of distinction is one of the "cardinal principles" of international humanitarian law and part of customary international law.[3] Apart from the protection conferred to civilians, this distinction is also important for the applicability of the specific rules regulating the status of combatants during hostilities.

According to Article 43(1) of the Additional Protocol I to the Geneva Conventions, the armed forces of a state "consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a

[1] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 2nd Edition, 2016.

[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51(1); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 27; Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 297; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 3.

[3] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons*,* Adv. Opinion, ICJ Reports 1996, p. 226, paras. 78-79.

government or an authority not recognized by an adverse Party".[1] This definition is now part of customary international law.[2] Irregular forces also fall within the purpose of this definition as long as they fulfil the requirements of organization and being under a command responsible before one of the parties to the conflict.[3] On the one hand, members of regular forces, with the exception of medical and religious personnel, automatically enjoy combatant status.[4] Even if they contribute indirectly to the war effort and perform, for instance, only administrative tasks, as long as they are authorized to fight as part of the armed forces, they enjoy combatant status.[5] On the other hand, in order to be considered lawful combatants, members of irregular forces must fulfil four cumulative conditions prescribed by the Hague Regulation (IV) in Article I and by the Geneva Convention (III) in Article 4.[6] Irregulars must be under responsible command, must bear a distinctive and fixed emblem, carry arms openly and comply with international humanitarian law rules.[7] According to Article 47 of the Additional Protocol I to the Geneva Conventions, a mercenary shall not enjoy combatant status or the rights granted to prisoners of war.[8] This means that a mercenary may be subject to prosecution under the laws of the detaining state.[9] A mercenary is a person specifically recruited for taking part in the hostilities in exchange of monetary

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 43(1); Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 302.

[2] Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 302.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 43; Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 303; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 15.

[4] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 188; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 13.

[5] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 188; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 13.

[6] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,* The Hague, 18 October 1907, Art. I; *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949, Art. IV.

[7] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,* The Hague, 18 October 1907, Art. I; *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949, Art. IV.

[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 47.

[9] Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 99.

compensation, and is not a national or a resident of a party to the conflict.[1] Private contractors not qualifying as mercenaries shall be regarded as part of the irregular armed forces of the contracting state and, in principle, shall be entitled to combatant status and prisoner of war privileges, as long as they are directly involved in the hostilities.[2] Another category of persons entitled to a treatment similar to prisoners of war consists of combatants who reached neutral territory and must be interned, as prescribed by international law.[3] A person feigning civilian status while also engaging in hostilities is an unlawful combatant.[4] Consequently, he is a legitimate military target but does not enjoy the privileges granted to lawful combatants or the protection conferred by the civilian status.[5] Lawful combatants who are part of the regular or irregular armed forces shall lose the right to be prisoners of war if they do not clearly distinguish from civilians by wearing a uniform or an emblem and by carrying weapons in the open during military engagement.[6] In case of doubt as to the status of a person, "that person shall be considered to be a civilian".[7]

Once a person qualifies as combatant, he becomes a legitimate target for the armed forces of the adversary at any time, until he surrenders or becomes *hors de combat.*[8] Even if the combatant is targeted far behind the combat lines, he remains a legitimate target.[9] A lawful combatant also enjoys certain rights and privileges stemming from this status. For instance, he has immunity from prosecution in relation to lawful acts perpetrated during hostilities, but not for

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 47.

[2] Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 304.

[3] *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949, Art. 4(B)(2).

[4] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 29.

[5] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 29; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 20.

[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 44(3)(4); Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, pp. 384-386.

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 50(1); Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 23.

[8] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 188.

[9] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 188.

those actions in breach of international humanitarian law.[1] If captured by the adversary, combatants enjoy protection under the Geneva Convention (III), which prescribes a series of basic principles pertaining to the treatment of prisoners of war.[2] Article 17 of the Convention prescribes that a captured combatant has the obligation to provide only his full name, rank, date of birth and serial number if applicable.[3] The capturing authorities should not request or coerce the prisoner to provide any other information.[4] The Convention protects prisoners of war from physical or mental torture and any other form of coercion and prescribes the obligation of the capturing state to ensure a non-discriminatory treatment towards all prisoners.[5] Unlike mercenaries, spies and unlawful combatants, prisoners of war are not liable for prosecution based on their participation in the hostilities and, thus, shall not be kept under punitive conditions.[6] This rationale stems from Article 43(2) of the Additional Protocol I, which states that combatants "have the right to participate directly in hostilities".[7] Consequently, a belligerent can take prisoners of war only for the purpose of rendering them *hors de combat* and, thus, neutralize their contribution to the conflict.[8]

There is no explicit definition of "astronaut" included in the UN outer-space related treaties.[9] Nowadays, it is considered that this status involves an

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[1] Nils Melzer, "The Principle of Distinction Between Civilians and Combatants", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 305.

[2] *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949; Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 101.

[3] *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949, Art. 17.

[4] International Committee of the Red Cross, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War,* 2020, Art. 17; Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 103.

[5] *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949, Arts. 16, 17.

[6] Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 102.

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 43(2); Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 102.

[8] Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 102

[9] Francis Lyall, Paul Larsen, *Space Law: A Treatise,* Ashgate, 2009, p. 131; Frans Von der Dunk, "International space law", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 29-126, p. 80.

altitude component.[1] As a result, for the purposes of the present paper, any person reaching an altitude higher than 90-100 km above sea level would qualify as an astronaut, since this would be the proper lower limit of outer space as discussed in Part 2.1.1 of the present paper. In accordance with the outer-space related treaties, astronauts are "envoys of mankind" and state parties should render to them any possible assistance in carrying out activities in outer space or in case of distress.[2] Moreover, state parties have the obligation to return the personnel on board of a space object to the launching authority.[3] However, these obligations become superfluous if astronauts on board of a space vehicle are actually taking part in a conflict unfolding in outer space. In this context, astronauts may become combatants and, consequently, fall within the scope of international humanitarian law rules. Additionally, the principle of distinction in the context of outer space conflict will operate to differentiate between combatant astronauts and civilian astronauts. The following paragraphs will analyse various scenarios concerning the involvement of astronauts in outer space warfare and the consequences it might have on their status.

Space-faring nations already have established military forces tasked with conducting activities in outer space, either as an independent branch or as part of their air forces. The US is the only country having a separate Space Force within its military structure.[4] India has a joint space command, dependent on a certain degree to the other military branches, while Australia, China, France, Russia and the United Kingdom integrated a space component into their

[1] Francis Lyall, Paul Larsen, *Space Law: A Treatise,* Ashgate, 2009, p. 131; Frans Von der Dunk, "International space law", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 29-126, p. 80.

[2] United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty),* United Nations General Assembly Resolution 2222(XXI), 1966 , Art. V.

[3] United Nations, *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (The Rescue Agreement),* United Nations General Assembly Resolution 2345 (XXII), 1967 Art. 4.

[4] Leonard David, "Space Force: What will the new military branch actually do?", 9 February 2020, <https://www.space.com/united-states-space-force-next-steps.html>, last visited on 30/05/2020.

aerospace forces.[1] Any person part of these structures and sent into space would qualify as an astronaut. Moreover, since space forces are part of the national military, he would also qualify as a lawful combatant during hostilities.

Considering the increasing role of the private industry in space affairs, a potential outer space conflict will also display a significant use of "irregular forces" or even "mercenaries" as within the scope of international humanitarian law. If a country uses the space capabilities, assets and personnel of a space-faring corporation registered on its territory, the persons working for that company and participating in the hostilities on behalf of the state would qualify as private contractors and, thus, irregular forces. In regards to the requirements for qualifying as lawful combatants, the specificities of an outer space conflict would not accommodate the obligation imposed on the combatants to carry their arms openly. For the purposes of the lawfulness of combatant status, an emblem of the private company placed on the space vehicle and on the personnel's suits would suffice. Consequently, as long as an astronaut, employee of a private corporation acting on behalf of one of the belligerents, is on a space station from which attacks are launched or on board of a space vehicle carrying a weaponized object and bearing a distinctive emblem, he shall qualify as a lawful combatant. However, feigning civilian status while involving in combat would render astronauts as unlawful combatants not entitled to prisoner of war status.

If astronauts falling within one of the categories described above experience distress or are forced to make an emergency landing, they can be captured as prisoners of war. According to the principle of *lex specialis derogat legi generali,* in the context of ongoing hostilities, international humanitarian law prevails over other legal regimes.[2] The outer space treaties represent the general law applicable to space activities at any time, while an armed conflict represents a specific situation falling within the scope of the particular regime of international humanitarian law. As a result, belligerents in an outer space

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[1] Elsa Kania, "China Has a 'Space Force'. What Are Its Lessons for the Pentagon?", 29 September 2018, < https://www.defenseone.com/ideas/2018/09/china-has-space-force-what-are-its-lessons-pentagon/151665/>, last visited on 30/05/2020; Vivek Raghuvanshi, "India to launch a defense-based space research agency", 12 June 2019, < https://www.defensenews.com/space/2019/06/12/india-to-launch-a-defense-based-space-research-agency/>, last visited on 30/05/2020; FLTLT Gene Elliott, "First Space Operations Unit", *Air Force*, the official newspaper of the Royal Australian Air Force, 21 May 2015; Russian Ministry of Defence Website – Aerospace Defence Forces, https://eng.mil.ru/en/structure/forces/cosmic.htm , last visited on 30/05/2020; Andrew Chuter, "Former fighter pilot picked to lead British military's space command", 15 January 2020, < https://www.defensenews.com/global/europe/2020/01/15/former-fighter-pilot-picked-to-lead-british-militarys-space-command/ >, last visited on 30/05/2020.

[2] Michael Bothe, *The handbook of international humanitarian law,* Oxford University Press, 2013, p. 74.

conflict would be entitled to take astronauts, who are lawful combatants, as prisoners of war and would no longer incur the obligation to return them to the launching state as provided by the Rescue Agreement.

Another scenario relevant for the present analysis implies a company acting on behalf of one of the belligerents, which is not incorporated in one of the states participating in the hostilities and receives a significant monetary compensation for its involvement. Employees of such a private enterprise sent in space would qualify as astronauts under the outer space treaty framework, but as mercenaries under international humanitarian law. As a result, in case of emergency landing on the territory of one of the belligerents or of a neutral country, they would not enjoy the privileges afforded to prisoners of war and could be liable under the laws of that state. The same rule applies for combatant astronauts not wearing a uniform distinguishing them from civilian astronauts or being on board of an unmarked space vehicle.

In relation to civilian astronauts performing peaceful activities not related to the unfolding hostilities, both belligerents and neutral states will have the same obligations to assist them in case of emergency or distress and return them to the launching state. Moreover, civilian astronauts shall not be legitimate targets for attack. As prescribed by Additional Protocol (I) to the Geneva Conventions, in case of doubt as to the status of an astronaut, he should be considered civilian.

Having discussed the status of astronauts during outer space warfare, the next part of the present article will discuss the principle of distinction in relation to targeted objects. The analysis will focus on dual-use satellites, which might pose significant issues to the applicability of this principle.

3.3 Dual-Use Satellites – legitimate military objective?

According to Articles 48 and 52(2) of the Additional Protocol (I) to the Geneva Conventions, parties to a conflict must direct their attacks only against military objectives and are prohibited from perpetrating aggressive actions against civilian targets.[1] In order to establish the scope of application of the present rule, it is necessary to define the term "military objective". Additional Protocol (I) to the Geneva Conventions states that *"military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation (...) offers a definite*

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Arts. 48, 52(2).

military advantage".[1] This definition is now part of customary international law.[2] Consequently, there are two main elements that must be taken into consideration when assessing whether a target qualifies as a military objective. Firstly, it must effectively contribute to the military action and, secondly, its total or partial destruction or neutralization must trigger a clear and perceptible military advantage.[3]

An object might have a military nature through either its "nature", "use", "purpose" or "location". The nature of an object refers to its intrinsic attributes that contribute effectively to the conduct of hostilities.[4] Therefore, objects such as military aircraft, military camps, fortifications, weapons systems and others are clearly military objectives. The criterion of "use" refers to the object's present function, while "purpose" qualifies the object as military according to the intended use established by the belligerent.[5] Sometimes, an object might have a military nature and, thus, run the risk of being targeted simply because its location is a military objective.[6] The presence of civilians in the proximity of the military objective does not change its status and a belligerent can still target it.[7] However, any attack on a military objective, which might cause incidental civilian damage, must respect the principle of proportionality.[8] This entails that the casualties should not be excessive in relation to the anticipated military advantage.[9]

It is clear that military satellites qualify as military objectives because of their "nature".[10] The question is whether dual-use satellites should be regarded as

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 52(2).

[2] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 29; Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 520.

[3] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 520.

[4] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 88.

[5] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 89.

[6] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 89.

[7] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 31; Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War,* Cambridge University Press, 2010, p. 522; Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 55.

[8] Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 55.

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51(5)(b).

[10] Setsuko Aoki, "Law and military uses of outer space", in ed. by Ram Jakhu, Paul Stephen Dempsey, *Routledge Handbook of Space Law,* Routledge, 2017, pp. 197 – 224, p. 222.

legitimate military objectives. The answer is in the affirmative as long as that satellite also performs a military function during the conflict. For instance, a belligerent can damage or destroy a military satellite also used for civilian purposes or, at least, deny access to it through jamming or cyberattacks.[1] Similarly, a civilian satellite whose purpose has been changed during the conflict to perform military functions qualifies as a legitimate target. This is similar to the instance of attacking a church or mosque whose steeple or minaret the armed forces are using as a sniper's nest.[2] Despite its initial civilian nature, the usage of an object for military purposes makes it a legitimate target and its destruction or neutralization might bring a military advantage to the adversary. In the case of satellites, this might materialize in denial of access to crucial information or imagery or to the actual elimination of a threat to the space assets of the attacking state if the targeted satellite is weaponized.

As inferred from the first paragraph of the present part, a purely military or dual-use satellite used for military purposes remains a legitimate target despite its proximity to civilian space assets. In such cases, the belligerents should use weapons that would not cause excessive damage to these objects located near the target. For instance, an attack, which might cause enormous amounts of space debris that might negatively affect civilian satellites, thus jeopardizing their functioning, might breach the principle of proportionality. Space debris is an issue connected to another principle of international humanitarian law, namely environmental protection, and the following part of the present paper will address this aspect.

3.4 Protection of Environment in Outer Space Warfare

International humanitarian law contains specific rules providing for the protection of environment during the conduct of hostilities. On the one hand, Article 35(3) of the Additional Protocol (I) to the Geneva Conventions prescribes that *"it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".*[3] This rule protects the environment in its own right.[4] On the other hand, Article 55(1) of the same legal instrument

[1] Setsuko Aoki, "Law and military uses of outer space", in ed. by Ram Jakhu, Paul Stephen Dempsey, *Routledge Handbook of Space Law,* Routledge, 2017, pp. 197 – 224, p. 222.

[2] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 91.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 35(3).

[4] Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013.

links the protection afforded to the natural environment to its importance to the health or survival of the population, regardless of its status as combatants or civilians.[1] Therefore, the protection of environment under international humanitarian law is a two-pronged norm, firstly safeguarding the environment in its own right and, secondly, extending protection to parts of the environment essential for the life and health of people. Any incidental damage caused to the natural environment following an attack must respect the principle of proportionality, an idea upheld by the ICJ in the *Nuclear Weapons Advisory Opinion.*[2] Consequently, if the effects on the environment outweigh the obtained military advantage, the attack is in breach of the principle of proportionality.[3] The most famous example of destruction of a part of the natural environment during warfare is the chemical deforestation using Agent Orange in the Vietnam War.[4]

A belligerent must exercise caution also when attacking a military objective containing dangerous forces, such as oil refineries, since the attack might release dangerous substances threatening the environment and affecting the health and life of the population.[5] Another important aspect in relation to the protection of environment during warfare is the precautionary principle, which states that scientific uncertainty as to the effects of a certain military operation on the environment does not constitute a mitigating circumstance for the belligerents.[6] In its 1993 report to the UN General Assembly, the ICRC commented that the precautionary principle is *"an emerging, but generally recognized principle of international law (whose object it is) to anticipate and prevent damage to the environment and to ensure that, where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason to postpone any measures to prevent such*

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 55(1).

[2] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, para. 30.

[3] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 177; Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 68; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 145.

[4] Jean-Marie Henckaerts, Dana Constantin, "Protection of the Natural Environment", in ed. by Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 480; Jonathan Crowe, Kylie Weston-Scheuber, *Principles of International Humanitarian Law,* Edward Elgar Publishing Limited, 2013, p. 68.

[5] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 176.

[6] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I, ICRC, Cambridge University Press, 2009, p. 150.

damage".[1] The ICJ confirmed the applicability of this principle during armed conflict in its jurisprudence.[2]

In order to establish the applicability *ratione materiae* of the aforementioned rules of international humanitarian law, it is necessary to define the concept of "natural environment". International law does not contain a precise, uniform definition of what constitutes "natural environment", and Additional Protocol (I) to the Geneva Convention is silent on this matter.[3] The ICRC Commentary emphasizes that the concept should be broadly interpreted to cover agricultural areas, drinking water, forests, and other vegetation, the flora, fauna, biological and climatic elements.[4] Consequently, "natural environment" designates everything that is not made by man, including the atmosphere.[5]

According to the definition and interpretation put forward in the previous paragraph, outer space would clearly qualify as a "natural environment" since it is not a human creation. At a first glance, it might seem that international humanitarian law protects environmental elements strictly connected to Earth. However, firstly, Article 35(3) of the Additional Protocol (I) to the Geneva Conventions does not limit the scope of the concept of "natural environment" to strictly terrestrial elements. Secondly, considering that the present paper discusses outer space warfare and interprets international law rules in this particular context, outer space, including the moon and other celestial bodies, shall be considered a "natural environment" falling within the scope of Article 35(3) of the Additional Protocol (I) to the Geneva Conventions.

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[1] International Committee of the Red Cross, *Protection of the Environment in Time of Armed Conflict,* Report submitted by the ICRC to the 48th session of the United Nations General Assembly, 17 November 1993

[2] International Court of Justice, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests *(New Zealand v. France)* Case, Order, ICJ Reports 1995, p. 288, paras. 34-35; International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Adv. Opinion, ICJ Reports 1996, p. 226, para. 32.

[3] Jean-Marie Henckaerts, Dana Constantin, "Protection of the Natural Environment", in ed. by Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 470; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, 2004, p. 184.

[4] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 8 June 1977, Commentary of 1987, Commentary on Article 55.

[5] Jean-Marie Henckaerts, Dana Constantin, "Protection of the Natural Environment", in ed by. Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, p. 471.

Space debris following an attack against a space object is the main issue that might affect the outer space environment during the conduct of hostilities.[1] In 2007, China destroyed one of its out-of-function satellites by using an ASAT weapon, while in 2009 two satellites collided.[2] Only these two incidents produced an amount of debris, which in 2012 accounted for 36% of all low-Earth orbit objects.[3] This is illustrative of the negative impact an ASAT weapon attack might have on the space environment. Due to the velocity in outer space, even a debris particle of a size no more than 1 cm may cause significant damage to a functioning satellite or cause a fatal reaction.[4] Moreover, astronauts performing activities outside their space vehicles might sustain severe injuries, since their equipment does not provide adequate protection against space debris.[5] Consequently, an ASAT attack during outer space hostilities might contaminate the extra-terrestrial environment with space debris, harmfully interfering with the peaceful activities of other states, potentially causing damage to civilian satellites or even military space objects of non-belligerent states and endangering the life of civilian astronauts. Belligerents in an outer space conflict should limit their attacks with ASAT missiles only to situations of outmost necessity, when the military advantage following the attack would clearly outweigh the negative impact of the resulting space debris. Military operations aiming at jamming, spoofing or incapacitating a satellite using an on-orbit weaponized space object might be preferable and would not run the risk of breaching international humanitarian law rules pertaining to environmental protection.

Many satellites are using nuclear power sources (NPS) because this is the only energy option adequate for a wide range of long-term space missions.[6] During an outer space conflict, an attack against an NPS satellite might release radioactive material in the extra-terrestrial environment, potentially affecting participants in outer space activities.[7] However, since such an attack would

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[1] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, p. 719; Francis Lyall, Paul Larsen, *Space Law: A Treatise,* Ashgate, 2009, p. 301; Isabella Diederiks-Verschoor, Vladimir Kopal, *An Introduction to Space Law,* Kluwer Law International, 2008, p. 127.

[2] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, p. 721.

[3] National Aeronautics and Space Administration (NASA), *Orbital Debris Quarterly News*, Volume 16, Issue 3, July 2012, p. 2.

[4] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, pp. 721-722.

[5] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, pp. 721-722.

[6] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, p. 724.

[7] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, p. 724.

also cause debris, contaminated fragments might also fall on Earth. Such an incident might contaminate an entire area, the waters and/or the soil and subsoil, endangering the life and health of the population. One such example is the accidental re-entry, in 1978, of Cosmos-954, a Soviet NPS satellite that disintegrated on Canadian territory.[1] It caused the contamination of a significant portion of land, albeit unpopulated.[2] Consequently, an attack against an NPS satellite during outer space conflict would breach international humanitarian law. Belligerents should avoid perpetrating kinetic attacks against space objects powered by nuclear sources and should choose other means to incapacitate the target or deny the adversary access to its functions.

4. Conclusion

This second part of the article on the legal implications of outer space warfare proved that an attack against the satellite of a state can constitute a prohibited use of force and can mandate the victim state to act in self-defence. Despite the seemingly mild nature compared to other aggressive acts perpetrated during hostilities, attacks in outer space can reach the necessary gravity threshold to qualify as an armed attack. Regarding the right to self-defence, the paper demonstrates that a victim state can take defensive actions against aggressive acts perpetrated by both states and non-state actors, an important finding considering the increased role of the private industry in outer space activities. Moreover, the analysis proves that there is a difference between the international responsibility prescribed in the Outer Space Treaty and the one stemming from the rules of state attribution. The evolving technology employed in outer space confer rapidity in the perpetration of an attack, as well as increased lethality. Consequently, anticipatory self-defence should be lawful in this context to avoid frustrating the defensive purpose of the action.

In terms of jus in bello, the article addresses three main issues stemming from the application of international humanitarian law to the particularities of outer space warfare. It firstly establishes the international character of a space conflict. Secondly, it clarifies the legal status of astronauts in the context of outer space warfare. While astronauts directly involved in the conduct of

[1] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, p. 724.

[2] Lotta Viikari, "Environmental aspects of space activities", in ed. by Frans Von der Dunk, Fabio Tronchetti, *Handbook of Space Law,* Edward Elgar Publishing, 2015, pp. 717 – 768, p. 724.

hostilities would qualify as combatants, those performing peaceful exploration activities would keep the status of civilians. States would be allowed to capture those falling in the first category, but would incur the same obligations of assistance and return in regards to those pertaining to the second one. In terms of legitimate military targets, the article established that dual-use satellites can be the object of an attack during hostilities as long as they perform military functions contributing to the conflict. Nevertheless, caution must be paid as to the civilian casualties that might ensue as well as to the nefarious effects such an attack might have on the environment, both terrestrial and extra-terrestrial. This last issue is discussed in the final part of the paper.

While the present paper does not aim to be an exhaustive interpretation of the international law rules pertaining to armed conflict in the context of outer space warfare, it can provide a starting point for further considerations on the matter. Considering the aggressive stance of states in outer space and the increased militarization of this environment, the possibility of a conflict unfolding extra-terrestrially should not be disregarded. Therefore, it is necessary to have clarity as to the applicability of international legal norms in order to avoid impunity and offer victim states a proper framework to act in self-defence. Moreover, the actual conduct of hostilities should also be adequately regulated, thus the discussion on international humanitarian law also bears an essential importance.

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

Influence of Jurisdictional Matters over the Substance of Investment Agreements: The Case-law of the European Court of Justice and the European Union Investment Policy

Ion GÂLEA* [*]

Abstract: *The study observes two elements derived in well-known cases of the European Court of Justice, where substantial elements of investment law were essentially influenced by the interpretation to be given to jurisdictional matters. One element is represented by the intra-EU Bilateral Investment Treaties. Following the Achmea ruling of the European Court of Justice, that decided that the arbitration clause in the Bilateral Investment Treaties are incompatible with the exclusive jurisdiction of the Luxemburg Court, the Member States signed, on 5 May 2020, an agreement on the termination of the intra-EU Bilateral Investment Treaties. The agreement shall enter into force successfully, for the Member States that will ratify. However, it is the interpretative value and the object and purpose of this agreement that may represent the most important aspects. The second element is represented by the conditions foreseen by the European Court of Justice in order to accept the dispute settlement mechanism provided by the Comprehensive Economic and Trade Agreement with Canada (CETA) as compatible with EU law. Although the Court examined the dispute settlement system, the conditions it has identified – valid also for future agreements – relate to the substance of the document, mainly to the clauses concerning fair and equitable treatment and indirect expropriation.*

Key-words: *commercial policy; Bilateral Investment Treaties; European Court of Justice; fair and equitable treatment; indirect expropriation*

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1. Introduction

The year 2016 witnessed the adoption of the Global Strategy for European Union's Foreign and Security Policy, which relies on the common vision of a stronger Union on the global stage.[1] As the document points out, "*none of [the Member] countries has the strength nor the resources to address these threats and seize the opportunities of our time alone*".[2] Promotion of multilateralism and of rules based international trade remains among the priorities of the EU.[3] The European Union shows the ambition to continue negotiations on new trade agreements, which may be labelled as "ambitious": recent agreements included those with Canada and Japan, while negotiations are pursued with Mercosur, Mexico, Chile, Australia and New Zealand.[4]

The specificities of the trade agreements concluded after 2009 (the entry into force of the Treaty of Lisbon)[5] is represented by the fact that these agreements contain clauses concerning both trade and investment.[6] Practically, in certain cases, these treaties act as both "trade agreements" and "investment agreements", and thus they may replace the "traditional" Bilateral Investment Treaties (BITs) concluded by individual Member States.

On one side, the European Union is striving to promote trade and investment worldwide, though the "new type" of agreements it concludes, but, on the other side, such political willingness depends on certain peculiarities of the legal construction of the European Union: the competence of the Union to conclude treaties, the possibility of EU to conclude a treaty which might contain a dispute settlement system that would issue binding decisions, as well as the situation of similar agreements concluded between Member States. Even if it might represent an "internal" situation from the perspective of the EU, the latter may have a "mirroring" effect over the external dimension of concluding trade and investment agreements.

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[1] "Shared Vision, Common Action: A Stronger Europe", A Global Strategy for the European Union's Foreign And Security Policy, document available at https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf (consulted 1 August 2020).

[2] *Ibid.*, p. 3.

[3] *Ibid.*, p. 4.

[4] "The European Union's Global Strategy. Three Years On, Looking Forward", Report, 2019, document available at https://eeas.europa.eu/sites/eeas/files/eu_global_strategy_2019.pdf (consulted 1 August 2020), p. 16.

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal of the European Union, Series C, no. 306, 17.12.2007,* pp. 1–271.

[6] Merijn Chamon, "Mixtity in the EU's post-Lisbon free trade agreements", in Isabelle Bosse-Platière, Cécile Rapaport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements. Constitutional Challenges,* Edward Elgar Publishing, 2019, p. 39-57.

This study proposes to explore the consequences that recent case-law of the European Court of Justice might have – or already had – on the policy of the Union concerning international investments (either in the relations between Member States, or in relation to third partners). First, the study will focus, therefore, on the ”internal” aspect of investments – the treaties concluded between the Member States, and on the consequences that this ”internal” aspect may have, in the future, on the external side. The study will continue to explore the „external” aspect – mainly the criteria imposed by the European Court of Justice in its Opinion no. 1/17 of 30 April 2019 and their future consequences on agreements to be concluded by the Union.

In both ”aspects”, the point of departure that the European Court of Justice examined was related to jurisdictional matters – either the possibility of a Bilateral Investment Treaty to confer the competence to adjudicate a dispute to an Arbitral Tribunal (in case of the ”internal” aspect), or the possibility of a Trade and Investment Agreement concluded by the Union to create a ”Dispute Settlement Mechanism/System”, to adjudicate disputes between the Union and/or its Member States and investors of third Parties. The main purpose of the study is to observe how what appeared to be at a first glance a ”jurisdictional matter”, in reality had an important impact over the substantive aspects of the respective agreements and of the Union's policies.

2. Exclusive Competence of the EU on Investments

After the entry into force of the Lisbon Treaty, article 207 of the Treaty on the Functioning of the European Union ("TFEU") included the "foreign direct investments" within the common commercial policy of the EU. At the same time, the common commercial policy was expressly designated as exclusive competence of the Union (article 3 (1) e) of the TFEU).[1]

Nevertheless, the compatibility between Bilateral Investment Treaties concluded by Member States and EU law was not a new issue. Even from 2006, the European Commission started legal action against Austria, Finland and Sweden, for maintaining in force Bilateral Investment Treaties concluded with third countries which contained clauses that were ”incompatible” with EU law.[2] The Court held that only the transfer of capitals clause contained

[1] See also Federico Ortino, Piet Eeckhout, "Towards an EU Policy on Foreign Direct Investment" in Andrea Biondi, Piet Eeckhout, Stefanie Ripley (eds.), *EU Law after Lisbon,* Oxford University Press, 2012, p. 312-330.

[2] Article 351 paragraph 2 of the TFEU.

”incompatibilities” with EU law, but still held that the three Member States violated the TFEU by not eliminating these incompatibilities.[1]

Since the competence of the European Union over ”foreign direct investments” became exclusive after the Lisbon Treaty, the European Union needed a coherent policy on investments, balancing the ”investor exporting” and the ”investor importing” capacities. The practical consequence of such investment policy – which would have been included in the common commercial policy – was the fact that Member States would have the replacement of all Bilateral Investment Treaties concluded by the Member States with corresponding agreements concluded by the Union. Still, at the moment of the entry into force of the Lisbon Treaty, the number of Bilateral Investment Treaties concluded by Member States with third countries was significant (it was believed to have exceeded 1300).[2] Thus, ”replacing” these agreements on a short term would have been an almost impossible task. Even if certain scholars have argued that the exclusive competence of the EU was limited to ”direct” investment (and thus allowing ”shared” competence for other kinds of ”indirect” investments),[3] practice has shown pragmatism: on one hand, Member States did not insist for the shared character of the competence,[4] on the other hand, the Commission accepted the ”Grandfathering technique”,[5] by which the Council and the European Parliament ”delegated back” the competence to the Member States to maintain in force the existing Bilateral Investment Treaties, and, in certain cases, even to conclude new treaties, following a procedure of notification and approval from the Commission.[6]

Even if the Union did acquire exclusive competence over the substantive aspects of the investment policy, it was still not certain whether the dispute settlement mechanisms – specific to investment treaties – also fell under such

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[1] Cases C-205/06, Commission v. Austria, 3 March 2009, ECLI:EU:C:2009:118, C-249/06, Commission v. Sweden, 3 March 2009, ECLI:EU:C:2009:119, C-118/07, Commission v. Finland, 19 November 2009, ECLI:EU:C:2009:715; Wenhua Shan, Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, European Journal of International Law Vol. 21, no. 4, (2010), p. 1049-1073, at 1052.

[2] Wenhua Shan, Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy, loc. cit.,* p. 1068.

[3] *Ibid.*, p. 1070.

[4] The Preamble of Regulation (EU) No 1219/2012 states: ”The TFEU does not contain any explicit transitional provisions for such agreements which have now come under the Union’s exclusive competence. Furthermore, some of those agreements may include provisions affecting the common rules on capital movements laid down in Chapter 4 of Title IV of Part Three TFEU” – paragraph 4 of the Preamble.

[5] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. *Official Journal of the European Union, Series L 351, 20.12.2012, p. 40–46.*

[6] *Ibid.*, articles 7-11.

competence[1]. The specificity of EU law is that its main implementation is done by the Member States.[2] Thus, in case of a hypothetical investment agreement between the EU and a third country, the potential investor-to-State dispute settlement system would be confronted with claims of investors related to "measures" which may result from a „combined" action of EU and Member States (the EU enacts legislation, while the Member States implements it). The question that may arise is: who should be the defendant? This question is similar to the one that was raised in connection to the accession of the EU to the European Convention for Human Rights: the proposed agreement for accession envisaged a „co-respondent" mechanism which would have addressed this issue.[3] The proposed accession of the EU to the European Convention for Human Rights failed, as the European Court of Justice found that the proposed accession agreement breaches the fundamental Treaties. f the EU[4]. Nevertheless, the opinion 2/13 revealed important criteria for an "exterior" or "superior" dispute settlement mechanism to be accepted: the most important criterion is the preservation of the "autonomy" of EU law and the need for the "international" jurisdiction "not to interpret" EU law.[5]

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3. "Internal" Aspect: Intra-EU Bilateral Investment Treaties

Despite the willingness of EU institutions to pursue further a EU policy in the field of international investment,[6] these demarches were "affected from within", by the situation of the Bilateral Investment Treaties concluded between EU Member States (the so-called "Intra-EU BITs"). Most of these "Intra-EU BITs" originated in the early 1990, when States from Central and Eastern Europe that went through democratic changes concluded an important number of Bilateral Investment Treaties with West-European States. In 2004, 2007 and 2013, 13 States acceded to the European Union – and the Bilateral Investment Treaties which had been concluded with "the

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[1] Davide Rovetta," Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues ", in Marc Bungenberg, Christoph Herrmann (eds.), *Common Commercial Policy after Lisbon,* Springer, 2013, p. 221-234.

[2] Article 4 (3) of the Treaty on the European Union ("TEU"); Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, 2010, p. 85.

[3] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, ECLI:EU:C:2014:2454, para. 215-235.

[4] *Ibid.*, para. 258.

[5] *Ibid.*, para. 181, 183, 184.

[6] See, for example:" Trade for All: Towards a more responsible trade and investment policy", Communication from the Commission to the European Parliament, the Council, the Committee of Regions and the Economic and Social Committee, Brussels, 14.10.2015 COM(2015) 497 final, p. 3-26.

other" EU Member States remained in force. In certain situation, situations which may be labelled as "bizarre" occurred: investors challenged measures which have been taken by the respondent State in order to comply with EU law or in order to harmonize its legislation with EU law – as it was the case *Micula v Romania.*[1] In most cases, arbitral tribunals established under the International Center for Settlement of Investment Disputes ("ICSID") or under the UNCITRAL rules, were to adjudge on alleged breaches of investor rights caused by the application of EU law – when the investor was also a national of an EU Member State – as it was the case of *Austrian Airlines v Slovakia, Eureko (Achmea) v. Slovakia* and *Eastern Sugar v. Czech Republic.*[2]

One of the main lines of defence invoked by the respondent States, as well as by the European Commission, was based on the partial or total termination of the Intra-EU BITs, as a result of subsequent application *inter partes* of the fundamental treaties of the European Union (the TEU and the TFEU).[3] This line of argument relied on three different possible grounds:

i) the rule contained by Article 59 (1) b) of the 1969 Vienna Convention on the Law of Treaties between States[4], which provides that "*a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: [...] b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.*"[5]

ii) alternatively, the rule contained by Article 30 (3) of the said Convention, according to which "*when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*".[6] In this sense, it might have been argued, also, that article 344 of the TFEU (which states that: "*Member States undertake not to submit a dispute*

[1] *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 130-136.

[2] For example: *Austrian Airlines v. Slovak Republic*, UNCITRAL, (Austria/Slovak BIT), Final Award of 9 October 2009; *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010; *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007.

[3] Szilárd Gáspár-Szilágyi, *It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV,* European Papers, vol. 3, 2018, no. 1., p. 357-373, 360.

[4] United Nations Treaty Series, vol. 1155, p. 331.

[5] *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010, para. 63-64; *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 100.

[6] *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 316-317, related to the position of the European Commission.

concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”), which is a ”later treaty” in relation to the BIT, makes impossible that a dispute concerning the treatment of investors be submitted to an arbitral tribunal, and not to the European Court of Justice.

iii) in a ”simple” manner, the priority of the European Union law – a principle which has been recognized at the level of the European Union, as derived from the case-law of the European Court of Justice.[1]

The Arbitral Tribunals have rejected such arguments. Mainly, the arbitral tribunals relied on the fact that articles 59 and 30 (3) of the Vienna Convention are not applicable because the Bilateral Investment Treaty and the fundamental treaties of the EU are not ”*treaties covering the same matter”*.[2]

The question of the ”Intra-BITs” might have been solved from the early stages by a common agreement between the Member States (and the Commission) related to the simultaneous termination of these treaties. Nevertheless, in the initial stages, such agreement lacked: on one side, the ”investor importing States” within the European Union (such as Slovakia, the Czech Republic or Romania – which were respondents in arbitral proceedings), were interested to terminate the BITs and supported the proposals of the Commission; on the other side, ”investor exporting States”, like the Netherlands or Sweden, were interested in the maintenance of the BITs, as supplementary legal safeguards for their investors. An illustration of such disagreement was represented by the initiation, in 2015, of infringement procedures according to article 258 TFEU, by the European Commission, against the parties to those BITs that generated arbitration proceedings – Romania, Slovakia, Austria, Sweden, Netherlands.[3]

4. The *Achmea* Ruling and Its Follow-up

[1] Declaration no. 17 concerning primacy, attached to the Treaty on the European Union and the Treaty on the Functioning of the European Union; case *Costa/ENEL*, 15 July 1964, Case 6/641; Letter of the European Commission, January 13, 2006, quoted in *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 119.

[2] *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 159; *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010, para. 239.

[3] Press Release, ”Commission asks Member States to terminate their intra-EU bilateral investment treaties”, 18 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198 (consulted 1 August 2020).

On this background, the *Achmea* decision of the European Court of Justice[1] offered the Court the opportunity to the examine itself the relation between an Bilateral Investment Treaty concluded between the Netherlands and Slovakia and the fundamental Treaties of the EU. On the basis of the above mentioned Bilateral Investment Treaty, the company Achmea (formerly named Eureko) initiated arbitration proceedings according to UNCITRAL rules against Slovakia, and the arbitral tribunal held that the BIT had been violated and obliged the respondent State to compensation.[2] As the seat of arbitration was Frankfurt, Germany, Slovakia asked the German Courts to annul the arbitral award. As one of the grounds requested by Slovakia was violation of EU law, the German Court asked for a preliminary ruling of the European Court of Justice.[3] It could be reminded that before the arbitration tribunal constituted according to UNCITRAL rules, Slovakia invoked the lack of competence of the arbitral tribunal for the reason of the cessation of the validity of the BIT, but the tribunal rejected this argument.[4] It has to be underlined that the main element of ”incompatibility” related to the compromisory clause – thus to the competence of the arbitral tribunal: article 8 of the BIT (the arbitration clause) was alleged to be incompatible with article 344 of the TFEU.[5]

Two important element could be outlined with respect to the *Achmea* ruling. First, the Court expressed its opinion on the ”general” possibility for an international agreement to create a dispute settlement system, other than the Court itself:

> *”It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their*

[1] C-284/16, *Slovak Republic v. Achmea,* 6 March 2018, ECLI:EU:C:2018:158.

[2] *Achmea BV (formerly Eureko BV) v. Slovakia*, PCA Case no. 2008-13, Final Award, 7 December 2012.

[3] Bundesgerichthof, Beschluss, III ZB 37/12 vom 19. September 2013.

[4] *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010; C-284/16, *Slovak Republic v. Achmea,* 6 March 2018, ECLI:EU:C:2018:158 (hereinafter ”C-284/16, Achmea”), para. 11.

[5] As mentioned above, article 344 of the TFEU states: ”*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*”.

provisions, provided that the autonomy of the EU and its legal order is respected".[1]

It can be noted that the main criterion – "autonomy of EU law" was reiterated.[2] Nevertheless, the European Court of Justice underlined that the arbitration established by the compromisory clause under the BIT was different from a commercial arbitration procedure, because it results from a treaty, by which States agreed to extract certain elements from the competence of their own jurisdictions – thus, the tribunal created by the BIT did represented neither a "part of the judicial system of the Netherlands or Slovakia",[3] nor a commercial arbitration tribunal.[4]

Second, the European Court of Justice held that maintaining in force article 8 of the Bilateral Investment Treaty, by which an arbitration tribunal could be seized with respect to a dispute between an investor of one Party and the other Party, represents a violation of articles 267 and 344 of the TFEU, which confer exclusive jurisdiction to the European Court of Justice. The main argument was the autonomy of EU law:

" Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".[5]

The consequences of the *Achmea* ruling overpassed the relations between the Member States, for the reason that the above statement had to be invoked

[1] C-284/16, *Achmea*, para. 57.

[2] The Court also quoted its earlier case-law: Opinion 1/91 (EEA Agreement — I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183.

[3] C-284/16, *Achmea*, para. 45.

[4] *Ibid.*, para. 55; see also Burkhard Hess, *A European Law Reading of Achmea,* 8 March 2018, https://conflictoflaws.net/2018/a-european-law-reading-of-achmea/ (consulted 1 August 2020); Francesco Munari, Chiara Cellerino, *The EU Law is Live and Healthy: the Achmea Case and a Happy Good-Bye to the Intra-EU Bilateral Investment Treaties,* 17 April 2018, http://www.sidiblog.org/2018/04/17/eu-law-is-alive-and-healthy-the-achmea-case-and-a-happy-good-bye-to-intra-eu-bilateral-investment-treaties/ (consulted 1 August 2020); Harm Schepel, *From Conflicts-Rules to Field Preemption: Achmea and the Relationship Between EU Law and International Investment Law and Arbitration*, 23 March 2018, https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/ (consulted 1 August 2020).

[5] C-284/16, *Achmea,* para. 60.

before arbitral tribunals – some of them constituted within international fora, like the ICSID. Moreover, in certain cases, the execution of awards issued on the basis of an Intra-EU BIT was asked by the claimant with respect to assets situated in a third country.[1] One of the essential questions was whether the above quoted paragraph 60 of the *Achmea* ruling could by itself be invoked by a responding State, in front of an ICSID arbitral tribunal, in a future case, in order to contest the lack of jurisdiction of such arbitral tribunal. Could the ruling of the European Court of Justice have authoritative nature before an ICSID tribunal?

In order to overcome such difficulties, the first step was represented by the signature, on 15 and 16 January 2020, of a Declaration,[2] by which the Member States declared in a ”formal” manner the consequences of the *Achmea* ruling. The declaration was designed to be addressed to the arbitral tribunals (either ad-hoc, or constituted under ”non-EU” fora, such as ICSID), in order to inform about the position of the Parties to the BITs about the precedence of EU law. The Declaration stated:

> *”Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty”.*[3]

The declaration, invoked a mixture of EU law and public international law arguments that would represent the basis for this priority. Thus, even if the Declaration invoked the case-law of the European Court of Justice which acknowledges the principle of primacy, which is peculiar to EU law,[4] the text

[1] See, for example, United States Court of Appeals, District of Columbia Circuit, Ioan Micula et al v. Government of Romania, Appeal from the United States District Court for the District of Columbia (No. 1:17-cv-02332), Judgment, No. 19-7127, 19 May 2020.

[2] Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (consulted 1 September 2020); 22 States signed on 15 January, 5 on 16 January, and Hungary signed through a different document.

[3] *Ibid.*, preamble, para. 2.

[4] The Declaration quotes: *Matteucci,* 235/87, EU:C:1988:460, paragraph 21; and C-478/07, *Budějovický Budvar,* EU:C:2009:521, paragraphs 98 and 99 and Declaration 17 to the Treaty of Lisbon on primacy of Union law.

mentions that ”*the same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention on the Law of the Treaties and customary international law (lex posterior)*”.[1] Practically, the Member States confirm that articles 30 and 59 of the Vienna Convention lead to the same result and might be ”easier to accept” by arbitral fora.

In our opinion, the Declaration is not *per se* an agreement to terminate the Bilateral Investment Treaties, but an *interpretative agreement*, in the sense of article 31 paragraph 3) letter a) of the 1969 Vienna Convention on the Law of Treaties).[2] Practically, the States have provided an interpretation concerning the cumulative effect of the two legal instruments that applied at the same time – the fundamental treaties of the EU (the TEU and the TFEU) and the Bilateral Investment Treaties. This combined effect results in the non-applicability of the arbitration clauses – leading thus to the lack of jurisdiction of future arbitral cases. The declaration also contains a “commitment” to terminate the Bilateral Investment treaties, “by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally”. This appears to be a rather political commitment, as the legal effect will be governed by the agreement to be concluded.

This agreement was signed on 5 May 2020 by 23 Member States of the European Union.[3] Nevertheless, the disagreement continued – the European Commission started infringement procedures against those five EU Member States that refused to sign the agreement.[4] The agreement is not so simple as it seems.[5] First, the preamble of the Agreement is rather complex: it makes reference to the ”customary law codified in the Vienna Convention on the

[1] Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (consulted 1 September 2020), footnote 1.

[2] On interpretative agreements – Georg Nolte, ”Subsequent Agreements and Subsequent Practice”, in Georg Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, p. 309; Anthony Aust, *Mordern Treaty Law and Practice,* 2nd Ed., Oxford University Press, p. 239; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),* Judgment, I.C.J. Reports 2014, p. 226, para. 46.

[3] The States that signed the agreement are: Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain; Press release – EU Member States sign an agreement for the termination of intra-EU bilateral investment agreements, 5 May 2020 https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en (consulted 1 August 2020).

[4] Press release, Commission asks EU Member States to terminate their intra-EU bilateral investment agreements, 18 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198 (consulted 1 August 2020).

[5] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed in Brussels, on 5 May 2020 (not yet in force), the text of the agreement is available in the Official Journal of the European Union, L 169, 29 May 2020, p. 1-41.

Law of Treaties”[1] and and it reiterates the interpretation elements contained by the Declaration of 15 and 16 January 2019:

> *”Considering that investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union,*
>
> *Sharing the common understanding expressed in this Agreement between the parties to the EU Treaties and intra-EU bilateral investment treaties that, as a result, such a clause cannot serve as legal basis for Arbitration Proceedings”.*[2]

Not only the preamble, but also the text of the Agreement expresses very clearly that:

> *”The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings”.*[3]

Second, the Agreement provides not only for the termination of the BITs in the Annex, but also for the termination of the ”sunset clauses”.[4] Third, the Agreement contains detailed procedures concerning pending and new arbitration proceedings.[5]

The entry into force provisions have been subject to debate. Practically, two solutions might have been possible: i) the agreement to enter into force ”for all signatories at the same time”, with the consequence that all the BITs would be terminated simultaneously; ii) the agreement to enter into force successively for the States that ratify, with the consequences that the BITs will terminate also „successfully”, on a ”bilateral basis”. The second option was preferred, even if its disadvantage is represented by „fragmentation”.

[1] *Ibid.*, preamble, para. 2.
[2] *Ibid.*, preamble, para. 5 and 6.
[3] *Ibid.*, article 4.
[4] *Ibid.*, article 1.
[5] *Ibid.*, article 6-9.

Nevertheless, the advantage of this option is represented by excluding the possibility for one State to block the process of terminating the BITs.[1]

Two legal aspects could be mentioned in relation to the Agreement signed on 5 May 2020. First, in our opinion, it maintains – at least before its entry into force, the status of ”interpretative agreement” that the Declaration of 15 and 16 January 2020 had. Practically, the Agreement does not regulate an element „for the future”, but reflects the understanding of the Parties concerning a legal situation that occurred when the last of the parties to a BIT joined the European Union. Second, it may be reasonably argued that the statement concerning the inapplicability of the arbitration clauses (contained both in the preamble and in the article 4 entitled ”Common provisions”) are part of the *object and purpose of the treaty.* The legal consequence would be represented by the obligation of the signatories to refrain from any act that would defeat the object and purpose of the treaty – according to the customary rule provided by article 18 of the Vienna Convention on the Law of Treaties.[2]

5. The exterior aspect of investment policy – can the European Union be a party to a dispute settlement mechanism?

As it has been pointed out, the *Achmea* ruling “touched” upon the exterior aspects of commercial and investment policy, especially on the possibility for the Union to be submitted to a dispute settlement system (*according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law).*[3]

At the same time, after the entry into force of the Lisbon Treaty, legal debates continued with respect to the enlargement of the competencies of the European Union with respect to concluding international agreements. It is not our purpose to discuss in detail the trend of enlarging the exclusive competences, to the detriment of the shared competences between the Union and the States: nevertheless, an example may be relevant: whether in 1994, the European Court of Justice decided that the competence to conclude the GATS and the TRIPS agreements within the WTO is shared between the

[1] As it has been seen, five States did not sign, with the consequence that the Commission initiated infringement procedures against them.

[2] On article 18 of the Vienna Convention – Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Martinus Nijhoff, 2009, p. 169; Anthony Aust, *Modern Treaty Law and Practice, op. cit.*, p. 117.

[3] C-284/16, *Achmea,* para. 57.

Union and the Member States,[1] in 2013 it decided that an agreement on trade in services falls within the exclusive competence of the Union.[2]

This "emerging trend" towards consolidating the exclusive competences of the EU overlapped with the emergence of the new type of agreement – as an instrument of EU common commercial policy, covering both trade and investment issues. Nevertheless, the above mentioned trend towards exclusive competences was halted by *Opinion 2/15* on the Free Trade Agreement with Singapore.[3] The Court decided that this agreement was to reveal of the shared competence between the Member States and the Union. The main argument was linked to the dispute settlement system: an Investor-State Dispute Settlement System, which is specific to Investment Agreements, cannot be established without the consent of the Member States.[4] The opinion had an important aspect for the future, because all similar agreements will be concluded as "mixed" agreements, having both the Union and the Member States as parties.[5] Thus, following Opinion 2/15, the Commission readjusted the practice of the agreements concluded with Singapore and Vietnam: two agreements were concluded – one covering only trade, falling under EU exclusive competence and one covering the investment protection, falling within the shared competences.

Nevertheless, the conclusion of two different agreements is not always the appropriate solution. This was the case of the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA"), which applies provisionally since 21 September 2017,[6] which was drawn as a single instrument, falling under shared competence of EU and its Member States.

The most sensitive question related to the CETA was the establishment of a jurisdictional system by which disputes between investors and the Parties (which can be either the European Union or a Member State – or both). As it was shown above, the European Court of Justice proved rather reluctant in the past (although did not prohibit in an absolute manner), to accept that the

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[1] Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and Protection of Intellectual Property, WTO, 1994, ECR I-5267.

[2] C-137/12, *Parliament v. Council (European Convention on the legal protection of services based on, or consisting of, conditional access),* ECLI:EU:C:2013:675, para. 76. On the exclusive competences, see also B. Van Vooren, R.A. Wessel, *EU External Relations law. Text Cases and Materials,* Cambridge University Press, 2014, p. 75.

[3] Opinon 2/15, Free Trade Agreement with Singapore, 16 May 2017, ECLI:EU:C:2017:376.

[4] *Ibid.*, para. 292.

[5] On mixed agreements, see M. Maresceau, "Typology of Mixed Agreements", in C. Hillion, P. Koutrakos (ed.), *Mixed Agreements Revisited. The EU and its Member States in the World*, Hart Publishing, Oxford, 2010, p. 11.

[6] The text of CETA is available at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (consulted 1 August 2020).

EU law system, including its jurisdictions, to be submitted to an external dispute settlement mechanism. Thus, in Opinions 1/91 and 1/92, the European Court of Justice ruled that a proposed ”Court of the European Economic Area” (composed by the EU and the European Free Trade Association) would affect the autonomy of EU law, but accepted that requests for preliminary ruling be referred to the European Court of Justice by domestic courts of other EFTA States.[1] In Opinion 1/09, the European Court of Justice accepted the creation of a European Patent Court[2] (comprising 38 States, including all the members of the European Union). However, the ”reluctance” of the European Court towards ”external control” was again evident in the Opinion 2/13 concerning the accession to the European Convention on Human Rights.[3]

On this background, the Opinion 1/17 of 30 April 2019[4] on the compatibility of CETA with the fundamental Treaties of the EU represented a cornerstone for the shaping of the future agreements of the EU and of the future commercial policy itself. The fundamental question was whether EU law permitted the establishment, through an international agreement, of a dispute settlement system between investors, on one side, and the Union and/or its Member States, on the other side.

This was exactly the question raised by the Kingdom of Belgium, who requested the opinion of the Court: more exactly, Belgium raised three questions: first concerned the compatibility with the ”principle of the autonomy of the legal order of the European Union”, while the second and the third concerned the compatibility of the dispute settlement mechanism with the principles of equal treatment and access to an independent tribunal.[5]

The question linked to the autonomy of EU law was, indeed, the most important. The Court recalled that ”*an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law*”[6] and that the most important condition is that such

[1] Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR *1991 I-0607; Opinion 1/92* Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR *1992 I-02821.*

[2] Opinion 1/09, Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties, ECR *2011 I-01137.*

[3] Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454.

[4] Opinion 1/17, 30 Aprilie 2019, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), ECLI:EU:C:2019:341.

[5] *Ibid.*, para. 46-69.

[6] *Ibid.*, para. 106.

dispute settlement mechanism would not bring ”*an adverse effect to the autonomy of the EU legal order*”.[1]

The Court brought details to these requirements and established two conditions to be fulfilled: i) that the dispute settlement mechanism should not ”*confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and principles of international law*” and ii) that the tribunals of the dispute settlement mechanism should not ”a*wards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework*”.[2]

The first condition was an essential element in the reasoning of the Court to refuse the accession of the European Union to the European Convention on Human Rights.[3] In the Opinion no. 1/17 the Court adopted a different reasoning, relying on the express provisions of the CETA concerning the applicable law. Thus, Section F, chapter 8 of CETA provided that the tribunals will have the power to apply ”this Agreement as interpreted in accordance with the [Vienna Convention], and other rules and principles of international law applicable between the Parties' and that it will not have jurisdiction 'to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party'.[4] At the same time, the CETA stated that *„in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact.”*[5] Indeed, it appears that it has been necessary that the agreement would provide expressly such statement, which reflects a general rule of public international law – that domestic law represents a merely fact before an international jurisdiction – as it has been recalled by the Permanent Court of International Justice in the case concerning *German Interests in Polish Upper Silesia.*[6]

The second criterion, namely that the dispute settlement mechanism should have *”no effect on the operation of the EU institutions in accordance with the EU constitutional framework”* triggered an evaluation of the European Court of Justice of the provisions concerning fair and equitable treatment, indirect expropriation and capital flows. Practically, the Court verified whether these

[1] *Ibid.*, para. 109.
[2] *Ibid.*, para. 119.
[3] *Supra,* footnote 19.
[4] Opinion 1/17, para. 121.
[5] *Ibid.*, para. 130.
[6] *German Interests in Polish Upper Silesia,* PCIJ, 1926, ser. A, no. 7, p. 19.

clauses of CETA (fair and equitable treatment,[1] indirect expropriation[2] and capital flows)[3] affect the competences of the institutions of the Union to regulate, in order to uphold the public interest: in our opinion, the ”decisive” criterion established by the European Court of Justice is that the jurisdiction of the tribunals must not be

> *”structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market”.*[4]

Briefly, the criterion can be translated into the requirement that the dispute settlement mechanism must not affect the ”level of protection of a public interest established by the EU institutions”.[5]

The Court decided that the CETA satisfied this condition and relied its finding on the following substantial clauses of the agreement: a) a general exception (resembling article XX of the GATT);[6] b) the express recognition, by article 8.9.1. of CETA, of the ”*right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*” and the express mention of the fact that „*the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation*”;[7] c) the Joint Interpretative Instrument, that reaffirmed that the Agreement will not lower standards related to ”*food safety, product safety, consumer protection, health, environment or labour protection*”, that the imported goods and services ”*must continue to respect domestic requirements, including rules and regulations*” and that the CETA ”*preserves the ability of the European Union*

[1] CETA, article 8.10

[2] CETA, article 8.12.

[3] CETA, article 8.13.

[4] Opinion 1/17, para. 148.

[5] *Ibid.*, para. 149.

[6] According to article 28.3.2 CETA, the provisions of Section C ”cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties”; Opinion 1/17, para. 152.

[7] Article 8.9.2. of CETA; Opinion 1/17, para. 154.

and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest";[1] d) the details provided for the notion of indirect expropriation: "for greater certainty, except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations".[2]

The Opinion 1/17 analyzed also other two questions raised by Belgium: the compatibility of the dispute settlement mechanism with the *"general principle of equal treatment and with the requirement of effectiveness"*[3] and with the right to access to an independent tribunal[4]. Indeed, the Court decided that the CETA dispute settlement mechanism satisfies these conditions. Nevertheless, within the overall structure of the Opinion, it is our belief that the key element is represented by the analysis of the "level of protection of a public interest", because of the mere fact that the analysis *did not concern the functioning of the dispute settlement mechanism but the substance of the agreement.*

6. Consequences of Opinion 1/17 for future agreements

While Opinion 2/13 did not allow a green light to the accession of the EU to the European Convention for Human Rights, it is a very important development that the European Court of Justice *did* offer such a green light to the conclusion of a trade and investment agreement, creating a dispute settlement system. As the *Achmea* ruling represented a "blow" to the settlement of investment disputes on the basis of Intra-EU BITs, the Opinion 1/17 provided an impetus to trade and investment agreements that would create dispute settlement systems. The creation of a dispute settlement system was *a sine qua non condition* for a future EU policy in the field of investment, as the „extra-EU BITs", concluded by the Member States and maintained with the approval of the Commission (on the basis of the so-called" granfathering regulation") cannot be" replaced" with EU investment agreements, without including a dispute settlement mechanism.

Nevertheless, the most significant development of the Opinion 1/17 is, in our view, the connection between the dispute settlement mechanism and the

[1] Points 1 d) and 2) of the Joint Interpretative Instrument; Opinion 1/17, para. 155.
[2] Annex 8-A, point 3, Opinion 1/17, para. 157.
[3] Opinion 1/17, para. 162-188.
[4] *Ibid.*, para. 189-244.

substance of the agreement. Indeed, CETA attempted to create a" new type" of dispute settlement system: the Tribunal shall be constituted of 15 members, appointed for a 5 years period (not for a particular dispute), and and Appelate Tribunal shall be established, in order to review on points of law the rulings "first instance" Tribunal.[1] However, the European Court of Justice did not analyses these novelties. The Court focused on the substantial clauses, mainly on indirect expropriation and fair and equitable treatment. Practically, *the Court has set limits on how an investment agreement of the EU may be drawn and thus created a precedent for future agreements.*

In case of the fair and equitable treatment, case-law of arbitral tribunals adopted different lines: on one hand, fair and equitable treatment was considered as being limited to what customary international law prescribes,[2] but, on the other hand, was interpreted also as exceeding this standard and incorporating he protection of" legitimate expectations" of investors.[3] By relying on article 8.9.2. of the CETA,[4] the European Court of Justice took a clear stance in the direction of promoting the idea that the sole" legitimate expectations" cannot represent the sole criterion for assessing the fair and equitable treatment.

It is known that the indirect expropriation clause in investment agreements has generated different interpretations. On one hand, the so-called "sole effects" theory leads to the result that an indirect expropriation may occur when the effect of a certain "measure" has the effect of diminishing the value of an investment (in a similar manner to a "direct" expropriation), even if the "measure" is a non-discriminatory piece of legislation that imposes new requirements for all operators in a certain branch[5] (for example, a piece of legislation in the field of environment that has the consequences that investors in a certain field are obliged to spend on new technologies).[6] On the other hand, the so-called „police powers" or "right to regulate" theory, according

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[1] CETA, articles 8.27, 8.28; moreover, the CETA envisages the possible creation, in the future, of a „of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes" – article 8.29.

[2] *SD Myers v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408, para. 263; *Monev v. USA*, ICSID Case no. ARB (AF)/99/2, Award of 11 October 2002; A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties. Standards of Treatment,* Wolters Kluwer, 2009, p. 264-266.

[3] *CMS Gas Transmission v. Argentina*, ICSID Case no. ARB/01/8, Award, 12 May 2008, 44 ILM 1205; *LG&E v. Argentina,* ICSID Case no. ARB/02/1, Decision, 3 October 2006.

[4] It can be recalled that article 8.9.2. provided that "*the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation".*

[5] *Pope & Talbot v. Canada,* UNCITRAL (NAFTA), Interim Award, 26 June 2000, 22 ILR 316; *SD Mayers v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408; *Marvin Feldman v. Mexico*, ICSID Case no. ARB (AF)/99/1, Award of 16 December 2002.

[6] For example *Metalclad v. Mexico,* ICSID Case no. ARB (AF)/97/1, Award of 30 August 2000.

to which a measure would not represent indirect expropriation, if its purpose is to uphold the public interest (for example, in the field of environment, health, consumer protection etc.) and is applied in good faith and in a non-discriminatory manner.[1] A balance between the theories was long searched by arbitral tribunals.[2] In many cases the line between ”loss” generated to an investor by complex legislative measures and the consequences of improper management were difficult to draw. The consequence of the Opinion 1/17 was the clear stance of the European Union in favour of the” right to regulate” doctrine. In the case of CETA, the view of supporting the „right to regulate”, in the case of clarifications to be brought to the notion of” indirect expropriation” represented a point of coincidence between EU and Canada – as for many years already, Canada was introducing such clarifications in its Bilateral Investment Treaties, including those concluded with EU Member States.

What the European Court of Justice has done through Opinion 1/17 was” to give a binding mandate” to the negotiators of the Union to embrace – in the text of the future agreements – the ”right to regulate” theory. Thus, future agreements of the Union will have to contain sufficiently precise clauses in the case of fair and equitable treatment and, especially, indirect expropriation, so that the agreement might not be interpreted (by the dispute settlement mechanism) in the sense of limiting this right to regulate” in the public interest”. Any clauses in future agreements that would leave” too much” flexibility to these notions (fair and equitable treatment or indirect expropriation) would trigger the agreement to be declared by the European Court of Justice ”incompatible with the fundamental Treaties of the EU”.

Important future agreements will follow this line: important agreements are likely to follow, such as Australia, Japan, Mexico, MERCOSUR and, as a matter of perspective, the United States of America.[3]

7. Conclusion

The *Achmea* ruling and the Opinion 1/17 represented landmark decisions for the shaping of the future investment agreements of, or within, the EU. In order to became an active actor in the world investment policy, the EU needed

[1] *TECMED v. Mexico*, ICSID Case no. ARB (AF)/002, Award of 29 May 2003, para. 50; see also OECD, *”Indirect Expropriation” and the ”Right to Regulate” in International Investment Law,* Working Papers on International Investment, no. 2004/4, p. 10-20.

[2] *El Paso v. Argentina*, ICSID Case no. ARB/03/15, Award of 31 October 2011.

[3] European Commission, Negotiations and agreements - https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (consulted 1 August 2020).

”order inside the house”, meaning a solution to be offered to the question of Intra-EU BITs. The *Achmea* solution represented only starting point of such „order”. The entry into force for *all* Member States of the Agreement for the termination of Intra-EU BITs, signed on 5 May 2020, shall represent the final point of such „order”. Nevertheless, this moment will not be close in time, because of the *successive* technique used for the entry into force of the Agreement. Thus, it is our view that the” great value” of the 5 May 2020 Agreement is its *interpretative value* and *its object and purpose*, as it reflects the understanding of the signatories that the combined effect of the BITs and of the fundamental Treaties of the EU leads to the non-application of the arbitration clauses contained by the BITs, and thus to the lack of competence for the arbitral tribunals. The withdrawal of consent to arbitrate can also be seen as part of the *object and purpose* of the Agreement, with legal consequences from the moment of signature. Even if the BITs in their have been regarded by the European Commission as incompatible with the EU law in their entirety, it was the jurisdiction clauses that represented the triggering point of the whole process.

Opinion 1/17 offered a more complex perspective: the main question which was asked referred to the possibility of the European Union to be submitted to an investment dispute settlement system. The European Court of Justice provided a ”green light” to such possibility, which is a wise and forward-looking approach (and a quite different one than in the case of the accession of the European Union to the European Court for Human Rights). Nevertheless, the Court took the opportunity to establish the limits of the future participation of the EU to a dispute settlement system and created the connection between jurisdiction and substance: a dispute settlement mechanism will be compatible with EU law only if the substance of the agreement will comply with certain parameters.

These parameters are linked mainly to the clauses concerning the fair and equitable treatment and the indirect expropriation – key provisions of the investment agreements. The European Court of Justice imposed limits on how these notions might be defined, so that the ”right to regulate” of the EU institutions in order to uphold the ”public interest” must not be affected. Thus, Opinion 1/17 is important because it will not be only the Council who will shape the mandate of the Commission for future agreements, but this opinion itself. The European Union will act, departing from this opinion, in order to support ”one side” – favorable to the „right to regulate” – of the two possible interpretations to be given to fair and equitable treatment and indirect expropriation.

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

The Legal and Practical Inefficiency of Systematically Introducing Human Rights Clauses in the European Union's Agreements

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Abstract: *This paper's goal is to provide a pertinent critique of the legal and practical deficiencies of the human rights conditionality model systematically implemented by the European Union in its foreign policy. This practice has been subject to academic examination since its introduction in 1995, yet very few analysed the issue from a public international law or practical perspective. This paper uses a qualitative method of research based on an investigation of the historical evolution of the human rights clause between multiple agreements concluded by the EU with third States. Starting from this collected information, it is revealed that the clause has developed heterogeneously and has a variable legal value. This has been determined in two ways: first, by comparing clauses with the Abbot-Snidal theory of distinguishing between soft law and hard law and, second, by analysing these clauses in light of the material breach of treaties doctrine. As for the practical point of view, it is found that no methodology has yet developed in order to properly assess the effects of human rights conditionality. Thus, the findings imply that this practice has, with a few exceptions, become outdated as the EU already is in possession of better instruments of human rights promotion which do not hinder its treaty-negotiation ability. This is a unique conclusion which, unlike previous works, does not suggest a mere reform of the system, but its entire removal.*

Key-words: *human rights conditionality; material breach doctrine; soft law and hard law instruments; European Union foreign policy*

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1. Introduction

The practice of conditioning (at least in appearance) trade liberalisation and other such treaties to the parties respecting certain individual rights or democratic principles has recently become normalised and is currently being implemented by States such as Canada, Australia or the United States of America.[1] However, since 1995, it is the European Union which has been systematically introducing the so-called "human rights clause" (HRC) in all of its trade, cooperation and association agreements with third States.[2] Typically, the clause also introduces obligations regarding other non-trade objectives such as maintaining the rule of law or other democratic principles. Furthermore, the Union classifies the HRC as essential clauses in these agreements in order to allow either party to suspend their obligations or even unilaterally denounce the entire agreement if the other party partakes in grave breaches of human rights.

In fact, during the past 25 years, the EU has never made use of this clause in order to meaningfully sanction human rights violations committed by various partners. A recent analysis shows that out of the existing 23 activations to date (all based on the Cotonou Agreement), none was based solely on breaches of human rights, but came in response to breaches of the other non-trade objectives which occurred in various contexts of civil unrest.[3]

Furthermore, recent official reports claim that a link between the HRC and an improvement towards the human rights situations in certain third-party States (in this case, Mexico and Chile) is difficult to establish.[4]

From an International Law point of view, this raises several questions which the present article aims to answer. First, what is the status of the HRC in relation to treaty law? Second, does the current form of the HRC provide an actual effective mechanism for the protection of human rights? Third, how and can the HRC be improved by the EU in order to provide better results for individuals?

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[1] For instance, the North American Agreement on Labor Cooperation functioned as a supplement agreement to the North American Free Trade Agreement.

[2] Bulletin of the European Union. No. 5/1995, par. 1.2.3.

[3] Anne-Carlijn Prickartz, Isabel Staudinger, "Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements", *Europe and the World: A law review*, vol. 3, issue 1/2019, p. 20.

[4] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 114.

2. A short comparative history of the European Union's HRC

Promoting human rights worldwide represents a fundamental aspect of the Union's foreign policy.[1] Nevertheless, conditioning international agreements to human rights protection has been the source of numerous internal debates at EU level which will not be pursued in this paper. It suffices to mention that the European Parliament has been a close promoter of introducing the HRC, while the Council and Commission have had a more trade-oriented perspective.

The first such clause has been introduced in the fourth iteration of the Lomé Convention in 1989 (now replaced by the Cotonou Agreement).[2] This was a trade liberalisation treaty between the States of the European Community and more than 60 former colony States from Africa, the Caribbean and the Pacific (ACP) regions. The initial forms of the Convention did not feature references to human rights which were later added following the Ugandan massacres of the 1970s.[3] A short text analysis shows that no legal obligations were in fact entailed. Lomé III only featured references in the preamble and in an annexed joint declaration,[4] while Lomé IV's Article 5 features wording which does not express legal obligations (e.g. *"deep attachment to human dignity and human rights"*).[5] Therefore, the first versions of the HRC were only political by nature.

The early 1990's saw the EU ratify numerous agreements with States from South America and Eastern Europe. The large number of agreements concluded with nations from different political mediums in such a short span of time determined a heterogenous development of the HRC dependent to specific region policies. This is demonstrated in an EU report from 1995 which classifies all the human rights references in all agreements in force at the time.[6] For example, most of the States from Middle East and Maghreb (with the notable exception of Tunisia) only included references in the preamble of the agreements, while most nations of the OSCE have included essential clauses which had potential legal implications. Additionally, certain treaties named the HRC as essential clauses without also introducing non-execution clauses (e.g. Argentina, Brazil, Vietnam). This is relevant as the

[1] https://europa.eu/european-union/topics/human-rights_en, last visited on 5/11/2020.

[2] Daniela Donno, Michael Neureiter, "Can human rights conditionality reduce repression? Examining the European Union's economic agreements", *The Review of International Organizations*, vol. 13, issue 3/2018, pp. 335- 357, p. 338.

[3] Karen Elizabeth Smith, "The use of political conditionality in the EU's relations with third countries : how effective?", *EUI Working Papers SPS,* no. 7/1997, p. 11.

[4] Third ACP-EEC Convention (Lomé III), preamble recital 4 and Annex I.

[5] Fourth ACP-EEC Convention (Lomé IV), Article 5.

[6] COM(95) 216, Annex 3, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995DC0216&from=EN], last visited on 5/11/2020.

interpretation of the agreement in case of a breach would have to be made in light of the customary rules codified in the Vienna Convention on the Law of Treaties (VCLT).

Moreover, the essential clauses seen in Europe were split between the "Baltic clauses" and the "Bulgarian clauses". The former ones were considered more rigid as they only allowed either party to suspend the agreement in case of serious breaches of human rights. The latter consider the suspension of the agreement to be a last-case scenario which should only be applied after other "appropriate measures" are first taken. Such measures include consultations of the breaching party and, in some cases, of a committee established through the agreement. Thus, a criterion of proportionality was introduced.[1]

By 1995, the EU decided to systematically include the HRC throughout all of its agreements. Thus, generally, the EU will seek to first conclude a "Framework Agreement" with the third State which features relevant details to the HRC (e.g. essential element clauses, non-execution clauses, observation mechanisms, dispute settlement mechanisms). All subsequent agreements with the State, irrespective of their scope, will contain references to the framework. However, discrepancies remain to this day, as some negotiations resulted in objectively better mechanisms than others. For example, in regard to monitoring mechanisms, none of the agreements included permanent committees to assess human rights violations. Therefore, only a few States went further and established *ad hoc* HRC committees.[2]

Another issue noted since 1995 has referred to the fact that the HRC was seldom implemented in sectorial agreements. This introduces further issues since such treaties tend to cover areas in which human rights abuses are frequent (e.g. textile production). The EU seems interested in remedying this situation and has begun introducing relevant references through Protocols to Fisheries Agreements concluded with Morocco and Cote d'Ivoire in 2013.[3]

At the present time, an additional obstacle can be observed during treaty negotiations. Developed States tend to refuse such clauses as they consider

[1] Nicolas Hachez, "'Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?", *Leuven Centre for Global Governance Studies*, Working Paper 158, 2015, p. 10.

[2] Lorand Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" study requested by the European Parliament, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf], last visited on 5/11/2020, p. 10.

[3] Lorand Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" study requested by the European Parliament, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf], last visited on 5/11/2020, p. 7.

them irrelevant to their situation. This led to various stalemates during negotiations with Australia[1] and Canada.[2]

3. HRC – between soft law and hard law

The previous part demonstrated that the HRC has had a unique development. As such, it requires an in-depth analysis of its variations in regard to the law of treaties in order to properly asses its implications.

First, it should be assessed whether the HRC is a form of soft law or hard law according to its binding character. Doctrine identifies three frequently used instruments of soft law: resolutions of international organisations, non-binding international agreements, and abstract non-committal clauses of international agreements.[3] While it is clear that the first situation is not relevant, it must be analysed whether the HRC-containing agreements or only the clauses themselves can be understood as forms of soft law.

Determining the binding nature of an entire agreement is a complex task, as demonstrated by modern practice. There is a clear tendency towards concluding international agreements which are not necessarily legally binding, commonly denominated as "memorandums of understanding".[4] In order to establish the legal character of an agreement, the International Court of Justice applies a series of customary conditions[5] codified by the VCLT.[6] In this regard, all of the EU framework agreements undoubtedly fall under the purview of the definition set forth by the VCLT. They are conventions concluded by the Union based on its international legal personality and third States with the express goal of introducing legal obligations in a plethora of

[1] Tobias Dolle, "Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages", in the volume *The Influence of Human Rights on International Law,* Springer International Publishing, London, 2014, p. 220.

[2] Katharina Meissner, Lachlan McKenzie "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes*", Journal of European Public Policy*, volume 26, no. 9, 2019, pp. 1273-1291, p. 1273.

[3] Karolina Podstawa, Viorica Vita, "Report analysing the findings of the research of the other work packages on policy tools", Work Package No. 14 – Deliverable No. 1 of the FRAME FP 7 research project, [http://www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-14.1.pdf], last visited on 5/11/2020, p. 29.

[4] Anthony Aust, "Modern Treaty Law and Practice", 2nd Ed., Cambridge University Press, Cambridge, 2007, p. 33.

[5] Jan Klabbers, "Qatar v. Bahrain: the Concept of „Treaty' in International Law." *Archiv Des Völkerrechts*, vol. 33, no. 3, July 1995, pp. 361–376, p. 366.

[6] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgement, ICJ Reports 1994. p. 112, par. 23.

domains. For instance, the Cotonou Agreement mentions that is based on cooperation "underpinned by a legally binding system".[1]

As far as the legality of the clause itself is concerned, professors Abbot and Snidal's theory of relative hard law will be applied. They argue that the line between soft law and hard law is currently so unclear that any clause's legality can only be appreciated based on three main attributes: precision, delegation and the level of obligation entailed.[2]

Precision refers to the amount of details provided by the parties in order to avoid overinterpretation. Unlike other States' clauses of conditionality which tend to include references to specific labour rights, the HRC is drafted as a generalised article concerning the protection of human rights as a whole. There is a distinct lack of precision in this matter. Some HRC include references solely to the Universal Declaration of Human Rights,[3] others also reference the European Convention of Human Rights or the Helsinki Final Act[4] and one even goes as far as referencing any "other relevant international human rights instruments".[5] Given the lack of precision, one may interpret that this also includes jurisprudential evolutions of such conventions, in particular of the ECtHR. Thus, the HRC appears akin to a soft law clause from this point of view.

Delegation implies that the parties ensure the existence of an efficient body which analyses possible breaches of the clause and provides solutions. Abbot and Snidal further classify such bodies in order to determine the weakness of the delegation trait. For example, an "international consultative body that facilitates political bargaining" would only demonstrate a low level of legality.[6] In fact, as previously mentioned, the HRC have never included a permanent and dedicated monitoring committee. Exceptionally, ad hoc committees dedicated to other sectors were created which could exceptionally take human rights issues into account.[7] However, it should be mentioned that

[1] Partnership Agreement 2000/483/EC — between ACP countries and the EU (Cotonou Agreement), Article 2.

[2] Kenneth W. Abbott, Duncan Snidal, "Hard and Soft Law in International Governance", *International Organization*, vol. 54, no. 3, 2000, pp. 421–456, p. 422.

[3] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, Article 1.

[4] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, Article 2 (1).

[5] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Article 1 (1).

[6] Kenneth W. Abbott, Duncan Snidal, "Hard and Soft Law in International Governance", *International Organization*, vol. 54, no. 3, 2000, pp. 421–456, p. 424.

[7] Decision No 1/2003 of the EU-Morocco Association Council of 24 February 2003 setting up subcommittees of the Association Committee, Annex 1.

EU association agreements include the formation of interparliamentary committees which have a general mandate over all aspects included in the treaty.[1] As an example, the EU Global Agreement with Mexico introduces no less than three monitoring mechanisms: a joint parliamentary committee, a joint council and a dispute settlement mechanism through the World Trade Organisation, yet only useable for trade issues. The former two are mostly political by nature and tend to have neutral stances on human rights problems, as an EU report aptly shows.[2]

The level of obligation refers to whether the clause is legally binding and, if so, how. This aspect ties heavily with the following chapter, the value of breaching the HRC, and will be thus continued.\

4. The HRC and material breaches under VCLT

Following the purely political clauses featured in the Lomé Convention, the HRC included in the EU – Argentina cooperation agreement of 1990 is considered to be the first one to be "operative". In fact, its text does not seem much different to that of Lomé IV: *"Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina."* Similar clauses were introduced in agreements with Uruguay, Paraguay or Chile.[3]

It seems that the European Commission's (EU's negotiator) logic was to implement a clause that states the factual situation at the moment of treaty's ratification in order to be able to invoke a fundamental change of circumstance (*rebus sic stantibus*) as defined by Article 62 of the VCLT if a human rights crisis would erupt in Argentina.[4] As professor Bartels notes, this is not a sensible solution, as it would demonstrate that the EU has foreseen the change of circumstances.[5] Thus, the EU later went further and expressly

[1] Lorand Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" study requested by the European Parliament, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf], last visited on 5/11/2020, p. 10.

[2] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", pp. 90-91.

[3] Anne-Carlijn Prickartz, Isabel Staudinger, "Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements", *Europe and the World: A law review*, vol. 3, issue 1/2019, p. 8.

[4] Written Question No 115/78 [1978] OJ C 199/27.

[5] Anne-Carlijn Prickartz, Isabel Staudinger, "Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements", *Europe and the World: A law review*, vol. 3, issue 1/2019, p. 12

mentioned in its next agreements that the clause represents "an essential element of this agreement" in order to be able to invoke a material breach in accordance with Article 60 of VCLT. Of course, Article 60 is also a codification of a well-recognised custom[1] and therefore should have ensured maximum applicability.

Mentioning the essential elements formula does indeed create a right to invoke material breaches under international law irrespective of the clause's relation to the treaty's purpose.[2] Nevertheless, the applicable rule should depend on the way in which the clause is drafted. For instance, the afore-cited HRC merely mentions the protection of human rights as a fundament for cooperation; there is no clear action or inaction which binds the parties. Therefore, invoking a material breach in the sense of Article 60 (par. 3, letter b) appears inapplicable. Furthermore, it is difficult, if not impossible, to argue that breaching human rights would amount to a repudiation of an entire treaty, the second possible reason to invoke Article 60.

These are the probable reasons for which the EU decided to subsequently introduce non-execution clauses for the HRC. The clauses expressly allow the parties to suspend, terminate or adopt specific measures in case of human rights abuses. Thus, the issue of material breaches is entirely avoided as the parties establish a much lower and consented threshold. For the "Baltic" clause, the level of legal obligation is clear: the party must respect the human rights requirement or it will face suspension or termination of the agreement if the other party wishes so.

The more recent and popular "Bulgarian" clause raises certain practical issues. In this case, the EU must first take appropriate and proportionate measures in case of human rights abuses and only as a last resort may apply a suspension of the agreement. Therefore, in theory, a legal sanctionable obligation exists in case of breaches. In practice, the EU has never used the suspension and, from a political point of view, it is difficult to imagine it will since promoting human rights over the economic benefits of a trade agreement is an issue about which even internal EU organs still have their debates. As for the "appropriate measures", their effect seems to be lacklustre for individuals, as seen in several post-factum official reports which will be analysed in the next subsection. The situation has evolved to the point in which the 2015 EU – Republic of Korea Framework Agreement does not even

[1] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Reports 16, par. 47.

[2] International Law Commission, "Draft Articles on the Law of Treaties with commentaries", Yearbook of the International Law Commission, 1966, vol. II, p. 255.

contain the words “suspension” or “termination” in relation to the HRC. The only clue towards this possibility is an annexed Joint Declaration which qualifies the HRC’s “cases of special urgency” as, in fact, material breaches of the agreement (which can, thus, be sanctioned through suspension).[1]

To summarise the legal analysis, the HRC appears to fall somewhere in the middle of the axis between soft law and hard law, as seen in the Abbot and Snidal non-binary theory. Thus, as long as the clause does not clearly express actions or inactions for the States to respect, the material breach cannot be invoked and the HRC falls under soft law territory. If human rights obligations are clearly stated, then the material breach becomes invokable under Article 60 (par. 3, letter b) and it becomes an issue of hard law. Furthermore, if a ‘non-execution clause’ is added then, irrespective of the precision of the formulation, hard law nature becomes a certainty. While the practical nature of the clause may be debatable, theoretical legal consequences certainly exist if the mentioned conditions are met.

5. Assessing the effectivity of the HRC – is it possible?

Determining the practical impact of the clause proves to be a difficult task. This is both because the EU has never applied this sanction, but also because a clear link between European action and foreign improvements of human rights situations cannot be established. Thus, the analysis will proceed twofold. First, how is the HRC supposed to motivate the contracting State to respect human rights? Second, what makes noticing the effects at individual level so difficult?

As far as the theoretical motivation is concerned, a now popular theory of international relations implies that there are two types of treaty conditionality, positive and negative, also commonly named the “carrot and stick” approach.[2] In order to achieve maximum efficiency, the HRC should benefit from both.

Negative conditionality (the stick), on one hand, implies that a party can sanction the other in order to obtain its goal (in this case, respecting human rights). The EU can achieve this by invoking the suspension/termination of the agreement with the abusing State in accordance with the afore-mentioned

[1] Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part - Joint Interpretative Declaration Concerning Articles 45 and 46.

[2] Hadewych Hazelzet, “Carrots or Sticks? EU and US reactions to Human Rights violations (1989-2000)”, *EUI PhD Theses*, 2001, [https://cadmus.eui.eu/bitstream/handle/1814/7157/2003_Hazelzet.pdf?sequence=3], last visited on 5/11/2020, p. 4.

rules. Making use of the other political measures required by the "Bulgarian" clause cannot amount to more than simple warnings. This becomes an issue as the EU does not seem politically interested in applying the maximum sanctions at its disposal, having not done so in over 25 years when referring exclusively to human rights violations. Moreover, as the European Parliament itself puts it, not exercising this sanction affects the credibility of the Union's human rights policy.[1]

Positive conditionality (the carrot), on the other hand, implies an incentive-based approach in order to attain human rights protection. This becomes a problem for EU trade agreements which already usually provide full elimination of tariffs, thus rendering future economic reward impossible.[2] Undoubtedly, some examples of incentives can be found in practice, especially in relation with States interested to become part of the EU in the future. For instance, enlargement has been recognised as an EU "carrot" for Turkey for many years.[3] Still, the issue that not all of EU's agreement network benefits from the same reward suggests a double standard which can determine certain States to be less interested in respecting the HRC.

Having these aspects considered, from a State-side perspective, the clause's efficiency seems to be low.

From the individual's perspective, the effects are difficult to observe. This is not only due to the fact that the EU has not sanctioned its partners' grave abuses of human rights. In fact, a clear relation between improvement of human rights situation and the HRC cannot be determined because, generally, the contracting State will be under numerous sources of pressure to improve its situation. Notwithstanding the clause, the EU itself has turned towards other means of promoting human rights protection, including the Generalised Scheme of Preferences (GSP) or even sanctions in order to protect specific rights (e.g. in order to protect the right to life, the EU has restricted exports of instruments linked to the death penalty to States such as Vietnam).[4] In addition, other international actors such as the United Nations may also take

[1] European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008IP0405&from=FR], last visited on 5/11/2020, par. 21.

[2] Ingo Borchert, Paola Conconi, Mattia Di Ubaldo, Cristina Herghelegiu, "The Pursuit of Non-Trade Policy Objectives in EU Trade Policy" Working Papers ECARES, September 2020, p. 20.

[3] Piotr Zalewski, "Sticks, carrots and great expectations: Human rights conditionality and Turkey's path towards membership of the European Union", *Warsaw Center for International Relations Working Paper*, no.9, 2004, pp. 11-12.

[4] Daniela Sicurelli "The conditions for effectiveness of EU human rights promotion in non-democratic states. A case study of Vietnam", *Journal of European Integration*, vol. 39, no. 6, 2017, pp. 739-753, p. 745.

simultaneous actions towards the same goal.[1] Moreover, internal actors such as NGO's may also have a large influence over the matter.

This obstacle led not only to a lack of literature on the matter, but, in fact, even the EU's amount of ex-post assessments of the agreements' human rights effects appears unremarkable. By 2015, no official ex-post report has been completed and methodologies were only beginning to be proposed by specialists.[2] In 2017, one comprehensive ex-post report has been published in relation with the HRC included in trade agreements with Mexico and Chile. The conclusions of the Mexican report indicate similar findings to that of the present paper: a legally binding clause which has never been invoked, a difficulty in assessing actual effects over human rights and, in the few cases where human rights improvements were found, they were mainly caused by internal political reasons and not thanks to the HRC. At best, the clause had modest results.[3] Similarly, the Chilean clause's effects are characterised as "very small".[4] What the HRC did manage was to implement various fora for political discussion and engagement between EU and national institutions.

Thus, the level of efficiency for individuals is also low.

6. Is improving the HRC a realistic solution anymore?

Following the numerous previous criticisms of the current HRC system, it is only natural that there is also a lot of room for improvement. Various authors have been providing suggestions for many years. Some of them will be thus presented together with their own disadvantages.

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[1] Enrico Carisch, Loraine Rickard-Martin, Shawna Meister, "The Evolution of UN Sanctions from a Tool of Warfare to a Tool of Peace, Security and Human Rights", Springer International Publishing, Cham, 2017, p. 165.

[2] Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, "The impact of EU trade and development policies on human rights", Work Package No. 9.2 of the FRAME FP 7 research project, p. 97.

[3] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 114.

[4] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 179.

From a treaty law point of view, enhancing the hard law status of the clause is a must. Regarding the delegation side of the issue in particular, the Union should seek to introduce dedicated mechanisms such as legal commissions to analyse breaches of human rights following individual complaints and enable the EU sanctions to fare efficiently in a non-political way. Thus, the uncertainty of a sanction that depends solely on political factors would be eliminated.

The ex-post assessment for the Mexico Agreement also provides suggestions for monitoring mechanisms such as one that would perform regular human rights impact assessments, one that would allow individuals to raise complaints against human rights abuses which would trigger an EU investigation or even a human rights commission to regularly analyse the parties' overall compliance with the HRC.[1] Professor Bartels mentions that a standard HRC should include an obligation for the parties to perform regular human rights impact assessments.[2] Still, in light of the methodology issues described in the previous sub-section, this particular solution does not seem feasible. Of course, another caveat of the proposed mechanisms is that they rely on the negotiator's ability to introduce them in a legally binding agreement. It would seem unlikely that third States, after not being subjected to meaningful sanctions through the HRC for many years, would agree to a legal and more efficient way of identifying and dealing with human rights abuses.

Another potential improvement refers to increasing the European Parliament's internal role in deciding over applying the sanctions of agreement suspension or termination.[3] Currently, the Parliament has no role in this domain, the Council being the sole institution able to decide over suspensions.[4] As mentioned previously, the EP tends to have a stronger tie to the protection of human rights and, as such, it should have a more important role which, in turn, would ensure better results for the HRC beneficiaries. On the other hand, allowing the Parliament such prerogatives may lead to even more politicised results. Thus, the application of sanctions may find itself

[1] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 45.

[2] Lorand Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" *German Institute for Human Rights and Misereor*, 2014, [https://ssrn.com/abstract=2405852], last visited on 5/11/2020, p. 31.

[3] Lorand Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" German Institute for Human Rights and Misereor, 2014, [https://ssrn.com/abstract=2405852], last visited on 5/11/2020, p. 33.

[4] Treaty on the Functioning of the European Union, Article 218 (9).

under an even more subjective situation: the EP may find itself inclined not to sanction abuses committed in States with which it may share ideologies at a certain point in time.

Relevant analyses show that the HRC faces a plethora of issues. Furthermore, while some experts suggest improvements, their implementation does not only depend on the EU's will to introduce them, but also on the ability to ensure that the contracting party will also agree with them. One might go as far as asking what even is the point of the clause since it does not produce much in terms of results for the protection of individuals. Moreover, the EU already implements other measures of external human rights protection through the GSP and other sanctions which have arguably clearer results. For instance, by banning exports of death penalty instruments to Vietnam, the EU managed to both heavily delay the application of capital punishments, but also sparked civil debates on the matter in the Asian State.[1]

Unfortunately, it would seem that the role of the HRC appears to be rather political by default; it is more of a way for the EU and its institutions to present themselves as international promoters of human rights than to provide meaningful change through legal means. To illustrate this issue, the negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada can be mentioned. In this case, the contracting State was heavily opposed to introducing the HRC. Furthermore, the EU Commission and the Member States were interested in making concessions on the matter.[2] Nevertheless, the European Parliament decided to use this as an opportunity to take a firm stance and made implementing the HRC as one of its strategic objectives. By being the sole EU institution to press on this matter, the EP was in fact interested in promoting itself as a protector of human rights and, thus, increase its legitimacy. This is further confirmed through interviews with EP officials at the time.[3] On the other hand, the Parliament has also been somewhat more forgiving during negotiations with States which featured a much worse human rights record (e.g. Columbia).[4] Thus, it would appear that the EP is more interested in projecting a certain image of itself as a human

[1] Daniela Sicurelli "The conditions for effectiveness of EU human rights promotion in non-democratic states. A case study of Vietnam", *Journal of European Integration*, vol. 39, no. 6, 2017, pp. 739-753, p. 748.

[2] Katharina Meissner, Lachlan McKenzie, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes", *Journal of European Public Policy*, vol. 26, no. 9, 2019, pp. 1273-1291, p. 1281.

[3] Katharina Meissner, Lachlan McKenzie, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes", *Journal of European Public Policy*, vol. 26, no. 9, 2019, pp. 1282-1283.

[4] Lore Van den Putte, Ferdi De Ville, Jan Orbie "The European Parliament as an international actor in trade. From power to impact", in the volume *The European Parliament and its International Relations*, Routledge, London, 2015, pp. 52–69 p. 64.

rights promoter for its own citizens through high profile negotiations such as those concerning CETA, than by enforcing the same standards to other States.

Certainly, this does not affect the Union's overall role in human rights protection, which it ensures through other mediums aforementioned. Regardless, this raises the questions on the relevancy of the HRC which may be seen as a somewhat outdated mechanism, especially in relation with partners outside of future enlargement objectives.

7. Conclusions

This paper has exposed a number of problems that the human rights clause encounters or may encounter at the present moment. In sum, two main issues can be identified.

First, by analysing the history of the clause, great differences in drafting were found which have the potential of leading to double standards. Furthermore, differences in drafting lead to some clauses not being legally binding which can be a major issue if the EU's intention is to effectively ensure human rights protection.

Second, as far as effectivity of the HRC is concerned, ex-post assessment appears to be a difficult task which not even the EU has been able to perform consistently. Thus, suggestions of implementing assessment commissions for every EU Agreement appear unrealistic.

Moreover, data suggests that the EU already implemented other mechanisms of enforcing external human rights protection which feature clear results. Thus, the HRC appears as an outdated mechanism which only serves political purposes for the Union and its institutions. At best, the clause can be used only when there is a political interest from the EU such as if the agreement is concluded with a neighbouring State which may become part of a future enlargement. In such a case, it is imperative that the State meets the required criteria. Thus, the clause can become an effective mechanism since the State now has both an incentive (enlargement) and a possible sanction (suspension of agreement) related to respecting human rights.

As an overall conclusion, the high number of issues identified in relation with the HRC indicate not only a lack of effectivity for human rights protection and an obstacle for the EU during its negotiations, but also that it may be time for the Union to stop introducing such a clause in a generalised manner and begin relying more on its other mechanisms. This would provide benefits such as better strength in agreement negotiation and more time for the EU's human

rights impact assessment specialists to focus on the effects of the GSP or other means of promoting human rights.

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