Asociația de Drept Internațional și Relații Internaționale

Publicație semestrială
Nr. 30 / ianuarie – iunie 2024

REVISTA ROMÂNĂ DE DREPT INTERNAŢIONAL

ROMANIAN JOURNAL OF INTERNATIONAL LAW

The Association for International Law and International Relations

Biannual publication
No. 30 / January – June 2024

The Romanian Journal of International Law is published biannually by the Romanian Branch of the International Law Association, which is also the International Law Section of the Romanian Association for International Law and International Relations (ADIRI). Established in 1966, ADIRI is currently an association of public interest. The Association provides qualified expertise in the field of international law and international relations, as well as for European affairs. As a forum of scientific debate, it organizes seminars, conferences and elaborates studies and opinions upon request or at its own initiative.

In order to contact the Editorial Board, you may write to the following e-mail addresses: bogdan.aurescu@drept.unibuc.ro; elena.lazar@drept.unibuc.ro; filiplariu@drept.unibuc.ro

CUPRINS

TABLE OF CONTENTS

Cuvânt înainte / Foreword

It is with great pleasure that we present the latest issue of the Romanian Journal of International Law, showcasing a diverse collection of articles that offer new insights into various fields of international law.

The first article, authored by Lucian Bojin, titled 'Italian Classic School of International Law through the Lenses of the International Relations Theory', evaluates how key theoretical concepts of international law were understood by Italian jurists and explores their implicit perspectives on international relations, emphasizing the distinction between law as a system of rules and law as discourse.

In the next article, 'Les nouveaux moyens de faire la guerre. L'intelligence artificielle dans le domaine du droit international humanitaire', Ioana-Alexandra Smărăndescu and Nina-Maria Vărzaru explore the growing role of artificial intelligence in modern warfare. Their study addresses the implications of AI on international humanitarian law, raising important questions about the compatibility of existing legal frameworks with the challenges posed by autonomous technologies in military operations.

Andreea Ivanov's article, 'The OECD Accession Process – Romania's Road to Economic Progress', delves into Romania's journey toward OECD membership. Ivanov presents an analysis of the accession process, highlighting Romania's bilateral relations with the Organisation, the benefits of membership, and the strategic advantages of the pre-accession period.

Finally, Sabin Solomon in his article 'Jurisdiction or Admissibility? The Nature of the Monetary Gold Principle as Applied by the International Court of Justice' addresses a key theoretical question about the ICJ case. Solomon investigates whether this principle pertains to the Court's jurisdiction or admissibility of cases, providing a nuanced analysis of the International Court of Justice's case law.

We trust that this issue will engage our readers with its breadth of topics and thought-provoking analyses, contributing meaningfully to the ongoing discourse in international law.

Professor Dr. Bogdan Aurescu

Editor-in-Chief of the Romanian Journal of International Law

Judge of the International Court of Justice

Articole
Articles

Italian Classic School of International Law through the Lenses of the International Relations Theory

Lucian BOJIN*

The West University of Timișoara, Faculty of Law

Abstract: *The study attempts to analyze the contributions of the Italian classic School of international law through the lenses of the international relations theory. To this effect, several important theoretical concepts in international law dealt with by some prominent members of the Italian classic School were selected. The approaches adopted by the Italian lawyers towards these concepts are then employed to qualify their (sometimes implied) view on the international affairs, using the categories of the international relations theory. The conclusion also stresses the difference between the conceptions of law as a system of rules and law as discourse, and why this distinction can be helpful in the field of International Relations theory.*

Keywords: *international law, international relations, liberalism, realism, Italian School of International Law*

* *Associate Professor, West University of Timisoara, Law Faculty, lucian.bojin@e-uvt.ro.*The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to. This study was drafted during author's stage at the Accademia di Romania in Rome, with the support of the Romanian Government, through national scholarships program "Vasile Pârvan".

1. Introduction. Theoretical assumptions and framework

The purpose of this study is to assess the contribution of the Italian classic School of International Law (ICSIL) through the lenses of some relevant concepts borrowed from the theory of international relations. The same or a similar type of approach might be used, in general, to evaluate the contribution of International Law (IL), international legal doctrine and the legal discipline itself to the problems that are the concern of international relations (IR) theory.

International law is part of what Barry Buzan and Richard Little called the "political sector of analysis" in IR,[1] one of the five sectors of analysis (together with the military, economic, socio-cultural and environmental), the purpose of which is to theoretically (and provisionally) "disaggregate" the field of IR in order to deepen its analysis. This means that both international law (as instituted system of rules) and international legal doctrine (as intellectual product of the legal community) are rather marginal phenomena in the field of IR. IL does not enjoy primacy not even within the political sector, where diplomacy, for example, is a much more important phenomenon. However, its marginality does not imply neglection from IR theory, as the phenomenon is regarded as having a certain degree of relevance by most IR theorists. Some of them even privileged its study as a means of contributing to the maintenance of international order, while simultaneously acknowledging its limitations in performing this function.[2] This status of IL as enjoying a generally accepted but also limited relevance for IR was, probably, best described by Stanley Hoffmann, which qualified IL as "*a type of* international relations which appears in *nearly* all international systems" (emphasis added).[3]

IR theorists approach, therefore, the IL as part of international politics. They do so from the perspective of political theory (IR being a subfield of the latter). This is in stark contrast with the lawyers' approach on their own field, for which the separation between law and politics is a constitutive element of

---

[1] Barry Buzan, Richard Little, *Sistemele internaționale în istoria lumii* (2009), Polirom, Iași, 2009, [original: *International Systems in World History. Remaking the Study of International Relations* (2000)], p. 90.

[2] Hedley Bull, *Societatea anarhică (*1998), Știința, Chișinău, [original: *The Anarchical Society: A study of order in world politics*, (1977)], p. 132 and subsequent.

[3] Stanley Hoffmann, *Ianus și Minerva. Eseuri asupra teoriei și practicii internaționale (1999)*, Știința, Chișinău, [original: *Janus and Minerva. Essays in the Theory and Practice of Interanational Relations* (1997)], p. 134.

the legal field's identity. As previously mentioned, in this paper I adopt the approach of IR, and not the IL one. The IL theory will, therefore, be the object of the study and not its methodological support. The forays into IL theoretical questions will be meant to illustrate points that are relevant for IR theory.

To this effect, I will select a number of theoretical issues related to IL which have the potential to unveil a certain propensity of the international lawyers towards a certain view of the world politics, in function of the positions adopted by such lawyers on the said theoretical legal issues. I will take ICSIL as a "sample" of the international legal community in general and I will select, within ICSIL, a number of lawyers, something that would allow also to reflect the evolution of the approaches spanning over more than half-century.

Some disclaimers are necessary, at this point. First, the assessment of the theoretical legal issues from the standpoint of political theory will necessarily overlook important theoretical nuances for lawyers (or even important parts of legal theory, that are too technical to be politically relevant). The second disclaimer concerns the inherently anachronistic character of the approach adopted. While the discussed opinions on legal theory issues date back to late 19th century up to mid-20th century, the relevant categories through which these are looked at have crystallized in IR theory rather in the second half of the 20th Century. Therefore, tagging one legal opinion or another with a label inspired from IR theory does not mean in any way that the author of such opinion would have properly adopted such a political approach, either intentionally or implicitly.

The interdisciplinary approach between IR and IL received attention in a vast literature during the last three decades.[4] However, this is focused rather on contemporary issues of international politics and IL[5] or on theoretical challenges,[6] but does not generally focus on the history of international law. On the other hand, the works in the latter field, although managing to link developments in IL with the political context of the time, do not apply in a general and consistent manner the concepts or the approaches specific to IR

[4] E.g., the encompassing review made by Anne-Marie Slaughter, Andrew Tulumello, Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", in American Journal of International Law, vol. 92 (1998), pp. 367-397.

[5] E.g. Christian Reus-Smit (ed.), *The Politics of International Law*, Cambridge University Press, 2004, Beth Simmons, Richard Steinberg (eds.), *International Law and International Relations* (2006), Cambridge University Press.

[6] Judith Goldstein, Miles Kahler, Robert Keohane, Anne-Marie Slaughter (eds.), *Legalization and World Politics* (2001), MIT Press.

theory.[7] One well known exception is provided by the works of Martti Koskeniemmi[8] which clearly prove his familiarity with IR theory. However, his focus on the structure of legal argument, rather than on the political relevance of the latter[9] contributes to qualify his work as pertaining to the field of IL, not to the field of IR.

The study will proceed as follows. In the first part (sections 2 to 5), I will make a brief summary of the main topics and points of debate in IR theory that, I believe, are relevant for the IL field. I will then continue with a brief presentation of the specificities of IL field (both in relation with IR and with the legal discipline in general). On that basis, I will select eight theoretical issues of IL that I retain relevant for a "qualification" of IL theoretical positions from the perspective of IR theory. The second part (sections 6 to 12) will open with a presentation of the ICSIL and its main representatives, out of which I selected Pasquale Fiore, Dionisio Anzilotti and Roberto Ago. I will then assess the positions expressed by the latter in relation with the theoretical issues selected from the perspective of IR theory. The study will end with some concluding remarks, stressing, among others, the importance of the constructivist distinction between law as a system of (enforceable) rules and law as discourse.

2. Main topics and points of debate in IR theory relevant to the IL field

Summarizing the IR theory in a couple of pages is, certainly, extremely difficult. Saying that such endeavour is audacious is a mere euphemism. However, it proves necessary, with all its downsides, since this study is addressed not only to IR researchers but also (and even mainly) to lawyers.

---

[7] Stefano Mannoni, *Potenza e ragione. La scienza del diritto internazionale nella crisi dell'equilibrio europeo (1870-1914)* (1999), Giuffre, Milano, Peter Hilpold (ed), *European International Law Traditions*, Springer, 2021.

[8] Martti Koskenniemi *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a new Epilogue* (2006), Cambridge University Press; Martti Koskenniemi M., *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870 – 1960* (2004), Cambridge University Press.

[9] This despite Koskeniemmi using the famous benchmark couple "apology" (of political power) – "utopia" (opposition to power in name of justice) group contributions from international lawyers. The couple apology/utopia would roughly approximate the opposition between realists and liberals in IR theory. Moreover, it might be mentioned Koskeniemmi allocates to ICSIL a rather small part of its attention, and somehow not proportionate with the historic impact of the latter over the discipline of IL.

The starting point for IR theory is that it deals with an anarchical society,[10] i.e. a group of social units that have no authority above them (in contrast with the hierarchically organized political society specific to States and domestic politics). Although the consequences that IR theorists draw from this situation differ depending the schools they are attached to (realism, liberalism, constructivism, etc.), this starting point is not contested. Anarchical does not, however, mean chaotic. Most IR theorists would agree that there exists, in the terms of Hedley Bull, an "international order", although, again, characterizing it would differ from one school to another. One can stick to Bull's description of a minimal threshold order that, in general (social order), would relatively ensure the security against violence, honouring the agreements and security of possession.[11] In the case of the international order in an anarchic society, its three main specific purposes would be "the preservation of the system and the society of states itself",[12] "maintaining the independence and external sovereignty of individual states"[13] and the goal of peace (limiting the violence),[14] but this order also relatively ensures the previously mentioned general goals of the social order.[15]

Adopting this view on the international order triggers the question of the place of justice in such a system. Although order and justice are not inherently incompatible,[16] it is generally accepted that order constitutes a pre-requisite for realizing other values, including justice itself[17] (without entering, for now, into debates over what is intended for justice). Consequently, order enjoys some kind of primacy towards justice in the international society.[18] Translating the order versus justice dilemma from the perspective of the system to the perspective of the actors results in the security versus morality dilemma. Should States behave according to moral rules, or should they

[10] Kenneth Waltz, *Teoria politicii internaționale* (2006), Polirom, Iași (original: *Theory of International Politics*, McGraw Hill, New York, 1979), pp. 144 and *passim*, Hoffmann (1999) 134, Bull (1998).

[11] Bull, *op.cit.* fn 2, pp. 3-6.

[12] Ibidem, p. 15.

[13] Idem.

[14] Ibidem, p. 16.

[15] Ibidem, p. 17.

[16] Ibidem, p. 87.

[17] Ibidem, p. 81.

[18] Ibidem, p. 91.

simply follow their own interest (assumed to be the conservation of security) is another classic dilemma in both IR theory and practice. And in terms of means to ensure one's own security, the dilemma is can be worded as power versus morality.[19] All these dilemmas that permeate almost all fields of IR theory are, quite manifestly, relevant to the legal field. Order, security, justice, and power are all concepts intimately linked with the law (in general) in many ways (power as support of the law, power as an instrument of law, justice as a purpose of law, order as the product of law, etc.).

On the other hand, and in close relation to what was stated above, there are a number of issues that brought to the "grand debates" that structure the IR discipline: conflict versus cooperation, war versus peace, and centralization versus decentralization. These debates and these dilemmas or, better said, the positions adopted towards them, generate the great divisions in the field, the most important schools of IR.

To maintain things as simple as possible, I will briefly refer only to the schools of realism (including neo-realism), liberalism (including neo-liberalism) and constructivism.[20]

The realist school, still the most influential, building on the previous practice of States in the foreign policy field, underlines the necessary distinction between moral desirability and what is possible from a political point of view.[21] According to it, whereas in the realm of the domestic politics of liberal States, it was possible to develop a political practice that takes into account the moral objectives and values of the citizens, the same approach would not work in IR. That is because the international society has an anarchic structure, fundamentally different from the domestic one.[22] The consequence of the anarchical structure of the international society is that, in order to ensure their security, States need to resort to self-help. Hence, they cannot prioritize abstract moral values over their own interest of self-preservation. Conflict is unavoidable thus and if one prioritizes security, it also prioritizes power (and in particular, military power) as an instrument to ensure that security. The

---

[19] Edward H. Carr, *The Twenty Years Crisis 1919-1939. An Introduction to the Study of International Relations*, (1981), MacMillan, London (1st ed. 1939).

[20] A particular mention should be made, though, concerning the English School of IR which, forecasting constructivism, put an important accent on the study of IL by IR theorists, especially through the voice of Hedley Bull.

[21] Hans J. Morgenthau, *Politics among Nations. The Struggle for Power and Peace* (1948) Alfred Knopf, New York.

[22] Carr, *op.cit.* fn 19, pp. 177-180.

relations between the units of the system (the States) are fundamentally relations of power. And States' behavior should be guided by national interest, not by "moral values". Neo-realism maintains this basic view on the IR, adding instead a more solid theoretical basis for this pessimistic view. The explanation for this state of affairs does not lie, according to neo-realism, in an inclination of the human nature towards violence, but in the characteristics of the system as such. The anarchical structure of the international system constrains the actors to behave in a certain way (as described by realism), irrespective of their intentions or wishes.[23]

Liberalism, especially in the years prior to the 1st World War (WW1) and in the interwar period, favored a more "cooperative" and "centralized" perspective on the IR, believing that the successful model in the domestic politics of liberal States could be transplanted in the world politics. According to liberalism, rational actors will choose dialogue over conflict, and economic cooperation would prove that. International Law was meant to have a central role in a "liberal world order", and a similarly important role would pertain to international organizations, such as the League of Nations, established in the aftermath of the 1st World War. The failure of the liberal approaches to prevent the disaster of the 2nd World War (WW2) discredited this overly optimistic perspective of the first liberalism. Instead, neo-liberalism that developed after the 50's accepted much of the neo-realist theoretical assumptions, but launched correctives to the neo-realist model. Neo-liberals as Robert Keohane and Joseph Nye[24] maintained that, in certain circumstances, the development of cooperation is still possible, and international institutions and regimes can create the framework in which States can overcome the security dilemma by "repeating" the game of interaction.[25] Other neo-liberals underlined the importance of the non-state actors in IR, challenging as such the "fetishization" of the State as the single type of IR actor.

Constructivism was instrumental in questioning the theoretical assumptions of both realism and liberalism. By exploring the social construction of IR actors and social norms, constructivism diversified the instruments of analysis and broadened the field of research and reflection in IR. The constructivist

[23] Waltz, *op.cit.* fn 10.

[24]Robert Keohane, Joseph Nye, *Putere și interependență* (2009), Polirom, Iași (original: *Power and Interdependence*, Taylor & Francis, 1973).

[25]Joseph Nye, *Descifrarea conflictelor internaționale* (2005), Antet, Bucureşti, (original: *Understanding International Conflicts*, Longman, 2003), p. 25.

approach had an important impact on reassessing the significance of IL, not only as a system of rules, but also as language and discourse. The conclusion of this article will draw upon this distinction between the functions of law, as emphasized by constructivism.

Moving now towards the approaches in IR theory towards rules (moral rules but also, in a second place, the rules of IL), Hedley Bull[26] distinguished between three normative approaches. The first approach, the *skeptic or Hobbesian*, views States as free to follow their own interests, without regard to rules, which only limit their ability to survive and, thus, observance of rules creates a net disadvantage for States. The opposite approach is the one called *cosmopolitan or Kantian*, according to which not only rules are relevant in the international society, but such rules are meant to primarily protect the interests of the individuals. From this perspective, the difference between domestic society and international society is not a difference in essence. Finally, the mid-way position between the two is represented by *internationalists or Grotians*, according to which rules are indeed relevant, but as rules between States as international actors. In this approach, international law is developed as a law between States and protecting the system of States.

3. IL as a legal discipline and as part of IR phenomena

As it is generally understood, the legal disciplines overlap more or less with the branches of law, i.e. the fields of law that study the legal rules in specific socio-political fields (e.g. constitutional law, private law, administrative law, labour law, criminal law, etc.). In this logic, IL would simply be the set of rules applicable in IR and, as a legal discipline, the study of such rules. Although, in both meanings, IL dates back at least to the 16th century, until the mid-19th century, IL was seen rather as an appendix to diplomacy than a proper branch and field of law.[27] Consequently, when we deal with the field of IR from the perspective of IL, we need to bear in mind that international lawyers have to position themselves not only towards IR practitioners (i.e. diplomats) but also towards fellow lawyers, towards the legal community in general.[28]

---

[26] Bull, *op.cit.* fn 1, pp. 22-25, J. Nye, *op.cit.* fn 25, pp. 30-35.

[27] Koskeniemi, *op.cit.* 2004 fn 8, pp. 28-30.

[28] Bull (*op.cit.* fn 2, pp. 127-128) was among the first to acknowledge that, despite substantial differences between international and domestic law, due to the different political systems

The main problem with positioning the IL in the field of law rests on the fact that IL hardly matches the standard definition used for law in general, i.e. a system of rules which can be enforced by recourse to public coercion. This implies the existence of the public monopoly of legitimate coercion, i.e. of the State, with its three functions (powers): legislative function, executive function, and judiciary function. Centralization of powers (even followed by their separation, in the paradigm of constitutionalism) was possible in the hierarchical system of domestic political organization. However, as we saw, the international system is anarchical, therefore no organization, even loosely resembling the State, is possible. For that reason, following Hobbes and Hegel, some lawyers (chiefly John Austin,[29] but also internationalists such as Adolf Lasson and Karl Fricker)[30] denied IL the very character of being "legal", precisely because of the absence of coercion. International lawyers formulated various answers to this objection, which will be treated *infra* (section 8). However, even accepting that IL is "law", as specific as it is, the problem of the functions performed by IL in the international system, by comparison to the functions of domestic law in the domestic systems, remains.

It is generally believed that the main function of law in domestic legal systems is precisely coercion. Based on that, several other functions are performed: organization of the legal system and legal order, dispute resolution, prediction of future behavior of the members of the society. Even if one could say that, to a certain extent, IL may perform the same functions (or some of them) in the international system, it is manifest that it does not do so in a comparable way to domestic law in the domestic system. Historically, this was one of the issues that international lawyers had to tackle to defend their belonging to the legal community and to justify their job as jurists.

Another problem of international lawyers in defending their "legal" identity concerned, instead, the conceptual apparatus and the methodology of their "legal science", as the legal discipline was called in the 19th century. Legal theory was dominated by jusnaturalism until the 18th century, while towards the end of that century and up to the mid-19th century, the legal field was

within which they operate, the two share the same language and, moreover, the professional training of lawyers in the two fields is no different. Thus, Bull acknowledged the role of the epistemic legal community in maintaining the "unity" of law.

[29] Bull, *op.cit.* fn 2, p. 124, M. Koskenniemi, *op.cit.* 2004 fn 8, p. 34.

[30] Mannoni, *op.cit.* fn 7, pp. 29-32.

already nearly completely positivist.[31] Jusnaturalists saw the world order as of divine nature and law was just part of this order. Beyond strict legal rules, there were always some latent natural rights that could be activated in case the legal rules would bring "unnatural" consequences. After the rationalist Enlightenment in the 18th century, the human nature replaced the divine as the foundation of the natural order. However, the inner logic of jusnaturalism remained unchanged. All this was challenged by positivists who tried to establish the autonomy of law in relation to ethics and religion, therefore the law was reduced to law enacted (posited) by the sovereign, i.e. written law (mainly legislation and acknowledged customs). By mid-19th century that was the new consensus in the legal community (at least in civil law systems) and jusnaturalism was seen as "unscientific". However, IL remained jusnaturalist way into the second half of the 19th century[32] and this heavily affected the professional recognition from the other lawyers.

It was against this background that the IL discipline developed and asserted itself starting in the second half of the 19th century. This self-promotion included formulating views about world politics, i.e. about IR. They went as far as to indicate a design for the future organization of the world.

It should be mentioned from the outset that many international lawyers were part of a movement (professional but also somehow of the activist type) that was advocating a more significative role for international law in international affairs, as a part of an effort to create a better, more "civilized" international society (hence the epithet "gentle civilizer of nations" which Koskenniemi used to describe the IL of the second half of the 19th century).[33] They hoped to be able to realize the "peace through law",[34] an achievement that would have solved the problem of war, which in the 19th century was generally regarded as not being subject to law. These lawyers shared the dominant liberal ideas of the era in Western Europe, with their optimism and belief in progress. However, not all international lawyers were supportive of this kind of attitude.[35]

This sort of leanings informed lawyers' approaches towards power and its relationship with the law. For domestic lawyers, the relation power – law is

[31] Ibidem, pp. 13-14.

[32] Idem.

[33] Koskenniemi, *op.cit.* 2004 fn 8, pp. 12-19.

[34] Mannoni, *op.cit.* fn 7, pp. 75-76.

[35] Ibidem, p. 133.

ambivalent. On one hand, power supports law. Without the power, the coercion element of the law would not be possible. On the other hand, law organizes power, renders its exercise more predictable and, in the constitutional orders, it openly constrains power. It does so in the name of constitutional values, therefore, in a broad sense, it can be said that law constrains power in the name of justice. The same approach was not tenable as such with reference to IL and IR. As we have seen before, in the international order, the order itself prevails over justice. And in the absence of the institutionalized power (providing some guarantees of neutrality), the only power in the international system was the power of the stronger States. In the terms of Martti Koskenniemi,[36] the law (and legal argument) was left oscillating between "apology" (of the power of the individual States) and "utopia" (a wishful thinking construction where the law would be able to play a similar role to the one of domestic law). Hence, advocating a more significate role for law in IR implied advocating the development of international institutions that would "neutralize" power to make the law effective.

From a different perspective, international lawyers were fighting on the front of professional recognition from the legal community. They won that battle only by abandoning the jusnaturalist foundation of their field and adopting positivism, which rapidly spread among lawyers, to become the dominant view by the end of the 19th century.[37] But positivism for international lawyers meant something completely different in practice than for domestic lawyers. Adopting positivism in IL meant also adopting voluntarism, i.e. the view that law is created only by consent of the States. That made very distant any horizon in which the development of international institutions, and the ensuing centralization of the international order, would be possible. While voluntarism defended a certain equality between sovereign States, irrespective of their military, political or economic power, it also "frozen" and legitimized the anarchic society not only in practice, but also in principle.

[36] Koskenniemi, *op.cit.* 2006 fn 8.

[37] Mannoni, *op.cit.* fn 7, pp. 37-61, Jianming Shen, "The Basis of International Law: Why Nations Observe", in *Dickinson Journal of International Law* (1999), vol. 17(2), p. 311.

4. IR categories relevant for an assessment of the works of international lawyers

From what was discussed above, the dispute between realism and liberalism seems relevant to characterize the work of international lawyers. While it is quite obvious that most lawyers would qualify as "liberals" (and, indeed, some of them were truly and openly liberals), not all the theoretical positions they were supporting would favor the arguments of liberalism. For example, a crude (not very nuanced) voluntarism fits rather the realist position than the liberal one.

Even more adequate is the typology between Hobbesian, Kantian and Grotian approaches. Although lawyers' positions fall mainly within the latter two categories (with Kantians seemingly being "utopists" and Grotians being "apologists"), there were also a few "Hobbesian" lawyers.[38]

Finally, another typology promises to be fruitful for our proposed assessment, one that comes neither from IR theory nor from the legal field either, but from sociology. In the late 19th Century, the German sociologist Ferdinand Tőnnies coined the distinction between community (*Gemeinschaft*), a group of people solidly integrated, whose members have a strong sentiment of belonging to the group, and society (*Gesellschaft*), a group of rather independent members who associate voluntarily only to pursue limited objectives.[39] The distinction was rapidly adopted by international lawyers, such as Max Huber[40] or Georg Schwarzenberger.[41] On its basis, the latter coined the tripartite distinction between the law of power (based on a relationship of domination, in a society where power is central for the social structure and the units in the system are unequal in terms of their power), the law of coordination (based on a *Gemeinschaft*-type of reality, where the need for coercion is really low, and the members share common interests) and the law of reciprocity (applicable to a society where the power of actors is equal or comparable and although their interests are opposed, they are able to compromise). The various evolutions in the field of IL were somehow analyzed as movements between

[38] Mannoni, *op.cit.* fn 7, pp. 31 and 133, Koskenniemi, *op.cit.* (2004) fn 8, pp. 37 ff., Giulio Bartolini (ed.), *A History of International Law in Italy* (2020), Oxford University Press, 2020, p. 174.

[39] Ferdinand Tönnies, *Community and Civil Society* (2001), Cambridge University Press.

[40] Mannoni, *op.cit.* fn 7, p. 138.

[41] Georg Schwarzenberger, "The Three Types of Law", in *Ethics*, vol. 53(2) (1949).

these three types of law, reflecting changes in the nature of the international society.[42]

5. Theoretical issues of IL allowing for relevant characterization from the IR perspective

As mentioned in the introduction, I selected several theoretical problems specific to IL that, by their implications, would constitute good indicators for a characterization of the lawyers' propensities from an IR theory perspective (i.e. more liberal or realist leaning, Kantian or Grotian leaning, etc.).

I identified six such themes (although some others could be added or maybe replace some of the selected ones).

The first topic is the so-called "foundation of IL", i.e. the explanation given for the existence and the nature of IL. The positions adopted in relation to this topic could indicate what is the view of the lawyer towards the nature of the international system: is it an anarchy, a society or a community?

The second theme is the nature and the binding force of IL, a question dealing directly with the "negationist", or Austinian approach, denying the very character of "law" to IL.

The third is the problem of the subjects of IL. Here, limiting the subjects to States would indicate a preference for Hobbesianism or Grotianism, while expanding the category to include private persons would unveil a penchant for Kantianism. Including international organizations in the category of the subjects of IL would indicate either Grotianism or Kantianism, but would exclude Hobbesianism.

The fourth topic is the classic problem of the sources of IL. Again, preference for treaties would indicate a propensity for Hobbesianism (or, at most, Grotianism), but would exclude Kantianism. While acceptance of custom (as independent from States' consent) or general principles might indicate a tendency towards centralization, of either Grotian or Kantian pedigree.

The fifth selected issue is the relation between international and domestic law, the famous problem of the legal orders, with its heated debates between dualism and the two kinds of monism. Here, the theoretical stakes seem quite evident. Dualism would correspond to Grotianism, Monism with domestic

[42] Hoffmann, *op.cit.* fn 3, p. 140.

law primacy to Hobbesianism and Monism with international law primacy to Kantianism.

The last topic would cover the problem of war and peace, a central concern in IR theory and one on which lawyers took interesting positions, in particular before the IL emerging in the inter-war period prohibited wars (which is now the consensus on the topic among international lawyers).

6. The Italian classic School of International Law

The Italian School of IL is one of the best-known national schools in Europe, having a history of notoriety and influence of more than one and half century. Leaving aside predecessors of Italian origins, such as Alberico Gentili, the Italian tradition in IL can be said to have started around the middle of the 19th Century, during the period of *Risorgimento*, with the charismatic figure of Pasquale Stanislao Mancini (1817-1888), whose ideas influenced the following generations of Italian international lawyers. From a theoretical perspective, more rigorous than Mancini was his disciple,[43] Pasquale Fiore (1837-1914), whose works enjoyed respect also outside Italy, setting the scene for the increase of notoriety of the Italian school in the first decades of the 20th Century.

The next generation of Italian international lawyers was the one that established the fame of the School, and its best-known member is Dionisio Anzilotti (1867-1950). Anzilotti gained international respect even before the 1st World War, with his seminal work on State responsibility.[44] After the establishment of the Permanent Court of International Justice, he was appointed as a judge and became the president of the Court in 1928. Other colleagues of generation with Anzilotti were Donato Donati (1880-1946), Giulio Diena (1865-1924) or Scipione Gemma (1867-1951).[45] This was the generation that aligned the Italian school with the most developed national traditions of IL in the Western world: the German school, the French school and the Anglo-American one. It was now that positivism was established as

[43] Bartolini, *op.cit.* fn 38, p. 99.

[44]Dionisio Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), Lumachi, Firenze, Georg Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations", in *European Journal of International Law*, (2002), vol. 13 (5) , pp. 1083-1098.

[45] Bartolini, *op.cit.* fn 38, p. 132.

the dominant theoretical approach in Italy, together with voluntarism and dualism, which dominated the international literature on IL as well.

The following generation of Italian international lawyers benefited from the fame acquired previously by the Italian school. By now, Italian scholars were already influential. According to the counting by Giovanni di Stefano and Robert Kolb, more than twenty courses held in the Hague Academy of International Law (the most respected institution dealing with the doctrine of IL) in the inter-war period were held by Italian professors.[46] Among the important names that were active in the inter-war period and continued after 2nd World War are: Angelo Pietro Sereni (1908-1967), Gaetano Morelli (1900-1989, later judge at the International Court of Justice), Roberto Ago (1907-1995, later member of the International Law Commission and later judge at the International Court of Justice), Giorgio Balladore Pallieri (1905-1980), Riccardo Monaco (1909-2000), Rolando Quadri (1907-1976), Giorgio Sperduti (1912-1993). This very prolific generation was followed by another one equally well-known, among whose members one can count Piero Ziccardi (1914-2015), Gaetano Arangio-Ruiz (1919-2022), Francesco Capotorti (1925-2002), Luigi Ferrari Bravo (1933-2016, judge at the European Court of Human Rights), Giorgio Gaja (b. 1939, judge at the International Court of justice).

The Italian School of IL has brought many important contributions to the field.[47] In the present study, following Koskenniemi's periodization,[48] I decided to apply the name "classical" to the doctrine issued until 1960, although many of the important representatives at that moment continued to be active for at least other three decades, with important contributions. Italian jurists contribute today as well to the important debates in IL. However, the period to which I refer in this study covers roughly the years between 1880 and 1960, after which the epithet "contemporary" is probably better deserved. Among so many important names of the ICSIL, I decided to make a selection encompassing one representative from each generation: namely, Pasquale

[46] Bartolini, *op.cit.* fn 38, p. 434.

[47] Just to name international responsibility which continues to be an "Italian affair", according to Georg Nolte (*op.cit.* fn 44). Although in terms of legal philosophy, ICSIL mainly followed German legal philosophy, in terms of technical legal issues, Italian contributions have been truly original and outstanding (to some of them mention will be made infra).

[48] Koskenniemi, *op.cit.* (2004) fn 8, p. 4. The same periodization id adopted by Paolo Palchetti in "Uno sguardo d'oltre oceano: la dottrina italiana di diritto internazionale nelle pagine dell'American Journal of International Law (1907-1960)" in *Rivista italiana per le scienze giuridiche*, no. 6/2015 (2015).

Fiore (for the early period of the school and representative for the liberal engaged jurists in the second half of the 19th century), Dionisio Anzilotti (for the "positivist" generation) and Roberto Ago (for the third generation, that started activity in the inter-war period but was largely consecrated after the 2nd World War). The selection does not entail any value judgment towards the content of the works of these law professors or those who were not selected.

7. The foundation of IL

The importance of the discussions on the foundation of IL rests on the fact that the positions adopted towards this problem might indicate a certain conception of the international system: Is it a simple international society (the members of this anarchical society merely recognize their reciprocal existence, but do not share any common interests or objectives – closer to the Hobbesian approach)? Is it an international community with permanent common purposes and its own assumed values – closer to the Grotian approach)? Or, is it conceived as a community of human beings, instead of being a community of States (closer to a cosmopolitan approach)?

As a jusnaturalist and an optimistic engaged liberal, Pasquale Fiore seems to see "beyond" the contemporary society of States a world community that waits to be "released". He quotes Bluntschli mentioning the existence of an "international interest reuniting more national interests".[49] This is still a contained style compared to when he writes emphatically about "humanity as a great natural society of nations [...] coexisting together under the binding empire of the Supreme Law".[50] It follows that for Fiore, as jusnaturalist, the foundation of IL is the human nature. But not all jusnaturalists were cosmopolitans, while Fiore seems to really incline towards that direction. Although he mentions the nations as members of the human community, it really seems that nations are simply better political environments to express human will in the international arena and not the ultimate beneficiaries and members of the world community.

Dionisio Anzilotti, on the other side, as the representative of the first generation of positivists, is firmly attached to the States' will as the foundation of IL. In his first period (before WW1), Anzilotti was a proponent of the "collective will" of the States as the foundation of IL, following Triepel's lead

[49] Pasquale Fiore, *Trattato di diritto internazionale pubblico* (1904), UTET, Torino, p. 88.

[50] Ibidem, p. 114.

in this direction.[51] Localizing in the States the foundation of IL would make Anzilotti's position a Grotian one with a Hobbesian tendency, but the nuance of "collective" will suggests however a more "communitarian" approach. This was confirmed in the later evolutions in Anzilotti's thought, after WW1, where, similarly to Kelsen, he embraced the idea that the principle *pacta sunt servanda* is the foundation of IL.[52] While preserving the essential role of the States, such conception also suggests acceptance of a more "centralizing" order, whose base lies beyond the States' will, in a legal principle recognized by the entire community.

Finally, Roberto Ago's position on this topic reflects the evolution of the IL doctrine up to his generation, a more intellectually mature one. According to Ago, the very topic of the foundation of IL is not relevant and necessary for the "legal science". A legal order is an objective reality and the existence of the international legal order is, similarly, objective.[53] The problem of foundation was a positivistic idiosyncrasy, due to the centrality of the sovereignty in the positivistic construction of IL,[54] and to the fact that multiple sovereignties could not fund by themselves a single basis of the system, therefore a unifying concept was needed, and that was found, according to him, in the idea of "foundation of IL". By this, Ago reveals himself as a true "communitarian".[55]

---

[51] Dionisio Anzilotti, *Corso di diritto internazionale pubblico (Appunti ad uso degli studenti). Volume terzo: I modi di risoluzione delle controversie internazionali* (1915), Athenaeum, Roma, p. 5, Laura Passero, *Dionisio Anzilotti e la dottrina internazionalistica tra Otto e Novecento* (2010), Giuffre, Milano, p. 8, Palchetti, *op.cit.* fn 48, p. 274.

[52] Dionisio Anzilotti, *Corso di diritto internazionale pubblico (Appunti ad uso degli studenti). Volume primo: Introduzione – Teorie generali* (1928), Athenaeum, Roma, p. 43, Rosario Fiore, "L'obbligatorietà del diritto internazionale: elaborazione di una teoria della volontà arbitraria", in *Rivista di diritto dell'economia, dei trasporti e dell'ambiente,* vol. XIII – 2015, p. 335.

[53] Roberto Ago, "Science juridique et droit international", in *Recueil des cours de l'Academie de droit international de La Haye* (1956), vol. 90, p. 953.

[54] For Ago's criticism of sovereignty, see Ago, *op.cit.* fn 53, p. 858.

[55] Ago regularly uses the term of "international community" to refer to the international society (Ago, *op cit.* fn 53, Roberto Ago, *Caratteri generali della comunità internazionale e del suo diritto*, without year (w.y.), Biblioteca interdipartamentale di scienze giuridiche, Sede diritto internazionale, Università Roma 1, La Sapienza).

8. Nature and binding force of the IL

Austin's argument about the absence of "legal character" of IL, because of the absence of coercive sanctions is not only a contestation of IL, but also expresses a view on the international society as qualitatively essentially different from a politically organized society, as the one within States. At least from this perspective, it is a radical Hobbesian view of the international world.

It was natural for international lawyers to defend the legal character of their field of activity, so there is no surprise that each of the jurists whose works are discussed here denies the validity of the Austinian critique. It is interesting, however, to see on what arguments they rely on.

Pasquale Fiore answers to Austinian critique by underlining the "effective authority" of IL.[56] "The *imperium* of the law has been accepted repeatedly by Governments", he mentions.[57] The absence of coercive sanctions does not represent a problem for Fiore. The part of IL which is natural law has its own specific sanctions, i.e. the natural sanctions. While for the "positive" IL, i.e. the law containing the rules posed by States (such as treaties), it has its own coercive sanctions, applied by the States themselves.[58]

Anzilotti defends the same idea of the "decentralized" sanctions, i.e. sanctions applied by the States themselves.[59] According to his theoretical rigour, Anzilotti deals with the issue from the perspective of validity, and less from that of effectiveness. After WW1, Anzilotti added the "collective coercive action" provided by Art. 16 of the Covenant of the League of Nations.[60]

Roberto Ago notes that the entire " negationist" argument is based on philosophical or aprioric assumptions, that are not "scientific".[61] The "negationists" start from a concept of law that rejects accepting all manifestations of law, qualifying as such only the "statist" law. As we will later see, for Ago, the main expression of IL is the spontaneous law, the

[56] Fiore, *op.cit.* fn 49, p. 124.

[57] Ibidem, p. 125.

[58] Ibidem, pp. 127-131.

[59] Anzilotti, *op.cit.* fn 52, p. 44.

[60] Idem.

[61] Roberto Ago, *Lezioni di diritto internazionale* (1943), Giuffré, Milano, p. 13

custom,[62] and its reality and existence are "objective" and cannot be denied by ideologically driven arguments. On the contrary, the fact that States indeed create law is based on a concept of law that encompasses State law as well. But, in any case, the law cannot be reduced to State law.

9. Subjects of IL

In the matter of the subjects, limiting them to States would indicate a preference for Hobbesianism or Grotianism. Expanding the category to include private persons would unveil a tendency towards cosmopolitism. Including international organizations would indicate either Grotianism or even Kantianism, but would exclude Hobbesianism. It should be reminded that building legal orders, such as the European Union or the European Convention on Human Rights system necessarily implies accepting private persons as bearing legal personality.

On this point, Fiore believes that international legal personality may accommodate various categories of entities, not only States. The individual is a legal subject "in a natural way".[63] Legal persons, aggregating individuals, enjoy legal personality if they express a certain "moral unity".[64] Therefore, according to Fiore, in IL, it is the States' legal personality that must be proven, and not that of individuals. On this point, Fiore departs from the previous Italian tradition of IL, which, under Mancini's lead, supported the view that nations, and not States, are the "real" IL subjects.[65] Fiore argues that the subjects of IL are the peoples that constituted an autonomous government on a given territory (i.e. the States, according to the definition still in use).[66] But Fiore goes much beyond that and argues in favour of the international legal personality of non-State actors, provided that their activity is cross-border,[67] and as well of what we would call today international organizations ("legal entities ... created by States for a common interest" – *Confederazioni* or *società di Stati*).[68] One must acknowledge that Fiore's view on the

[62] Ago, *op.cit.* fn 53, pp. 936 ff.

[63] Fiore, *op.cit.* fn 49, p. 167. See also Mannoni, *op.cit.* fn 7, p. 21.

[64] Fiore, *op.cit.* fn 49, p. 171.

[65] Ibidem, p. 173.

[66] Ibidem, p. 180.

[67] Ibidem, p. 231.

[68] Ibidem, p. 234.

international legal personality was a very generous one, making him a fully-fledged cosmopolitan.

Anzilotti, instead, faithful to his positivist, voluntarist and dualist stance sees only States as proper subjects of IL. Even in his more "liberal" period, after WW1, in the field of subjects, Anzilotti sticks to his strict approach to personality in IL. He rejects the theories arguing that individuals might be subjects of IL,[69] by saying that even when individuals are conferred rights by international treaties, such rights are to be exercised within the legal domestic order of each State and not within the realm of IL.[70] After an initial denial of the legal personality of international organizations,[71] Anzilotti seemed then ready to accept the legal personality of international organizations, in particular of the already existent League of Nations, which he compares to the status of confederations and real union of States.[72] However, he was still skeptical and not really convinced of the usefulness of the discussion (he labels it a merely semantic discussion), while he seems rather inclined to qualify the organs of the organizations as "collective organs" of the States (as opposed to "individual organs" of each State, such as heads of States, etc.).[73] Indeed, in his textbook from 1923, he discussed this topic within a chapter entitled "Organs", subdivided between "individual" and "collective" ones. Here he adopts an interesting view, somehow Kelsenian, where the legal order (in this case the international one) attributes (imputes) to subjects certain acts.[74] It seems, therefore, that, for Anzilotti, States retain the quality of subjects of IL and that international organizations are somehow "transparent" in that they facilitate the expression of the collective will of the States but do not constitute autonomous entities. This sort of approach matches very much what used to be the traditional realist approach to international organizations, as mere instruments of the States.[75] As a whole, Anzilotti's position towards

[69] Bartolini, *op.cit.* fn 38, p. 187, Passero, *op.cit.* fn 48, p. 7.

[70] Dionisio Anzilotti, *Corso di diritto internazionale. Lezioni tenute nell'Università di Roma nell'anno scolastico 1922-1923. Introduzione – I soggetti – Gli organi* (1923), Athenaeum, Roma, pp. 73-74.

[71] Ferrajolo, *Il contributo di Dionisio Anzilotti al progetto italiano del Patto della Società delle Nazioni* (2005) (available at http://www.prassi.cnr.it/prassi/docs/Anzilotti.pdf), p. 8.

[72] Anzilotti, *op.cit.* fn 70, p. 88.

[73] Ibidem, pp. 153-158.

[74] Ibidem, p. 137.

[75] Clive Archer, *International Organizations* (2001), 3rd ed, Routledge, London, pp. 68-69, Anna Caffarena *Le organizzazioni internazionali* (2009), Il Mulino, Bologna, p. 36.

legal personality in IL seems to confirm an approach that at most can be qualified as Grotian, but in no way closer to a cosmopolitan approach.

Ago, as well, at least in his first theoretical works, does not seem inclined to accept that private persons can be subjects of IL.[76] Before the developments occurred after WW2, he was still seeing international and domestic legal orders as distinct without the possibility of transferring legal personality from one another, not even for States.[77] Concerning the international organizations, he was much more "progressive". Already in 1943, writing in Fascist Italy, he was forecasting the creation of a political international organization to limit the power of the States, similar to what the UN had to become.[78] After WW2, Ago witness the ICJ's Opinion[79] confirming the legal personality of the UN and he had written early and extensively in the field of international organizations,[80] then a relatively new one, therefore he had no problem in acknowledging their legal personality. Consequently, Ago could be characterized as a Grotian with "centralization" tendencies, and his evolution as a lawyer in the second half of the 20th century confirms such characterization.

10. Sources of IL

If acknowledgement of sources of IL requires States' consent this indicates a strong preference for Hobbesianism or, at maximum Grotianism, with the rejection of Kantianism. Acceptance of sources unrelated or more detached from States' consent would indicate a tendency towards centralization, of either Grotian or Kantian pedigree.

Not surprisingly, Fiore is very generous in accepting many sources of IL, starting with "principles of international morality".[81] Treaties and customs, the standard sources in positivist accounts, are acknowledged but they are

[76] Ago, *op.cit.* fn 61, p. 50.

[77] Idem.

[78] Ibidem, p. 118. See also Bartolini, *op.cit.* fn 38, p. 162.

[79] International Court of Justice, Advisory Opinion of 11 April 1949, Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, 174.

[80] Roberto Ago, *Considerazioni su alcuni sviluppi dell'organizzazione internazionale* (1952), CEDAM, Padova.

[81] Fiore, *op.cit.* fn 49, p. 145.

only "particular law",[82] something that we might label in today's language as "sources of obligations".

For Anzilotti, only treaties are sources of IL. Custom is indeed a source of IL but in its quality as "tacit agreement".[83] Although, on many issues, Anzilotti changed after WW1 some of his theoretical views,[84] he remained inflexible on the core issues of positivism, voluntarism, and dualism.

Roberto Ago's most original contribution to the philosophy of IL is his theory of the spontaneous rules,[85] a category where he includes custom, as independent of governments' will.[86] "Spontaneous rules" appear naturally, while the other rules are "artificial". Without establishing a formal hierarchy between these kinds of rules, Ago assigns some sort of primacy to "spontaneous rules".[87] By taking this stance, Ago proves a strong propensity for centralization of international order, a view that he championed during many decades after WW2.

Comparing the above-mentioned views, we can notice a somehow "naive" cosmopolitanism in Fiore, a rigid Grotianism in Anzilotti and a more mature centralization-leaned Grotianism in Ago.

11. The relation between domestic law and IL

Fiore does not deal directly with this issue, which is specific to positivists. As a jusnaturalist, however, he is inherently monistic,[88] as the natural order is one single order, and law, including IL, is part of it.

---

[82] Ibidem, p. 147.

[83] Anzilotti, *op.cit.* fn 52, p. 68.

[84] Giorgio Bosco, *Dionisio Anzilotti. L'attività diplomatica e giurisdizionale* (2006), Nagard, Milano, p. 13, R. Fiore, *op.cit.* fn 52, p. 336, Giorgio Gaja, "Positivism and Dualism in Dionisio Anzilotti", in *European Journal of International Law* (1992), no. 3, p. 138.

[85] Koskenniemi, *op.cit.* 2004 fn 8, p. 51, Bartolini, *op.cit.* fn 38, pp. 178 ff., Palchetti, *op.cit.* fn 48, p. 271.

[86] Ago, *op.cit.* fn 53, p. 936.

[87] Ibidem, p. 946. Somehow ironically Ago says that the custom of *pacta sunt servanda* is the foundation of the law of treaties, but not of IL.

[88] Rolando Quadri, *Diritto internazionale pubblico* (1949), Priula, Palermo, p. 35.

Not much is to be said about Anzilotti's view on the topic. He is well known as one of the staunchest supporters of dualism.[89]

More nuanced is the position adopted by Ago. In his *Lezioni di diritto internazionale* of 1943, although he seems sympathetic to monism by not rejecting it *de plano*,[90] he nevertheless acknowledges the existence of a plurality of legal orders as an "objective reality", therefore accepting dualism as the reigning paradigm. After WW2, Roberto Ago was involved in the works of drafting the Italian Constitution and had an instrumental role in the provisions concerning international law.[91] Although Art. 10 of the Italian Constitution is said to be informed by dualism,[92] it is indeed a mild version of dualism that creates a constitutional duty for domestic bodies to align with IL, thus accepting a form of *de facto* primacy of IL. On the same occasion, an article authorizing limitations of sovereignty to adhere to international organizations was introduced in the Constitution.

By comparing the views of the three Italian jurists on the relation between legal orders, it can be noticed that Fiore's views is infused with an idealistic cosmopolitanism, Anzilotti's position corresponds to some sort of mainstream Grotianism (but that could easily slip into other instances towards Hobbesianism), while Ago's Grotianism could be characterized as moderate and pragmatic.

12. The problem of war and peace

Since the entry into force of the UN Charter, recourse to force in IR was outlawed, unless authorized by the Security Council of the UN, or in self-defense. Regulation of war started with the Covenant of the League of Nations and then continued with the Briand-Kellogg Pact. So for contemporary international lawyers (including Roberto Ago in this category) this is not *per se* an issue. However, until WW1, recourse to war was licit in principle or, in any case, not prohibited. It is then interesting to see what were the opinions of the lawyers mentioned here.

---

[89] Gaja, *op.cit.* fn 84, Palchetti, *op.cit.* fn 48, p. 274.

[90] Ago, *op.cit.* fn 61, p. 45.

[91] Bartolini, *op.cit.* fn 38, pp. 390 ff.

[92] "Italian legal system conforms with the generally recognized principles of international law".

Although Fiore was not precisely an activist against war, he gave important space in his 1904 treatise to efforts to "civilize the war" by limiting its legitimacy to self-defense.[93] He also applauded the self-limitation of war conduct by domestic laws adopted by United States.[94] Much of the liberal spirit that was influential on the intellectual stage in those years can be detected in Fiore's works.

Anzilotti, on the other hand, as a good positivist, was more neutral in this regard. He regarded war (or, better, the decision to start it) as a "fact outside the scope of law".[95] In his 1915 volume on international dispute resolution, recourse to force is considered, among other dispute resolution mechanisms, the most violent one. Certainly, with a moderate tone, he however opinated that "pretending that a State cannot ever impose his will on issues to other States [...] would lead to impossible and absurd practical consequences".[96] However, in practice, after WW1, Anzilotti proved to share the line of the liberal jurists of the late 19th century. He was one of the drafters of the Italian project for the Covenant of the League of Nations which provided for a general prohibition of the use of force, like what was realized, more than two decades later, with the Art. 2 (4) of the UN Charter.[97]

13. Conclusions

A few conclusions may be formulated based on this research which is far from being exhaustive, neither in terms of topics discussed (several other topics could have been of interest, such as the issue of legal dispute resolution for example), nor in terms of the variety of opinions expressed by such eminent lawyers as the ones gathered under the label of Italian Classic School of IL.

A first conclusion is that, undeniably, and despite their differences in theoretical approaches, the international lawyers aligned with the liberal aspirations expressed in the second half of the 19th century and the first half of the 20th century. This is very visible for the generation of Pasquale Fiore

[93] Fiore, *op.cit* fn 49, p. 79.

[94] Ibidem, p. 82.

[95] Anzilotti, *op.cit.* fn 51, pp. 139-146, Antonio Cassese, "Realism v. Artificial Theoretical Constructs. Remarks on Anzilotti's Theory of War", in *European Journal of International Law* (1992), no. 3, p. 152, Mannoni, *op.cit.* fn 7, p. 120.

[96] Anzilotti, *op.cit.* fn 51, p. 41.

[97] Ferrajolo, *op.cit.* fn 71, Bosco, *op.cit.* fn 84, p. 42.

(after all, the generation that started the movement around the *Revue de droit international et de législation comparée*).[98] Also, for authors like Roberto Ago, who were, in a different historical context (after the defeat of Nazism in the 2WW), engines of promoting an international order based on law and international organizations (to the extent it was possible). But even Dionisio Anzilotti, who tried to limit as much as possible the political influence on his theoretical works, in practice (with the Italian proposal for the Covenant of the League of Nations) proved to share the same liberal ideals and projects for the future of the world order.

A second conclusion is that the sequence of generations of lawyers tended to reflect a certain historical evolution of the views on the IR. The generation of Pasquale Fiore seems to be close to liberal idealism[99] that dominated the political and intellectual scene in the aftermath of the 1st World War. Although by then the generation of Fiore had already disappeared, its discourse and values did influence the liberal current of thought that created the League of Nations. The generation of Anzilotti and the other voluntarist positivists seems to be a reaction to the previous generation's idealism. In this way, although in a different historical time, the same sequence between liberalism and realism in IR is reproduced (indeed, the sequence of liberalism-realism in IR occurred a few decades after the period discussed). Finally, the generation of Roberto Ago seems to combine the theoretical rigor of positivists with a dose of the idealism of the earlier generation of liberal lawyers. Much in the same way in which neoliberals integrated the unchallengeable assumptions of neorealism, only to correct them based on their willingness to explore ways of encouraging cooperation despite unfavorable contexts or conditions.

A different conclusion refers to the functions of law. As mentioned previously, the basic function of law in domestic legal orders is organizing and, ultimately, applying coercion. In the course of doing that, the function of supporting dispute resolution proved to be essential for the social peace in these societies. Moreover, in liberal constitutional systems, law openly constrains the political power, by imposing limits to its exercise. These are functions of the law understood as a centralized system of rules with enforceable sanctions. The anarchic society does not allow law to perform these functions in IR, at least not to a relevant extent.

---

[98] Koskenniemi, *op.cit.* (2004) fn 8, pp. 12 ff, Mannoni, *op.cit.* fn 7, pp. 76 ff, Fiore, *op.cit.* fn 49, p. 85.

[99] Koskenniemi, *op.cit.* 2004 fn 8, p. 54.

Instead, if law is understood as language, as discourse, as "grammar", i.e. a system of communication following a certain inner logic (as constructivists did)[100] other functions become apparent. One is the function of "justification" or "legitimization".[101] When lawyers argue in courts or when judges give the reasons for their decisions, they "justify" a certain conduct by trying to persuade others and they use the language of the law to this effect. As it was noted,[102] the same function is performed by States when they are trying to present their conduct as "justified" or "legitimate". They do not always succeed but the mere practice of using this sort of language strengthens the role of law in IR. And lawyers are instrumental in this, as they are the ones that are drafting the legal arguments.

A second function, related to the previously mentioned one, is that of "moderation" of power.[103] When States, including powerful States, enter into a dialogue based on legal arguments they, somehow, *they accept to limit their own access to the language of force*. In this way, "moderation" of the process is encouraged in IR. Lawyers are instrumental in forging this language. And this function of "moderation" can be discovered retrospectively also in the history of IL doctrine. It is generally held that (liberal) lawyers have failed in their efforts during the second half of the 19th century to convince States to give up the use of force in IR and replace it with the use of law. And that is certainly true if one imagined success as equivalent to establishing an international rule of law on world politics. But the legal discourse of the late 19th century was a success in its persuasive effect. In fact, the liberal trend in world politics in the inter-war period (let aside its practical failures) was based on assimilating the language of the liberal lawyers of the 19th century. From this perspective, it could be said that *law as a system of enforceable rules always follows the exercise of power*. But *law as discourse can be said to precede the exercise of power*, in that it might determine certain self-limitations of the power holder, that law as a system of rules cannot do in IR.\

[100] Reus-Smit, *op.cit.* fn 5, p. 2 ("The discourse of politics is now replete with the language of law and legitimacy as much as realpolitik"), 5 ("when international law is indeterminate, or when situations arise that were not anticipated when the rules were formulated, international law serves as a discursive medium in which states are able to make, address, and assess claims") and *passim*.

[101] Nye, *op.cit.* fn 25, p. 156.

[102] Reus-Smit, *op.cit.* fn 5, p. 6.

[103] Ibidem, p. 1.

Bibliography

Roberto Ago, *Caratteri generali della comunità internazionale e del suo diritto*, without year (w.y.), Biblioteca interdipartamentale di scienze giuridiche, Sede diritto internazionale, Università Roma 1, La Sapienza.

Roberto Ago, *Considerazioni su alcuni sviluppi dell'organizzazione internazionale*, CEDAM, Padova, 1952.

Roberto Ago, *Lezioni di diritto internazionale*, Giuffre, Milano, 1943.

Roberto Ago, "Science juridique et droit international", in *Recueil des cours de l'Academie de droit international de La Haye*, vol. 90, 1956.

Dionisio Anzilotti, *Corso di diritto internazionale pubblico (Appunti ad uso degli studenti). Volume primo: Introduzione – Teorie generali*, Athenaeum, Roma, 1928.

Dionisio Anzilotti, *Corso di diritto internazionale pubblico (Appunti ad uso degli studenti). Volume terzo: I modi di risoluzione delle controversie internazionali*, Athenaeum, Roma, 1915.

Dionisio Anzilotti, *Corso di diritto internazionale. Lezioni tenute nell'Università di Roma nell'anno scolastico 1922-1923. Introduzione – I soggetti – Gli organi*, Athenaeum, Roma, 1923.

Dionisio Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Lumachi, Firenze, 1902.

Clive Archer, *International Organizations*, 3rd ed, Routledge, London, 2001.

Giulio Bartolini (ed.), *A History of International Law in Italy*, Oxford University Press, 2020.

Giorgio Bosco, *Dionisio Anzilotti. L'attività diplomatica e giurisdizionale*, Nagard, Milano, 2006.

Hedley Bull, *Societatea anarhică*, Ştiinţa, Chişinău, 1998 (original: *The Anarchical Society*, 1977).

Barry Buzan, Richard Little, *Sistemele internaționale în istoria lumii*, Polirom, 2009, București (original: *International Systems in World History. Remaking the Study of International Relations*, 2000).

Anna Caffarena, *Le organizzazioni internazionali*, Il Mulino, Bologna, 2009.

E. H. Carr, *The Twenty Years Crisis 1919-1939. An Introduction to the Study of International Relations*, MacMillan, London, 1981 (1st ed. 1939).

Antonio Cassese, "Realism v. Artificial Theoretical Constructs. Remarks on Anzilotti's Theory of War", in *European Journal of International Law*, no. 3, 1992, pp. 149-155.

O. Ferrajolo, *Il contributo di Dionisio Anzilotti al progetto italiano del Patto della Società delle Nazioni*, 2005 (available at http://www.prassi.cnr.it/prassi/docs/Anzilotti.pdf).

Pasquale Fiore, *Trattato di diritto internazionale pubblico*, UTET, Torino, 1904.

Rosario Fiore, "L'obbligatorietà del diritto internazionale: elaborazione di una teoria della "volontà arbitraria", in *Rivista di diritto dell'economia, dei trasporti e dell'ambiente,* vol. XIII – 2015.

Giorgio Gaja, "Positivism and Dualism in Dionisio Anzilotti", in *European Journal of International Law,* no. 3, 1992, pp. 123-138.

Judith Goldstein J. *et al* (eds.), *Legalization and World Politics*, MIT Press, 2001.

Peter Hilpold (ed), *European International Law Traditions*, Springer, 2021.

Stanley Hoffmann, *Ianus și Minerva. Eseuri asupra teoriei și practicii internaționale*, Știința, Chișinău, 1999 (original: *Janus and Minerva. Essays in the Theory and Practice of Interanational Relations*, 1997).

Robert O. Keohane, Joseph S. Nye, *Putere și interependență*, Polirom, Iași, 2009 (original: *Power and Interdependence*, Taylor & Francis, 1973)

Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a new Epilogue*, Cambridge University Press, 2006.

Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870 – 1960*, Cambridge University Press, 2004.

Stefano Mannoni, *Potenza e ragione. La scienza del diritto internazionale nella crisi dell'equilibrio europeo (1870-1914)*, Giuffre, Milano, 1999.

Hans J. Morgenthau, *Politics among Nations. The Struggle for Power and Peace*, Alfred Knopf, New York, 1948.

Joseph S. Nye, *Descifrarea conflictelor internaționale*, Antet, București, 2005 (original: *Understanding International Conflicts*, Longman, 2003).

Georg Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations", in *European Journal of International Law*, vol. 13 (5), 1083-1098.

Paolo Palchetti, "Uno sguardo d'oltre oceano: la dottrina italiana di diritto internazionale nelle pagine dell'American Journal of International Law (1907-1960)" in *Rivista italiana per le scienze giuridiche*, no. 6/2015.

Laura Passero, *Dionisio Anzilotti e la dottrina internazionalistica tra Otto e Novecento*, Giuffre, Milano, 2010.

Rolando Quadri, *Diritto internazionale pubblico*, Priula, Palermo, 1949.

Christian Reus-Smit (ed.), *The Politics of International Law*, Cambridge University Press, 2004.

Georg Schwarzenberger, "The Three Types of Law", in *Ethics*, vol. 53(2), 1949.

Jianming Shen, "The Basis of International Law: Why Nations Observe", in *Dickinson Journal of International Law*, vol. 17(2), 1999.

Beth A. Simmons B. A., Richard H. Steinberg (eds.), *International Law and International Relations*, Cambridge University Press, 2006.

Anne-Marie Slaughter, Andrew Tulumello, Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", in *American Journal of International Law*, vol. 92, 1998.

Ferdinand Tönnies, *Community and Civil Society*, Cambridge University Press, 2001.

Kenneth Waltz, *Teoria politicii internaționale*, Polirom, Iași, 2006 (original: *Theory of International Politics*, McGraw Hill, New York, 1979).

Les nouveaux moyens de faire la guerre.

L'intelligence artificielle dans le domaine du droit international humanitaire

Ioana-Alexandra SMARANDESCU[*]

Nina-Maria VARZARU[**]

Université de Bucarest, Faculté de Droit

Résumé*: L'intelligence artificielle est de plus en plus présente dans nos vies. Au niveau international, les États ont commencé à utiliser les algorithmes pour accomplir des objectifs politiques et militaires, en confiant aux technologies des tâches qui n'étaient auparavant accomplies que par des êtres humains. Les éléments de tactique ou de prise de décision stratégique, activités qui nécessitent un temps de réflexion ou une analyse exhaustive de la situation factuelle, sont devenus de simples intrants pour les nouvelles technologies qui promettent de rationaliser les opérations militaires. Ainsi, le développement de l'IA soulève de questions dans le domaine du droit international humanitaire. La question de la compatibilité des règles actuelles du droit international avec le développement de l'IA et la création d'une responsabilité pour les actes illicites produits par l'IA sont soulevées de manière récurrente.*

Mots-clé*: intelligence artificielle, droit international humanitaire, conflit armé;*

[*] *Étudiante en 4ème année de licence, Faculté de Droit, Université de Bucarest, Bucarest, Roumanie, Les opinions exprimées dans cet article sont celles de l'auteur uniquement et n'engagent pas l'institution à laquelle il appartient.*

[**] *Étudiante en 4ème année de licence, Faculté de Droit, Université de Bucarest, Bucarest, Roumanie, Les opinions exprimées dans cet article sont celles de l'auteur uniquement et n'engagent pas l'institution à laquelle il appartient.*

The new means of waging war.

Artificial intelligence in the field of international humanitarian law

Ioana-Alexandra SMARANDESCU[*]

Nina-Maria VARZARU[**]

University of Bucharest, Faculty of Law

Abstract*: Artificial intelligence is increasingly present in our lives. Internationally, states have begun to use algorithms to achieve political and military objectives, entrusting technologies with tasks that were previously performed only by human beings. Elements of tactics or strategic decision-making, activities that require time for reflection or exhaustive analysis of the factual situation have become mere inputs for new technologies that promise to streamline military operations. For example, the development of AI raises questions in the field of international humanitarian law. Thus, the questions of the compatibility of current rules of international law with the development of AI, and the creation of responsibility for unlawful acts produced by AI, are recurrently raised.*

Keywords*: artificial intelligence, international humanitarian law, armed conflict.*

[*] Fourth year bachelor student, Faculty of Law, University of Bucharest, Romania. The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

[**] Fourth year bachelor student, Faculty of Law, University of Bucharest, Romania. The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

1. Introduction

Lors du sommet sur la sécurité de l'intelligence artificielle organisé à Bletchley Park le 2 novembre 2023, Ursula von der Leyen, présidente de la Commission européenne, a déclaré : « *Nous entrons dans une ère totalement différente. Nous sommes au début d'une ère où les machines peuvent agir intelligemment. Mon souhait pour les cinq prochaines années est de tirer les leçons du passé et d'agir rapidement. Compte tenu de la complexité de ces machines intelligentes, la sécurité de l'IA est d'autant plus complexe. C'est pourquoi l'expérience passée peut servir de guide. Prenons l'exemple de l'histoire de l'énergie atomique et de la bombe nucléaire. Les scientifiques ont découvert la physique quantique, ce qui a conduit [...] à des risques sociétaux, mais aussi à la bombe atomique. Nous avons besoin d'un système de contrôle et de contrepoids* »[1]. À cet égard, récemment, le 21 mars 2024, l'AG de l'ONU a adopté un projet de résolution[2], dirigé par les États-Unis, soulignant la nécessité de respecter, de protéger et de promouvoir les droits de l'homme dans la conception, le développement, le déploiement et l'utilisation de l'IA. C'est la première fois que l'Assemblée adopte une résolution sur la réglementation de ce domaine émergent, soutenue par 120 États.

Cette citation est l'occasion de réfléchir à la manière dont l'évolution de l'intelligence artificielle (IA) influence la sphère normative du droit humanitaire.

Le développement et l'amélioration continus de la technologie militaire signifient que de nouveaux types d'armes sont constamment utilisés dans les conflits armés[3]. Dans ce contexte de progrès technologique rapide, il convient d'examiner l'attitude des États à l'égard de la réglementation de ces nouveaux types d'armes.

---

[1] Proposition de Règlement du Parlement Européen et du Conseil établissant des Règles Harmonisées Concernant l'Intelligence Artificielle (Législation sur l'Intelligence Artificielle) et Modifiant Certains Actes Législatifs de l'Union, COM/2021/206 final https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52021PC0206, visité le 18.03.2024.

[2] Edith M. Lederer, "The UN adopts a resolution backing efforts to ensure AI is safe", AP News,*https://apnews.com/article/united-nations-artificial-intelligence-safety-resolution-vote-8079fe83111cced0f0717fdecefffb4d,* visité le 22.03.2024.

[3] Anca-Daniela Deteseanu, *Droit international humanitaire et droit des réfugiés*, 1ère édition. Ed. Hamangiu, 2024, Bucarest, p. 149.

Avant d'entamer l'analyse proprement dite du cadre législatif actuel au niveau international, il est nécessaire de commencer par définir les concepts qui font l'objet du présent document. Dans un premier temps, il convient d'analyser la notion d'Intelligence Artificielle (IA), qui est l'objet même de l'étude, la source du débat sur les nouveaux types de guerre fonctionnant sur sa base.

2. Le concept. Définition des termes pertinents

2.1. Définition de l'intelligence artificielle (IA)

Selon la *Proposition de règlement du Parlement européen et du Conseil établissant des règles harmonisées en matière d'intelligence artificielle*[4], un système d'intelligence artificielle (IA) est un logiciel développé à l'aide d'une ou plusieurs des techniques et approches énumérées à l'annexe I et qui, pour un ensemble donné d'objectifs définis par l'homme, peut générer des résultats tels que du contenu, des prédictions, des recommandations ou des décisions qui influencent les environnements avec lesquels il interagit[5].

En y regardant de plus près, l'annexe I énumère les techniques utilisées dans l'IA : les approches d'apprentissage automatique, y compris l'apprentissage supervisé, non supervisé et par renforcement, utilisant un large éventail de méthodes, y compris l'apprentissage profond ; les approches logiques et fondées sur les connaissances, y compris la représentation des connaissances, la programmation inductive (logique), les bases de connaissances, les moteurs inductifs et déductifs, le raisonnement (symbolique) et les systèmes d'expertise ; les approches statistiques, les méthodes de recherche et d'optimisation[6].

On peut donc considérer que l'IA fonctionne de la même manière que le cerveau humain. L'apprentissage automatique est un sous-domaine de l'intelligence artificielle, tel que défini par Harry Surden: « algorithmes informatiques qui ont la capacité d'apprendre ou d'améliorer leurs

[4] Proposition de Règlement du Parlement Européen et du Conseil établissant des Règles Harmonisées Concernant l'Intelligence Artificielle (Législation sur l'Intelligence Artificielle) et Modifiant Certains Actes Législatifs de l'Union, COM/2021/206 final**,** https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52021PC0206, visité le 18.03.2024.

[5] Ibid.

[6] Ibid.

performances au fil du temps pour une tâche donnée »[7]. Il s'agit essentiellement d'une machine qui apprend à partir de données au fil du temps. Cet apprentissage se fait par le biais d'un « processus statistique qui part d'un ensemble de données et tente de dériver une règle ou une procédure qui explique les données ou prédit les données futures »[8].

Si nous avons défini l'IA, nous devons également préciser ce que nous entendons par nouvelles façons de traiter les conflits internationaux et pourquoi nous considérons que leur présentation est pertinente dans le contexte international actuel.

2.2. Définir les nouveaux moyens de traiter les conflits internationaux

Les nouveaux moyens de lutte contre les conflits armés désignent donc les armes, les systèmes d'armes et les munitions qui sont utilisés dans le cadre d'un conflit armé[9] et qui, contrairement aux moyens traditionnels (balles, etc.) qui nécessitent une intervention humaine, sont dotés de l'IA en tant qu'élément intégral, nécessitent une intervention humaine minimale et peuvent être contrôlés à distance.

La portée de l'analyse sera limitée à l'étude des armes qui ne font l'objet d'aucune réglementation internationale établie, ce qui reflète la tradition de pratique cohérente au sein de la communauté internationale. Bien entendu, en raison de l'évolution rapide de l'IA, une pratique des États dans ce sens ne s'est pas encore cristallisée. On constate donc que la tendance à l'évolution du droit est plus lente que la vitesse de développement de l'IA, qui progresse d'une année à l'autre.

L'étude vise également à refléter le cadre réglementaire actuel et les tentatives de la communauté internationale de réglementer les limites de leur utilisation. À titre d'exemple, et afin de mieux cerner le champ d'application de l'étude, il convient de mentionner les drones télécommandés, les opérations de cybersurveillance, le stockage, l'enregistrement et la systématisation de données dans des bases de données informatiques, et les systèmes d'armes létales autonomes. L'analyse de ces nouveaux moyens de guerre est d'autant plus pertinente que des drones russes ont été capturés près des frontières de

[7] Harry Surden, "Machine Learning and Law", Washington Law Review, Vol. 89, No. 1, 2014.

[8] Ibid.

[9] Anca-Daniela Deteseanu, *Droit international humanitaire et droit des réfugiés*, 1ère édition. Ed. Hamangiu, 2024, Bucarest, p. 126.

l'Union européenne, à savoir près des frontières avec la Pologne et la République de Moldavie[10].

Le concept de nouveaux moyens de guerre doit être analysé en relation avec les notions de moyens de guerre conventionnels et de principe de double usage. Ce dernier englobe tous les biens et technologies logicielles qui peuvent être utilisés à des fins civiles et militaires. C'est pourquoi on peut discuter de l'intégration de l'IA dans les moyens de guerre[11]. Par exemple, on peut parler d'un réaménagement des moyens traditionnels de mener des conflits armés (utilisation de matières nucléaires, systèmes de navigation pour le guidage, systèmes de propulsion d'avions, télécommunications, reconnaissance faciale, sécurité de l'information, capteurs et lasers, traitement informatisé de l'information, etc.). D'autre part, les moyens conventionnels de mener un conflit armé impliquent l'utilisation de tactiques de combat communes et traditionnelles, principalement utilisées au cours des siècles passés. Par exemple, l'affrontement direct d'armées sur le champ de bataille par : l'utilisation de la force, d'armes qui peuvent être portées directement par les militaires - munitions, armement classique (fusils, pistolets, balles, etc.)[12]. Ainsi, les nouveaux moyens de mener des conflits armés représentent la nouvelle génération d'armes modernes qui se concentrent sur des objectifs autres que la simple déstabilisation des armées, comme la cyber déstabilisation, l'automatisation des armes conventionnelles (l'intervention humaine est limitée).

Outre les moyens traditionnels de faire la guerre, de nouvelles armes sont de plus en plus développées et sont extrêmement précieuses pour les États qui recherchent la suprématie cybernétique. Les techniques de « deep fake » consistent à manipuler l'information et à déformer les événements à des fins de propagande. Un exemple bien connu est la vidéo dans laquelle le président de l'Ukraine exhorte la population à abandonner le combat, qui est d'un réalisme effrayant et a autant d'impact qu'une arme conventionnelle. Il est clair que cette nouvelle façon de faire la guerre peut donner un avantage considérable à l'une des parties, ce qui est le but ultime de tout belligérant. Les nouveaux moyens de guerre doivent être considérés en relation étroite avec la notion de conflit armé. Par conséquent, afin de répondre aux questions

[10] Adam Easton, "Poland says Russian missile entered airspace then went into Ukraine", BBC News, https://www.bbc.com/news/world-europe-67839340, visité le 18.03.2024.

[11] Guidance, Export controls: dual-use items, software and technology, goods for torture and radioactive sources, https://www.gov.uk/guidance/export-controls-dual-use-items-software-and-technology-goods-for-torture-and-radioactive-sources, visité le 21.03.2024.

[12] Ibid.

soulevées par le sujet du document lui-même, la notion de conflit armé doit également être définie, de sorte que l'on puisse analyser s'ils peuvent être considérés comme faisant partie intégrante de la notion de conflit armé dans le contexte actuel.

2.3. Définition du conflit armé international

Le terme de conflit armé remplace le terme traditionnel de guerre[13]. *Les Conventions de La Haye de 1907 et de Genève de 1949* sont pertinentes à cet égard. Ainsi, le terme de guerre a été défini dans la Convention de La Haye comme *une situation juridique entre deux ou plusieurs groupes hostiles appelés à régler leur conflit par l'emploi de la force armée ou comme une lutte sanglante entre groupes organisés*[14]. Bien entendu, cette définition plutôt étroite reflétait les réalités sociales du début du XIXe siècle, lorsque les guerres étaient menées par des moyens traditionnels, principalement avec des armes conventionnelles (balles, munitions explosives, etc.) impliquant un degré rudimentaire de violence physique.

Toutefois, depuis la Seconde Guerre mondiale, compte tenu des souffrances et des pertes causées par la guerre, la communauté internationale a manifesté une volonté croissante de sanctionner un éventail plus large d'actes commis dans le cadre de conflits militaires, afin de prévenir de telles catastrophes à l'avenir. En conséquence, les Conventions de Genève de 1949 ont remplacé le terme « guerre » par le terme « conflit armé », qui comprend lui-même l'ancien concept de guerre. En ce qui concerne le champ d'application des Conventions[15], on entend par attaque armée une guerre déclarée ou tout autre conflit armé entre deux ou plusieurs Hautes Parties contractantes, même si l'état de guerre n'est pas reconnu par l'une d'entre elles[16].

Si nous examinons l'article d'un point de vue grammatical, nous pouvons remarquer l'utilisation du mot « tout », qui a favorisé l'inclusion de presque tous les actes militaires impliquant l'utilisation de la force dans son contenu. D'un point de vue pratique, on peut dire que cet article a constitué la base des

[13] Anca-Daniela Deteseanu, *Droit international humanitaire et droit des réfugiés*, 1ère édition. Ed. Hamangiu, 2024, Bucarest, p. 45.

[14] Ibid., p. 47.

[15] Ibid. 47.

[16] Art. 2, Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12.08.1949.

solutions jurisprudentielles ultérieures[17] qui ont continué à réaffirmer une logique beaucoup plus large pour la classification et, par conséquent, la sanction des comportements et pratiques belligérants causant des souffrances supplémentaires. A fortiori, sur la base du même raisonnement, il convient d'examiner si l'utilisation de méthodes modernes de guerre impliquant l'utilisation de l'IA peut être incluse dans le champ d'application large de la notion de tout autre conflit armé.

En outre, il convient de mentionner le travail de l'ONU dans ce domaine, qui, au fil du temps, avec le développement de l'IA, tente de refléter le plus fidèlement possible les nouvelles réalités de la gestion des conflits. Ainsi, la *Convention des Nations unies sur certaines armes classiques*, entrée en vigueur en 1983, vise à interdire ou à restreindre l'utilisation d'armes produisant des effets traumatiques excessifs[18], c'est-à-dire affectant à la fois les populations militaires et civiles pendant les conflits armés. En pratique, dans le cadre de la Convention, la portée de la définition et de la compréhension de la communauté internationale en matière d'armements peut changer constamment, en fonction des négociations entre les États et de l'évolution du climat politique et militaire international.

Plus important encore, la Convention offre un espace pour négocier des protocoles supplémentaires visant à interdire ou à restreindre des systèmes d'armes spécifiques. À l'heure actuelle, il existe cinq protocoles de la Convention, notamment des protocoles restreignant ou interdisant l'utilisation de fragments indétectables, de mines terrestres, d'armes incendiaires, d'armes à laser aveuglantes et de restes explosifs de guerre. Les réunions de 2017 et 2018, au cours desquelles il y a eu une structure plus formelle appelée Groupe d'experts gouvernementaux, sont pertinentes pour le sujet du présent document. Les réunions sont chargées d'examiner la définition des systèmes d'armes autonomes, le rôle de l'homme dans l'utilisation de la force létale et les options possibles pour relever les défis humanitaires et sécuritaires[19]. Bien entendu, on peut légitimement se demander pourquoi une discussion sur les réunions des groupes d'experts serait pertinente. Elles doivent être ajoutées à l'analyse car, même si elles ne sont pas juridiquement contraignantes, elles

[17] Par exemple, dans l'affaire Tadić du 15 juillet 1999, le Tribunal international pour l'ex-Yougoslavie a établi qu'un conflit armé existait dès lors que des États avaient recours à la force.

[18] The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001, *https://disarmament.unoda.org/the-convention-on-certain-conventional-weapons/,* visité le 21.03.2024.

[19] Ibid.

sont une indication directe de la volonté des États et de leur pratique dans ce domaine, les participants étant des représentants des gouvernements des États qui composent la communauté internationale.

Par conséquent, il convient de se poser la question suivante : « Dans quelles limites l'utilisation des moyens modernes de faire la guerre est-elle compatible avec le droit humanitaire? Compte tenu du vide juridique actuel, les États sont-ils autorisés à justifier leurs éventuelles actions belliqueuses? Le droit international humanitaire classique est-il suffisant pour sanctionner l'utilisation de l'IA comme moyen de guerre? Pour répondre à ces questions, il est nécessaire de les replacer dans leur contexte. Après avoir défini les termes autour desquels s'articule le document, il convient de les mettre en relation avec des données historiques sur la pratique des États dans les conflits armés internationaux.

3. Le contexte historique

3.1. Premières tentatives des États pour limiter l'utilisation des moyens de résolution des conflits internationaux

Depuis le Moyen Âge, les États se sont rendu compte que la guerre, en tant que moyen de résolution des conflits, entraîne inévitablement des souffrances supplémentaires, souvent inutiles, et la consommation d'importantes ressources[20]. Ils ont donc cherché à conclure des traités pour tenter d'atténuer ces souffrances. On peut affirmer que le développement du droit humanitaire et l'évolution des moyens de faire la guerre sont directement proportionnels. Parce que la simple conclusion de traités et de conventions ne suffisait pas, et dans le contexte des pertes massives causées par les Première et Seconde Guerres mondiales, les États ont pris conscience de la nécessité de créer des organismes internationaux visant à maintenir la paix à long terme. C'est ainsi qu'ils ont créé la Cour permanente de justice en 1920 et l'Organisation des Nations unies (ONU) en 1945[21].

Toutefois, compte tenu de l'évolution constante de la technologie, la littérature et les articles internationaux signalent que la communauté

[20] Anca-Daniela Deteseanu, *Droit international humanitaire et droit des réfugiés*, 1ère édition. Ed. Hamangiu, 2024, Bucarest, p. 45.

[21] Philip Alexander, "Reconciling Automated Weapon Systems with Algorithmic Accountability: An International Proposal for AI Governance", https://journals.law.harvard.edu/ilj/2023/10/reconciling-automated-weapon-systems-with-algorithmic-accountability-an-international-proposal-for-ai-governance/, visité le 19.03.2024.

internationale est confrontée à une troisième vague d'attaques armées basées sur des systèmes d'IA automatisés. Par exemple, l'Iran a annoncé le développement d'une série de chars miniatures automatisés contenant des armes de qualité militaire[22]. Cet exemple a été utilisé pour mettre en évidence les tendances évolutives et les défis actuels du droit humanitaire, qui semble contraint de s'adapter à ces nouveaux moyens automatisés. Au cours de l'analyse, d'autres exemples de ce type seront longuement étudiés, mais dans le strict but de mettre en évidence l'évolution historique du droit humanitaire, nous nous sommes limités à l'énumération de cette situation. Il reste que le contexte international actuel doit être analysé par rapport à l'état actuel du droit dans ce domaine.

3.2. Adapter le droit humanitaire au contexte actuel. La grande marge d'appréciation des États sur la notion de conflit armé

Tout au long de cette étude, et plus particulièrement dans sa première partie, il a été possible de constater la souplesse et le manque de rigidité que les États, par le biais du droit international humanitaire, ont donné à la définition du conflit armé au niveau international. Il convient d'ajouter à l'analyse du sujet que cette ligne de conduite est encore maintenue aujourd'hui au sein de la communauté internationale, comme le permettent les dispositions du *Protocole additionnel I aux Conventions de Genève*[23]. L'article 36 de ce protocole prévoit expressément que, lors de la recherche, de la mise au point, de l'acquisition ou de l'adoption d'une nouvelle arme, d'un nouveau moyen ou d'une nouvelle méthode de guerre, une Haute Partie contractante a l'obligation de s'assurer que son emploi n'est pas interdit, dans certaines circonstances ou en toutes circonstances, par les dispositions du présent protocole ou par toute autre règle de droit international applicable à cette Haute Partie contractante[24].

Si le texte est analysé de manière téléologique, il est facile de conclure, sur la base des données analysées tout au long du document, que le droit humanitaire ne restreint pas la liberté des États de sanctionner de nouveaux moyens de faire la guerre, mais, au contraire, leur donne une grande latitude pour inclure ou non l'utilisation de nouveaux dispositifs techniques militaires dans le concept d'attaque armée. Par conséquent, ils disposent d'une liberté

[22] Ibid.

[23] Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I).

[24] Ibid., art. 36.

suffisante pour sanctionner toute utilisation de ces armes qui contreviendrait aux principes fondamentaux du droit humanitaire.

En outre, sur la base du protocole, il est possible de déduire un certain nombre de critères permettant de classer une pratique particulière dans la catégorie des conflits armés[25].

Premièrement, conformément à l'article 35 du protocole, il convient d'examiner si les armes basées sur l'intelligence artificielle sont susceptibles de causer des blessures ou des souffrances inutiles, des dommages graves durables et étendus à l'environnement naturel[26]. Deuxièmement, il faut examiner, comme le prévoit l'article 51 du protocole, si ces armes sont susceptibles de nuire à la population civile et aux individus[27]. Enfin, il faut déterminer si leur utilisation est conforme aux principes du droit humanitaire et si elles respectent la clause de Martens[28], prévue à l'article 1 du protocole, qui sera détaillée au cours de ce document.

La combinaison de ces critères dérivés des dispositions du Protocole permet d'affirmer que le droit international humanitaire peut, même dans le contexte législatif actuel, relever les défis posés par l'intégration de l'IA dans le domaine militaire. Certes, il serait souhaitable de disposer d'une réglementation actualisée qui régisse de manière exhaustive les hypothèses dans lesquelles l'utilisation d'appareils militaires fondés sur l'IA y contrevient, mais on peut conclure que, même en l'absence de tels textes internationaux, le droit international humanitaire présente des principes et des méthodes autonomes pour déterminer l'existence de conflits armés internationaux, sur la base desquels toute pratique éventuelle contraire au droit international humanitaire peut être sanctionnée. Dans ce contexte, on peut affirmer que le droit international humanitaire se caractérise par sa propre autonomie.

Cependant, lorsque ses principes fondamentaux sont analysés par rapport à la dynamique législative actuelle, ils peuvent conduire à une plus grande protection.

---

[25]Qiang Li, Dan Xie, “Legal Regulation of AI weapons under International Humanitarian Law: a Chinese perspective”, https://blogs.icrc.org/law-and-policy/2019/05/02/ai-weapon-ihl-legal-regulation-chinese-perspective/, visité le 19.03.2024.

[26] Ibid.

[27] Ibid.

[28]Ted Piccone, “How can international law regulate autonomous weapons?”, https://www.brookings.edu/articles/how-can-international-law-regulate-autonomous-weapons/, visité le 19.03.2024.

3.3. Contexte législatif actuel

Le débat sur la réglementation de l'utilisation des armes basées sur l'IA se fait de plus en plus pressant. Ainsi, récemment, le Parlement de l'Union européenne a adopté la proposition de règlement du Parlement européen et du Conseil établissant des règles harmonisées en matière d'intelligence artificielle, qui doit encore être formellement adoptée par le Conseil de l'Union européenne pour entrer en vigueur. Parallèlement, l'administration Biden a publié en octobre 2022 un projet de principes qui devraient guider la conception, l'utilisation et le déploiement de systèmes automatisés pour protéger le public américain à l'ère de l'intelligence artificielle, le Blueprint for an AI Bill of Rights (projet de charte des droits de l'IA).

Si nous avons démontré l'autosuffisance du droit international humanitaire, la communauté internationale s'oriente vers un détail des droits et des sanctions qui découlent de l'utilisation de l'IA, ce qui ne fait que renforcer la protection contre les pratiques qui y contreviennent. A la modernisation des moyens s'ajoute une mise à jour du droit international, une intégration croissante de l'IA et des conséquences de son utilisation dans le droit international, reflétant l'évolution de la société et non l'inverse.

4. Pratique des États en matière d'utilisation de l'intelligence artificielle dans les conflits armés

4.1. La Chine et la politique de « guerre cognitive »

La communauté internationale a déjà exprimé sa préoccupation ou, au contraire, son intérêt pour l'évolution de l'utilisation de l'IA dans les conflits armés. Au niveau international, la Commission du désarmement et de la sécurité internationale a approuvé l'adoption d'un projet de future résolution sur l'utilisation de l'intelligence artificielle dans les conflits armés. Par ailleurs, la commission a décidé qu'un algorithme ne devrait pas avoir le pouvoir de décider de lancer ou non une attaque armée[29]. Toutefois, on peut constater qu'il existe une pratique distincte au niveau des États. L'utilisation de l'IA dans les conflits armés a été initiée par la République populaire de Chine, qui a promu, dans le contexte du conflit sur le statut de Taïwan, une nouvelle politique militaire, appelée « guerre cognitive »[30]. La communauté

[29] Site internet des Nations Unies, Déclaration sur l'adoption de la résolution: https://press.un.org/en/2023/gadis3731.doc.htm#:~:text=Turning%20to%20the%20draft%20as,T%C3%BCrkiye%2C%20United%20Arab%20Emirates, visité le 16.03.2024.

[30] Ruben Steward, Georgia Hinds, “Algorithms of war: The use of artificial intelligence in decision making in armed conflict”,https://blogs.icrc.org/law-and-

internationale a donc été mise devant le fait accompli : l'avenir technologique avait déjà atteint la sphère des conflits armés. La Chine a annoncé publiquement[31] qu'elle allait soutenir le développement de l'intelligence artificielle pour l'utiliser dans des attaques, considérant l'utilisation d'algorithmes comme une mesure impérative pour la sécurité de l'État[32]. Les mesures que l'on cherche à prendre lors d'un conflit armé sont liées à l'accumulation de renseignements sur les positions militaires et les effectifs de l'ennemi, à la manipulation d'armes sans intervention humaine et à la création d'algorithmes capables de déterminer des décisions stratégiques, là encore, sans intervention humaine[33]. Fondamentalement, ce qui est en jeu, c'est l'utilisation de techniques innovantes qui permettent la conquête de points militaires stratégiques par des algorithmes, avec leur propre raisonnement, non soumis à la volonté et à la raison humaines[34].

La Chine n'est pas non plus étrangère à l'utilisation de techniques de guerre moins « orthodoxes ». Au fil des ans, la République populaire de Chine a eu recours à la collecte d'informations, dites données personnelles, en utilisant des techniques telles que les deep fakes ou la diffusion de fausses informations sur les politiques d'autres États. Ce qui est certain, c'est que ces incidents disparates sont appelés à s'intensifier à mesure que l'IA se répand dans les conflits armés.

D'un point de vue juridique, les actes unilatéraux (déclarations du président chinois Xi Jinping) produisent des effets juridiques et engendrent des obligations à l'égard de la communauté internationale. Cependant, la question de la compatibilité de ce nouveau type de guerre avec le droit international humanitaire reste d'actualité. Du point de vue de l'article 36 du protocole additionnel à la convention de Genève, l'utilisation de l'intelligence artificielle dans la guerre est une arme nouvelle au sens de cette norme. L'objectif de l'adoption de cette règle était de donner aux Hautes Parties contractantes un pouvoir d'appréciation pour déterminer si une arme au sens de la Convention,

---

policy/2023/10/24/algorithms-of-war-use-of-artificial-intelligence-decision-making-armed-conflict/, 24 octobre 2023, visté le 16.03.2024.

[31] Gabriel Dominguez, "China takes 'stunning lead' in key technological research, think tank says*", https://www.japantimes.co.jp/news/2023/03/03/world/china-lead-tech/,* visité le 16.03.2024.

[32] Gabriel Dominguez, "Winning without fighting? Why China is exploring 'cognitive warfare'",https://www.japantimes.co.jp/news/2023/05/26/asia-pacific/china-pla-ai-cognitive-warfare/, visité le 16.03.2024.

[33] Ibid.

[34] Ibid.

à savoir être utilisée dans un conflit armé, qu'elle soit ou non conforme aux obligations auxquelles les parties se sont engagées. En d'autres termes, tout au long du développement et de l'examen de l'utilisation possible d'une technologie particulière, l'État est tenu de s'assurer que la technologie en question ne contrevient pas aux articles des conventions et des protocoles additionnels au moment où l'analyse est effectuée[35]. L'article 36 doit être interprété en liaison avec l'article 35, qui stipule que les armes pouvant être utilisées en temps de guerre ne sont pas illimitées, afin de décourager les États d'ajouter de nouvelles armes à la liste de celles qui sont déjà utilisées. D'autre part, l'article 51 du Protocole stipule qu'il est interdit de soumettre les civils à des attaques et, à plus forte raison, de diriger ces attaques dans le but d'infliger la terreur à la population civile. Dans le contexte de l'émergence de nouveaux types de guerre, il est difficile de dire dans quelle mesure ces nouvelles techniques sont ou non compatibles avec le droit international humanitaire et les dispositions du droit de Genève.

Il convient de noter que, par principe, le Comité international de la Croix-Rouge, autorité importante dans le domaine du droit international humanitaire, n'est pas opposé à l'ajout de nouvelles armes à la liste existante[36], comme le montre le libellé des articles susmentionnés. Toutefois, le Comité se garde d'être trop tolérant à l'égard des pratiques de la Chine et d'autres États en la matière.

4.2. Les États-Unis d'Amérique et la proposition de règles sur la responsabilité

Outre les actions nationales de la Chine, il existe également un souci de donner une forme juridique aux nouvelles réalités de la guerre. Les États-Unis ont rédigé un document novateur sur l'élaboration de règles relatives à l'utilisation de l'IA dans les conflits armés. La Déclaration politique sur l'utilisation militaire responsable de l'intelligence artificielle et de l'autonomie a été adoptée à la Haye en 2023 lors du Sommet sur l'utilisation responsable de l'IA dans les conflits armés[37]. Le document a la valeur d'une loi non

[35] Commentaire de l'article 36 du Protocole additionnel à la Convention de Genève du 12 août 1949.

[36] ICRC No. 913, *ICRC Position Paper: Artificial intelligence and machine learning in armed conflict: A human-centered approach,* https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913, visté le 17.03.2024.

[37] Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy, Bureau of Arms Control, Deterrence and Stability,https://www.state.gov/political-

contraignante (soft law), contenant des règles qui ne sont pas juridiquement contraignantes, mais qui représentent un pas en avant important dans la réglementation de l'utilisation de l'IA. À ce jour, 49 pays ont exprimé leur soutien à cette initiative, dont la Roumanie[38]. Comme on pouvait s'y attendre, la Chine n'a pas soutenu la proposition américaine. La déclaration réitère l'importance du respect des règles du droit international humanitaire dans les conflits où des armes dirigées par l'IA sont utilisées. En outre, le paragraphe B souligne la nécessité pour les États d'accroître le degré de protection des civils dans de tels conflits[39]. Par ailleurs, le paragraphe H de la déclaration insiste sur le fait que les États doivent définir clairement le but de ces armes afin d'en limiter l'utilisation arbitraire[40].

Il reste à voir si les États reprendront ces règles non contraignantes et les transformeront en droit coutumier international, devenant ainsi des règles contraignantes dotées d'une force juridique plus importante qu'aujourd'hui.

5. L'éthique et l'humanité « artificielles » dans le domaine du droit international humanitaire

5.1. La clause Martens dans le contexte de l'utilisation de l'IA dans les conflits armés

L'un des principes les plus importants du droit international humanitaire est le principe d'humanité, qui stipule que les personnes en situation difficile, comme les civils, qui ne sont pas en mesure de se défendre contre l'ennemi comme le font les combattants, doivent être traitées avec humanité, dans le respect de leur droit à la vie et à l'intégrité physique et mentale[41]. Cette idée se retrouve dans la Convention de La Haye de 1899 sur la guerre en mer et

declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/), visité le 16.03.2024.

[38] Lauren Kahn, "How the United States Can Set International Norms for Military Use of AI",https://www.lawfaremedia.org/article/how-the-united-states-can-set-international-norms-for-military-use-of-ai, 21 janvier 2024, visité le 16.03.2024.

[39] Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy, Bureau of Arms Control, Deterrence and Stability, https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/, visité le 16.03.2024.

[40] Ibid.

[41] Anca-Daniela Deteseanu, *Droit international humanitaire et droit des réfugiés*, 1ère édition. Ed. Hamangiu, 2024, Bucarest, p. 27.

est connue sous le nom de *clause Martens*[42]. L'objectif de cette règle est précisément d'éviter les situations de vide réglementaire par rapport à une situation juridique particulière. Dans ce contexte, le recours à la clause de Martens peut apporter la protection nécessaire aux catégories qui en ont besoin, sans qu'il soit nécessaire d'obtenir une réponse des États, qui arriverait souvent trop tard pour être considérée comme efficace. La clause incite donc les États et les individus à prendre des mesures proportionnées et humaines au moment où elles sont le plus nécessaires[43].

Cependant, malgré son noble objectif, la clause Martens peut poser de nouveaux problèmes dans l'utilisation de l'intelligence artificielle dans les conflits armés. Le processus consistant à peser les valeurs et à imaginer les résultats qui seront produits était, jusqu'à récemment, une opération exclusivement humaine. Mais le progrès technique a montré qu'il est possible de créer des algorithmes capables de faire beaucoup de choses qui ne semblaient possibles qu'à l'échelle humaine. Mais l'IA peut-elle respecter le principe d'humanité, comme l'exigent les conventions du droit international humanitaire?

L'un des arguments en faveur de l'utilisation de l'intelligence artificielle dans ce cadre serait que la grande précision de ces algorithmes peut réduire de manière exponentielle les erreurs tactiques que les humains commettraient inévitablement[44]. Cette idée s'inscrit dans le contexte de la nécessité de rationaliser les opérations militaires. En théorie, il s'agit d'un objectif noble, mais dans la pratique, les choses sont quelque peu différentes. Les algorithmes créés par des humains peuvent, comme les humains, se tromper. Logiquement, une entité imparfaite ne peut pas créer quelque chose de parfait. Dans les conflits armés, cependant, les erreurs de système sont encore plus graves que dans d'autres domaines. Il semble que la pensée basée strictement sur des règles mathématiques soit incompatible avec la prise de décision tactique. Récemment, il y a eu de nombreux exemples d'algorithmes qui n'ont pas fonctionné. Un exemple frappant est le dysfonctionnement des voitures Tesla, qui a provoqué pas moins de 736 accidents, dont certains ont entraîné

[42] Ibid.

[43] Elena Lazar, *Dreptul inteligentei artificiale-o scurta introducere,* Ed. Hamangiu, Bucarest, 2024.

[44] Ruben Steward, Georgia Hinds, "Algorithms of war: The use of artificial intelligence in decision making in armed conflict", https://blogs.icrc.org/law-and-policy/2023/10/24/algorithms-of-war-use-of-artificial-intelligence-decision-making-armed-conflict/), visté le 17.03.2024.

la mort des victimes[45]. Les algorithmes ne sont donc pas parfaits et il est peu probable qu'ils réagissent de manière cohérente dans les situations de crise. La situation est encore pire dans les conflits armés, où les décisions de frapper ou non une cible militaire sont prises en quelques secondes.

D'un point de vue juridique, la clause de Martens a pour spécificité un raisonnement humain, qui met en balance deux situations potentielles et choisit la plus appropriée. La rapidité est-elle souhaitable dans de telles situations? Il semble plus important de trouver des alternatives que d'adopter une réponse mathématique. Les experts soulignent que c'est précisément ce temps, que l'utilisation de l'IA éliminerait, qui permet de trouver des alternatives, ce qui peut sauver de nombreuses vies[46]. La population civile peut ainsi s'abriter ou observer un cycle dans les opérations militaires menées[47], ce qui est évidemment à encourager selon les règles du droit international humanitaire. Certes, la guerre implique par nature la perte de vies humaines, mais leur nombre doit être aussi réduit que possible et la souffrance doit être évitée à tout prix.

5.2. La responsabilité de l'AI dans le domaine du droit international humanitaire

Les récents conflits militaires ont montré à quel point la notion de guerre a évolué aujourd'hui. Par exemple, dans la guerre entre la Russie et l'Ukraine, les deux parties utilisent des serveurs capables de détecter les cibles à atteindre, ainsi que des algorithmes qui permettent d'atteindre plus efficacement les objectifs militaires[48]. En quelques secondes, les drones, nouvelle présence sur le champ de bataille, sont capables de détruire des moyens militaires qu'il faudrait autrement beaucoup plus de temps pour éliminer. Mais ces machines sont contrôlées par des humains. L'avenir veut que les technologies basées sur l'IA prennent des décisions par elles-mêmes.

---

[45] Faiz Siddiqui, Jerem Merril, "17 fatalities, 736 crashes: The shocking toll of Tesla's Autopilot", The Washington Post, https://www.washingtonpost.com/technology/2023/06/10/tesla-autopilot-crashes-elon-musk/, visité le 17.03.2024.

[46] Ruben Steward, Georgia Hinds, "Algorithms of war: The use of artificial intelligence in decision making in armed conflict", (https://blogs.icrc.org/law-and-policy/2023/10/24/algorithms-of-war-use-of-artificial-intelligence-decision-making-armed-conflict/), visité le 17.03.2024.

[47] Ibid.

[48] Lauren Kahn, "How the United States Can Set International Norms for Military Use of AI",https://www.lawfaremedia.org/article/how-the-united-states-can-set-international-norms-for-military-use-of-ai), 21 janvier 2024, visité le 16.03.2023.

Une autre dimension de ce désir est la dimension éthique, une dimension importante pour le droit humanitaire international. Mais il est peut-être tout aussi important de savoir qui est responsable des actes commis par l'intelligence artificielle.

Est-il éthique de laisser un ordinateur décider si une personne doit être tuée ou non? Les Nations unies ont répondu fermement par la négative, dans la résolution adoptée par la Première Commission, organe du système des Nations unies[49]. La réponse de la communauté internationale est conforme aux principes du droit humanitaire et fortement en faveur de son respect. Mais, pour l'instant, la question de la responsabilité n'a pas été abordée en termes très clairs.

La réponse est similaire à celle donnée dans d'autres branches du droit : l'intelligence artificielle n'est pas une personne, au sens juridique du terme, et ne peut être tenue pour responsable. C'est peut-être sur ce vide normatif que certains États s'appuient pour décider d'utiliser ces algorithmes. De timides tentatives ont été faites sur la scène internationale pour donner une forme juridique à ces situations. Par exemple, le Haut-Commissaire des Nations Unies aux droits de l'homme a réaffirmé la nécessité que l'IA continue à se développer et à être utilisée dans le respect des droits de l'homme[50], une idée qui fait de plus en plus son chemin au sein de la communauté internationale. Ce signal d'alarme intervient dans un contexte d'inquiétude généralisée quant à la manière dont l'intelligence artificielle pourrait être détournée de ses objectifs initiaux et causer plus de souffrances que nécessaire[51]. Face à de telles manifestations, il a été présumé que les personnes qui utilisent ces algorithmes sont également celles qui doivent répondre de la manière dont ils fonctionnent. En interprétant l'article 35, paragraphe 1, du protocole additionnel à la convention de Genève, qui stipule que le choix des armes dans les conflits militaires n'est pas illimité, on est arrivé à l'idée que le choix d'une telle arme est néanmoins une décision prise par les responsables d'un État, qui prévoient comment elle fonctionnera et quels types d'effets elle produira[52]. Ainsi, les commandants et les civils en charge de la technologie

[49] Le premier comité des Nations unies a adopté le document A/C.1/78/L.56.

[50] Discours du Haut Commissaire aux droits de l'homme, 12 juillet 2023, https://www.ohchr.org/fr/statements/2023/07/artificial-intelligence-must-be-grounded-human-rights-says-high-commissioner, visité le 20.03.2024.

[51] Ibid.

[52] Li Qiang, Dan Xie, "Legal regulation of AI weapons under international humanitarian law: A Chinese perspective", https://blogs.icrc.org/law-and-policy/2019/05/02/ai-weapon-ihl-legal-regulation-chinese-perspective/, 2 mai 2019, visité le 17.03.2024.

militaire seraient les premiers visés[53]. Tout au long de la fabrication et de l'utilisation de ces armes, certaines personnes peuvent jouer un rôle important dans la création de ces algorithmes. Il est fort probable que ces personnes soient responsables de l'utilisation qui en est faite. Toutefois, les discussions sur la responsabilité n'ont pas encore été abordées comme elles devraient l'être, en raison du fait que cette question juridique a été soulevée relativement récemment. Mais il est certain que les États devront s'asseoir à la table des négociations dès que possible et trouver une réponse cohérente à cette question. L'organe le plus important qui pourrait répondre à ces évolutions est probablement la Commission du droit international, qui a pour rôle de codifier les coutumes du droit international et d'encourager le développement progressif du droit international dans des domaines où il n'existe pas encore de règles de droit contraignantes, comme le domaine de l'intelligence artificielle. Jusqu'à présent, la CDI n'a pas entamé de discussions sur cette question[54]. Il reste à voir quand un rapporteur spécial sera nommé sur cette question.

6. Conclusions

Chaque jour, il devient de plus en plus évident que l'humanité subit des transformations sans précédent et que l'intelligence artificielle devient un défi croissant dans de nombreux domaines. Naturellement, le droit international est également appelé à répondre à ces nouveaux défis. Jusqu'à présent, il n'y a eu que des réponses timides, que ce soit au niveau national ou international, mais sans force juridique contraignante pour garantir leur efficacité. En outre, les discussions sur la responsabilisation des agents de l'État pour les actes commis par des algorithmes ne semblent pas être une priorité absolue pour la plupart des représentants de l'État. Le besoin d'équilibre est plus grand que jamais et le droit international, en particulier le droit humanitaire, doit rapidement répondre aux questions posées : quelle confiance pouvons-nous accorder à ces algorithmes et dans quelle mesure peuvent-ils remplacer le jugement humain? Il reste à voir comment le droit international humanitaire abordera ces questions cruciales.

---

[53] Ibid.

[54] Le site web de la Commission du droit international indique que l'intelligence artificielle n'est pas actuellement un sujet de discussion au sein de la Commission. https://legal.un.org/ilc/status.shtml, visité le 20.03.2024.

Bibliographie

Anca-Daniela Deteseanu, *Droit international humanitaire et des réfugiés*, 1ère éd. Hamangiu, 2024, Bucarest ;

Commentaire de l'article 36 du protocole additionnel à la convention de Genève du 12 août 1949 ;

Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949 ;

Convention des Nations unies sur certaines armes classiques (CCW), entrée en vigueur en 1983 ;

Document A/C.1/78/L.56, Première commission des Nations unies ;

Proposition de règlement du Parlement européen et du Conseil établissant des règles harmonisées en matière d'intelligence artificielle (loi sur l'intelligence artificielle) et modifiant certains actes de l'Union ;

Tribunal international pour l'ex-Yougoslavie, Tadić, 15 juillet 1999 ;

Elena Lazar, *Dreptul inteligentei artificiale-o scurta introducere*, Ed. Hamangiu, Bucarest, 2024 ;

PROTOCOLE I, Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux ;

Remarques du président de la Commission européenne von der Leyen au sommet de Bletchley Park sur la sécurité de l'IA, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52021PC0206, visité le 18.03. 2024 ;

Proposition de règlement du Parlement européen et du Conseil établissant des règles harmonisées en matière d'intelligence artificielle (loi sur l'intelligence artificielle) et modifiant certains actes de l'Union ;

Harry Surden, "Machine Learning and Law", Washington Law Review, Vol. 89, No. 1, 2014 ;

Adam Easton, "Poland says Russian missile entered airspace then went into Ukraine", BBC News, Warsaw, 29.12.2023, https://www.bbc.com/news/world-europe-67839340, visité le 18.03.2024.

The Convention on Certain Conventional Weapons ;

Philip Alexander, "Reconciling Automated Weapon Systems with Algorithmic Accountability: An International Proposal for AI Governance", https://journals.law.harvard.edu/ilj/2023/10/reconciling-automated-weapon-systems-with-algorithmic-accountability-an-international-proposal-for-ai-governance/, visité le 19.03.2024 ;

Li Qiang, Dan Xie, "Legal regulation of AI weapons under international humanitarian law: A Chinese perspective", https://blogs.icrc.org/law-and-policy/2019/05/02/ai-weapon-ihl-legal-regulation-chinese-perspective/, 2 mai 2019, visité le 17.03.2024 ;

Ted Piccone, "How can international law regulate autonomous weapons?", https://www.brookings.edu/articles/how-can-international-law-regulate-autonomous-weapons/, visité le 19.03.2024 ;

Site internet des Nations unies, déclaration sur l'adoption de la résolution : https://press.un.org/en/2023/gadis3731.doc.htm#:~:text=Turning%20to%20the%20draft%20as,T%C3%BCrkiye%2C%20United%20Arab%20Emirates), visité le 16.03.2024 ;

Ruben Steward, Georgia Hinds, "Algorithms of war: The use of artificial intelligence in decision making in armed conflict", https://blogs.icrc.org/law-and-policy/2023/10/24/algorithms-of-war-use-of-artificial-intelligence-decision-making-armed-conflict/, 24 octobre 2023, visté le 16.03.2024 ;

Gabriel Dominguez, "China takes 'stunning lead' in key technological research, think tank says", https://www.japantimes.co.jp/news/2023/03/03/world/china-lead-tech/, visité le 16.03.2024 ;

Gabriel Dominguez, “Winning without fighting? Why China is exploring 'cognitive warfare.′”, https://www.japantimes.co.jp/news/2023/05/26/asia-pacific/china-pla-ai-cognitive-warfare/, visité le 16.03.2024 ;

CICR n° 913, Prise de position du CICR : L'intelligence artificielle et l'apprentissage automatique dans les conflits armés : une approche centrée sur l'humain, https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913, visité le 17.03.2024 ;

Commentaire de l'article 36 du Protocole additionnel à la Convention de Genève du 12 août 1949 ;

Lauren Kahn, “How the United States Can Set International Norms for Military Use of AI”,https://www.lawfaremedia.org/article/how-the-united-states-can-set-international-norms-for-military-use-of-ai, 21 janvier 2024, visité le 16.03.2024 ;

Discours du Haut-Commissaire aux droits de l'homme, 12 juillet 2023, (https://www.ohchr.org/fr/statements/2023/07/artificial-intelligence-must-be-grounded-human-rights-says-high-commissioner), visité le 20.03.2024 ;

Faiz Siddiqui, Jerem Merril, “17 fatalities, 736 crashes: The shocking toll of Tesla’s Autopilot”, The Washington Post, https://www.washingtonpost.com/technology/2023/06/10/tesla-autopilot-crashes-elon-musk/, visité le 17.03.2024 ;

Déclaration politique sur l'utilisation militaire responsable de l'intelligence artificielle et de l'autonomie, Bureau de la maîtrise des armements, de la dissuasion et de la stabilité, https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/, visité le 16.03.2024.

The OECD Accession Process – Romania's Road to Economic Progress

Andreea IVANOV*
University of Bucharest, Faculty of Law

Abstract: *In early 2022, the Council of the Organisation for Economic Cooperation and Development (OECD) decided to open accession talks with six countries, including Romania. With the adoption of the Roadmap for Romania, common visions with the Organisation were welcomed, while also setting out the conditions for accession. This article aims to analyse the process of accession to the OECD, presenting at the same time the dynamics of Romania's bilateral relations with the Organisation. Along with the benefits that come with membership, the advantages of the pre-accession period were also outlined. Being a specific international organisation, the OECD presents a set of particularities that set it apart from other international bodies.*

Key-words: *global forum, accession process, bilateral relations, international economic cooperation*

* *Student at the Faculty of Law, University of Bucharest (4th year) and at the Collège juridique franco-roumain d'études européennes. Andreea holds a bachelor degree in Economics from the Bucharest University of Economic Studies. E-mail address: andreea.ivanov@drept.unibuc.ro.* The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

1. Introduction

The Organisation for European Economic Cooperation, the forerunner of the Organisation for Economic Cooperation and Development (OECD, the Organisation), oversaw the implementation of the Marshall Plan in Europe and laid the foundation for the global policy forum that we know today as the OECD. Even from that troubled period, there was felt the need for an international organisation to administer the European Recovery Program, to bring economic cooperation closer to reality and to create a space for dialogue on topics of common interest to states. With the conclusion of the Marshall Plan, countries continued to work together in order to achieve common goals, to adopt harmonised economic policies and to exchange best practices, thus creating, in 1961, the OECD.

The OECD is the focal point of the world economy, with member states setting global trade and investment standards. Nowadays, the OECD has 38 member countries (from North and South America, Asia, Europe), the last to accede being Costa Rica and 8 candidate states (Argentina, Brazil, Bulgaria, Croatia, Indonesia,[1] Peru, Romania, Thailand[2]). Nevertheless, the OECD manages to reach more than 100 countries through its programmes and initiatives.[3]

The purpose of the Organisation is to promote the economic and social well-being of people by advancing policies within a framework in which governments work together in order to find solutions to common problems. Accordingly, the OECD develops and analyses indicators of productivity, trade flows, investment and statistics on a wide range of areas, setting global standards for public policy.

As far as the relations between Romania and the OECD are concerned, they have gradually evolved over time, as Romania has been proving its ambitions for membership since 2004, being renewed several times.[4] It was only 18 years later, on January 25, 2022, when the OECD Council decided to start accession talks with six countries, including Romania.

---

[1] Indonesia became a candidate country in February 2024, being the first in Southeast Asia.

[2] Thailand became a candidate country in June 2024.

[3] OECD, "How we work", https://www.oecd.org/en/about/how-we-work.html.

[4] The Romanian Government, "The Government of Romania welcomes the decision of the Council of the Organization for Economic Cooperation and Development (OECD) to open accession negotiations with Romania", 2022, https://gov.ro/en/news/the-government-of-romania-welcomes-the-decision-of-the-council-of-the-organization-for-economic-cooperation-and-development-oecd-to-open-accession-negotiations-with-romania

Romania's engagement with the OECD demonstrates the state's involvement in this process long before the opening of accession talks, showing a constant commitment to enhancing cooperation with the OECD. Being on the right track towards membership, Romania consolidates its position as an important future member of the Organization, implementing the recommendations and joining the specific instruments, interacting with member states and participating in related structures and specific programs, thus benefiting from constant exchange of expertise and cooperation with member states.

2. The OECD, a Specific International Organisation

Referred to by some authors[5] as the 'rich countries club', the OECD can be described as a specific international organisation, being the centre of international economic cooperation. Accordingly, the specificity of the organisation lies in the communication and cooperation – it is, in fact, a body based on dialogue between experts from the 38 member countries.

In this regard, another characteristic of the OECD is the attention given to statistical analysis of indicators in several domains, bringing a multi-disciplinary approach. The reports are actively published, including for non-member countries. Experts have also analysed the OECD's role as a *think tank,*[6] one of its main focuses being the study of economic indicators, while also providing recommendations.

Access to peer reviews, through the expertise provided by the OECD, represents one of the most important benefits for member countries, officials repeatedly welcoming the importance of this process. Despite having access to the reports even without being a member of the OECD, countries seek to meet the criteria for membership in order to be identified within a group of developed states. This identification comes with a compulsion from the other members of the group to accept an important set of policies and principles, to participate and contribute to an ongoing dialogue on the future direction of the world economy and political affairs.

Furthermore, a relevant aspect is that OECD member states are expected to comply with the Organisation's principles and policies for their own benefit,

[5] Christina L. Davis, "More than just a Rich Country Club: Membership Conditionality and Institutional Reform in the OECD", 2016, available at https://scholar.harvard.edu/files/cldavis/files/davis2016b.pdf, p. 3.

[6] Benoit Godin, "The New Economy: what the concept owes to the OECD", available at https://www.csiic.ca/PDF/Godin_21.pdf, p. 4.

not as a *quid pro quo,*[7] as it usually happens within other international organisations.

3. An Atypic Accession Process

One of the less discussed specificities of the OECD is the atypical accession process. After the Council's decision to open accession talks, the process starts with the adoption of the roadmap. This sets out, for each country, the terms and conditions of the accession, as well as the OECD committees that are to assess the candidate country and then submit a formal opinion to the Council. As part of this process, the country's legislation, policies and practices are reviewed, with a focus on the readiness and capacity to implement the Organisation's specific legal instruments and the alignment of national policies with those of the member States. The committees may make recommendations for changes to the legislation, policies or practices, in order to bring them closer to OECD standards.

The roadmap also foresees the need for the candidate country's position on the OECD legal instruments[8] at two important moments: at the beginning of the process (through the adoption of the initial memorandum) and at the end of the process (through the adoption of the final declaration).

The country's position can be one of acceptance, acceptance with reservations/observations or acceptance with a deadline for implementation. In theory, the option of non-acceptance is also possible, but it is clearly neither recommended nor used. At the end of the process, after the submission of the final declaration, which implies acceptance of the obligations arising from the membership, as well as the positioning on the instruments mentioned above, the Council, through a unanimous decision, invites the State to become a member. The next steps are the signing of the accession agreement, together with the adoption of internal measures in order to obtain approval for accession.[9]

The State becomes a member of the OECD from the deposit date of the

---

[7] Otaviano Canuto, Tiago Ribeiro dos Santos, "What can Brazil expect from joining OECD?", *Revista Tempo do mundo*, n. 25, 2021, available at https://www.cmacrodev.com/what-can-brazil-expect-from-joining-the-oecd/.

[8] The legal instruments of the OECD, almost 500, are binding decisions, recommendations, substantive outcome documents, international agreements.

[9] Nicola Bonucci, *Accession to the OECD: AN OVERVIEW*, 2017, available at https://www.gov.br/casacivil/pt-br/assuntos/downloads/ocde/palestras/avulsas/apresentacao_nicolabonucci_abril2017.pdf

instrument of accession to the OECD Convention.

The accession process is seen by some as atypical, with no precise general conditions. At the same time, there is a considerable and sometimes open to criticism margin of discretion in admitting new members.[10]

4. Romania & OECD

Romania has had very close relations with the OECD over the years, confirmed by the intentions of the post-December governments to implement the necessary measures in order to align with OECD standards.

In 2001, the Romanian Government decided to relaunch the cooperation with the OECD and in 2004 the OECD Office was opened within the Romanian Embassy in Paris.[11] The aspirations to become a member of the Organisation were born in 2004 and were reconfirmed over the years. Despite the fact that the Organisation repeatedly welcomed the dynamic relations with Romania, adding it to the 2004-2005 shortlist of candidate countries, Romania was not included in the 2007 OECD enlargement wave.[12]

Efforts, initially to align with OECD standards and subsequently to accede to the OECD bodies and legal instruments, have been underway since then, Romania participating in policy reviews on education, investment, corporate governance and others. Cooperation has deepened over the years and has been supported by successive governments. Thus, Romania took part in statistical reporting and started ratifying the legal instruments.

2022 was the year that brought hope that Romania's accession to the OECD is a realistic goal, the OECD Council deciding, on 25th January 2022, to start accession talks with six countries, including Romania.

Another milestone was the adoption of the Roadmap for Romania[13] in June 2022, which welcomed the shared values, vision and priorities with the Organisation. The document also sets out the conditions for accession, the focus being to enable the Council to take a decision on inviting Romania to

[10] Davis, 2016, cit. supra, p. 11.

[11] Ministry of Foreign Affairs of Romania, "Organizația pentru Cooperare și Dezvoltare Economică", https://www.mae.ro/node/1478.

[12] The enlargement wave started in 2007 and ended in 2010, with the accession of Israel, Chile, Slovenia and Estonia.

[13] OECD, "Roadmap for the OECD Accession Process of Romania", available at https://www.oecd.org/mcm/Roadmap-OECD-Accession-Process-Romania-EN.pdf.

join the OECD.

The Roadmap for Romania established 26 Technical Assessment Committees and the need to internalise more than 250 legal technical instruments into the national legislation, policies and practices. The 26 Committees cover areas such as structural reform, trade, investment, sustainable development, governance, digitalisation and others and will assess Romania's legislation, policies and practices.

Romania was well positioned *vis-à-vis* the OECD even before the start of the accession process, participating in 10 committees as a member, in 12 as an observer and in 15 as a guest. As the profile of the country shows on the OECD official website, Romania has joined a significant number of OECD bodies and legal instruments, participating as an associate or member in more projects and bodies than any other partner country. From the start of the accession process, Romania participates in all OECD working formats.

According to official information,[14] by July 2024, Romania has acceded to 84 OECD legal instruments out of almost 500. For the purpose of comparative analysis, Romania has acceded to 7 decisions (which are legally binding on member states, except those which abstain at adoption) and 45 recommendations (considered political commitments), while France (member state) has acceded to 58 decisions and 324 recommendations. As for international agreements (legally binding documents within the Organisation), Romania has acceded to 3 of them and France to 10. Compared to Bulgaria, which has also been included in the same list of countries to have opened accession talks with the OECD in 2022, Romania is in an advantageous position. Bulgaria has acceded to only 67 legal instruments, including 7 decisions, 34 recommendations, and, like Romania, 3 international agreements.

5. Romania's Accession to the OECD, Major Foreign Policy Objective

Major and strategic objective of the Romanian foreign policy,[15] the accession to the OECD implies integration into the group of the 38 'rich countries' with democratic systems of government and market economies.

Joining the OECD is justifiably considered to be the most important moment

[14] Data collected via the OECD platform – "OECD Legal Instruments", https://legalinstruments.oecd.org/en/.

[15] Ministry of Foreign Affairs of Romania, "Organizația pentru Cooperare și Dezvoltare Economică", https://www.mae.ro/node/1478.

for Romania in terms of foreign policy after joining the North Atlantic Treaty Organisation and the European Union.[16] The OECD is the focal point of the world economy, with member states and key partners setting global quality standards in trade and investment[17] and covering about 70-80% of world trade and investment.[18] Romania would achieve, through membership, an increased level of modernisation and development.

The effects of the accession can be seen in the OECD's role itself:[19] it helps member countries advance reform programmes, builds a fair and strong world economy and is the leading body on policy-making in areas such as combating corruption, corporate social responsibility, taxation, transparency and others.

Even with reference to the pre-accession period, it has been argued that the course of negotiations can have a 'catalytic effect' on public policies,[20] as it is the time to accelerate the implementation of long-awaited reforms. Although reforms and alignment with the standards of economically developed countries represent an advantage in themselves, regardless of whether or not one joins an international organisation, reforms are often perceived as concessions made by the state. This is not the case with OECD membership. There is a theory that the changes initiated when the accession process begins are positive *sui generis.*[21] The state, and therefore its citizens, have a lot to gain from the pre and post-accession process, given the implementation of reforms, alignment with the standards of economically strong and stable states, increased liberalisation and democratisation.

Accordingly, among other things, joining the OECD has a positive impact on

---

[16] Ministry of Foreign Affairs of Romania, "Organizația pentru Cooperare și Dezvoltare Economică", https://www.mae.ro/node/1481.

[17] Maria Iglesia, "The Benefits of being an OECD Member", available at https://conexionintal.iadb.org/2016/01/29/costos-y-beneficios-de-formar-parte-de-la-ocde/?lang=en.

[18] Republic of Latvia Ministry of Foreign Affairs, "The OECD and Latvia", https://www.mfa.gov.lv/en/oecd-and-latvia?utm_source=https%3A%2F%2Fwww.google.com%2F.

[19] Ariane de Saeger, "L'OCDE face aux défis de la mondialisation", *Culture Économique,* 2015, 50 Minutes, n. 8, available at https://univ.scholarvox.com/catalog/book/docid/88857792

[20] Geneva Network, "Is the OECD ready for Colombian membership?", available at https://geneva-network.com/wp-content/uploads/2018/04/OECD-and-Colombian-accession.pdf, p.3.

[21] Canuto, dos Santos, 2021, cit. supra.

the country's risk classification,[22] which would attract foreign investment and lead to a faster and more effective absorption of European funds. Likewise, other effects of accession include: increased economic growth, sustainable development and European economic convergence.

With OECD membership also comes an increase in the variety of products imported by a country.[23] The same advantage applies to exports[24] – with greater exposure to trade, productivity among domestic producers will increase, improving their efficiency and taking advantage of more export opportunities.

From a market point of view, the association with an organisation like the OECD pays off in terms of investor confidence, with member countries benefiting from lower interest rates. A country's reputation, as measured by its credit risk rating, rises or falls depending on its association with regional or global economic organisations.

The OECD's mission is to help countries find solutions to common problems through international cooperation, exchange of best practices and dialogue. Joining the OECD is a clear choice to be part of an international organisation that brings with it standards that must be met and respected, as well as benefits in terms of the state's reputation. In addition, the membership of an organisation that includes the world's strongest economies would give Romania the opportunity to participate in a constant dialogue and exchange of practices with other states, with the goal of strengthening political and economic reforms.

The objective of integrating a state into a particular organisation is based both on a desire to associate with a particular group of states (with a set of characteristics towards which the candidate country is aiming) and also a need to work with them in various areas. An example is one of the many dimensions on which OECD membership is based, transparency. Thus, countries wishing to join undertake to provide information to the Organisation's experts, exposing their work to public assessment.

---

[22] Davis, 2016, cit. supra, p. 15.

[23] Robert C. Feenstra, Hong Ma, "Trade Facilitation and the Extensive Margin of Exports", *The Japanese Economic Review*, 2014, available at https://onlinelibrary.wiley.com/doi/abs/10.1111/jere.12031.

[24] Cordeiro Luciana Machado, Campina Ana Claudia Carvalho, "Avantages et inconvénients de l'adhésion du Brésil à l'Organisation de coopération et de développement économiques – OCDE", 2021, available at https://www.nucleodoconhecimento.com.br/droit/ladhesion-du-bresil.

In addition to the accession assessment missions, countries also participate in the OECD's peer review mechanism, which is based on information provided by countries in order to ensure the OECD's main operating mechanism: the review of state policies, which is designed to determine whether or not the Organisation's standards are being met.

6. Conclusions

Being part of a club of the world's most developed economies, in a space of permanent dialogue with them, allowing the exchange of common visions, policies and principles, as well as having access to reports and analyses conducted by experts of the Organisation are the main reasons why the OECD is a specific international economic organisation.

The association with a group of countries such as OECD members brings with it the implementation of important reforms, direct access to each other's expertise, compliance with deadlines for specific assessments and technical reviews by OECD bodies, and the tendency to increase transparency and liberalisation. The very specificity of the accession process brings important changes. It goes without saying that achieving the goal of accession would not be possible without the long-desired but long-abandoned reforms.

At the same time, membership implies the responsibility of being part of a group with common goals, standards to be met and positions to be taken accordingly. All of these lead to increased international visibility, stronger economic cooperation, more investments and increased societal resilience.

The specific nature of the Organisation, the importance attached to membership, and the openness of public institutions to this objective reflect Romania's desire to overcome the problems that it has been facing for years, the goal of effective governance and the alignment with OECD standards, therefore being on the road to economic progress.

Bibliography

Ariane de Saeger, "L'OCDE face aux défis de la mondialisation", *Culture Économique,* (2015), 50 Minutes, n. 8, available at https://univ.scholarvox.com/catalog/book/docid/88857792

Benoit Godin, "The New Economy: what the concept owes to the OECD", available at https://www.csiic.ca/PDF/Godin_21.pdf

Carmen Radu, "Analysis Romania's accession to the OECD, a 'success' 20 years overdue. What benefits it will bring: 'The hard work is just beginning'", https://economedia.ro/analysis-romanias-accession-to-the-oecd-a-success-20-years-overdue-what-benefits-it-will-bring-the-hard-work-is-just-beginning.html

Christina L. Davis, "More than just a Rich Country Club: Membership Conditionality and Institutional Reform in the OECD", June 2016, https://scholar.harvard.edu/files/cldavis/files/davis2016b.pdf

Cordeiro Luciana Machado, Campina Ana Claudia Carvalho, "Avantages et inconvénients de l'adhésion du Brésil à l'Organisation de coopération et de développement économiques – OCDE", 2021, available at https://www.nucleodoconhecimento.com.br/droit/ladhesion-du-bresil

Geneva Network, "Is the OECD ready for Colombian membership?", available at https://geneva-network.com/wp-content/uploads/2018/04/OECD-and-Colombian-accession.pdf

Maria Iglesia, "The Benefits of being an OECD Member", available at https://conexionintal.iadb.org/2016/01/29/costos-y-beneficios-de-formar-parte-de-la-ocde/?lang=en

Nicola Bonucci, *Accession to the OECD: AN OVERVIEW*, 2017, available at https://www.gov.br/casacivil/pt-br/assuntos/downloads/ocde/palestras/avulsas/apresentacao_nicolabonucci_abril2017.pdf

OECD, "OECD and Enlargement", https://www.oecd.org/about/document/enlargement.htm

OECD, "The OECD and South East Europe – Romania", https://www.oecd.org/south-east-europe/economies/see-romania.htm

OECD, "OECD Legal Instruments", https://legalinstruments.oecd.org/en/

OECD, "75th Anniversary of the Creation of the OEEC", https://www.oecd.org/about/history/oeec/

OECD, "Resolution of the Council on the Opening of Accession Discussions", available at https://www.oecd.org/newsroom/Resolution-of-the-Council-on-the-Opening-of-Accession-Discussions-C-2017-92-final.pdf

OECD, "Roadmap for the OECD Accession Process of Romania", available at https://www.oecd.org/mcm/Roadmap-OECD-Accession-Process-Romania-EN.pdf

OECD, "How we work", https://www.oecd.org/en/about/how-we-work.html

Otaviano Canuto, Tiago Ribeiro dos Santos, "What can Brazil expect from joining OECD?", *Revista Tempo do mundo*, n. 25, 2021, available at https://www.cmacrodev.com/what-can-brazil-expect-from-joining-the-oecd/

The Romanian Government – press release, "Premierul Nicolae-Ionel Ciucă: Reuniunea de astăzi este semnalul pe care îl dăm privind seriozitatea cu care tratăm pregătirea aderării noastre la OCDE", 2024, https://gov.ro/ro/media/comunicate/premierul-nicolae-ionel-ciuca-reuniunea-de-astazi-este-semnalul-pe-care-il-dam-privind-seriozitatea-cu-care-tratam-pregatirea-aderarii-noastre-la-ocde

The Romanian Government – press release, "The Government of Romania welcomes the decision of the Council of the Organization for Economic Cooperation and Development (OECD) to open accession negotiations with Romania", 2022, https://gov.ro/en/news/the-government-of-romania-

welcomes-the-decision-of-the-council-of-the-organization-for-economic-cooperation-and-development-oecd-to-open-accession-negotiations-with-romania

Republic of Croatia Ministry of Finance, "Key Benefits of OECD Membership", https://www.porezna-uprava.hr/bi/Documents/Key%20Benefits%20of%20OECD%20Membership.pdf

Republic of Latvia Ministry of Foreign Affairs, "The OECD and Latvia", https://www.mfa.gov.lv/en/oecd-and-latvia?utm_source=https%3A%2F%2Fwww.google.com%2F

Robert C. Feenstra, Hong Ma, "Trade Facilitation and the Extensive Margin of Exports", *The Japanese Economic Review*, 2014, available at https://onlinelibrary.wiley.com/doi/abs/10.1111/jere.12031

Ministry of Foreign Affairs of Romania, "Organizația pentru Cooperare și Dezvoltare Economică", https://www.mae.ro/node/1481

Ministry of Foreign Affairs of Romania, "Organizația pentru Cooperare și Dezvoltare Economică", https://www.mae.ro/node/1478

Contribuţia doctorandului şi masterandului / Ph.D. and LL.M. Candidate's Contribution

Jurisdiction or Admissibility? The Nature of the Monetary Gold Principle as Applied by the International Court of Justice

Sabin SOLOMON[*]

University of Bucharest, Faculty of Law

Abstract: *This article seeks to address a fundamental theoretical question about the nature of the Monetary Gold principle as applied in the case law of the International Court of Justice. The primary inquiry revolves around whether the Monetary Gold principle pertains to the admissibility of claims before the Court, the jurisdiction of the Court to adjudicate a case, or whether it should be approached from an entirely different perspective.*

Keywords: *The Monetary Gold principle, Jurisdiction, Admissibility, Preliminary Objections.*

[*] *LLM in Public International Law, Faculty of Law, University of Bucharest, Romania. He is a Parliamentary Consultant within the Legislative Department of the Chamber of Deputies of Romania. E-mail address: solomonsabin@drept.unibuc.ro.* The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

1. Theoretical Introduction

The distinction between the concepts of admissibility and jurisdiction before the International Court of Justice (ICJ) often remains ambiguous in international law discourse, which has the potential to create considerable confusion. From a theoretical or academic perspective, this differentiation is typically emphasized as being significant. However, its practical utility is often questioned by some practitioners, who argue that the distinction is often less meaningful in real-world applications.

There have been even some instances in the history of the World Court where the parties themselves did not make a clear distinction when presenting arguments on the admissibility of a claim/jurisdiction before the judges, or in their written submissions, and the Court itself ended up not putting that much weight on the conceptual distinction in that particular case: "The Counter-Memorial of the United Kingdom, in Part II thereof, dealt with the merits of the case, the stated reason being that the United Kingdom thought assertions of the Republic of Cameroon should not remain unanswered. Part I of the Counter-Memorial raised a number of preliminary objections. These objections were developed at considerable length during the course of the oral hearing. For reasons which will subsequently appear, the Court does not find it necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds. During the course of the oral hearing *little distinction if any was made by the Parties themselves between "jurisdiction" and "admissibility"*."[1]

Practitioners frequently contend that whether an objection pertains to the admissibility of a claim before the ICJ or to the Court's jurisdiction to hear the case, the outcome is ultimately the same: the Court will dismiss the applicant's claim. Nevertheless, while the end result may indeed be identical, the paths leading to that conclusion are frequently quite distinct and fraught with complexities, unique to the issues of admissibility and jurisdiction. Each path encompasses different procedural and substantive challenges, which underscores the nuanced nature of these legal concepts as they are applied by the International Court of Justice.

Thus, the differentiation between the concepts of admissibility and jurisdiction is not merely a theoretical exercise, but a reflection of the nuanced nature of international dispute resolution. Recognizing and understanding these distinctions is often crucial for navigating the intricate landscape of international law and ensuring that legal principles are applied with precision

[1] *Northern Cameroons (Cameroon v United Kingdom),* International Court of Justice, Preliminary Objections, Judgment, ICJ Rep 15, 2 December 1963, p. 27.

and rigor. Practical considerations must not overshadow the theoretical importance of these concepts, as each concept plays a vital role in the adjudication process and the administration of justice on the international stage.

The eminent scholar and practitioner Jan Paulsson went so far as to assert, when referring to the notions of admissibility and jurisdiction, that: "They are indeed as different as night and day. It may be difficult to establish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that day and night do not exist."[2]

The essential difference between the two concepts as used in international adjudication has been concisely described as follows: "Unlike questions of jurisdiction that pertain to whether legal power exists or not, questions of admissibility pertain to whether or not the court may decline to exercise the power to adjudicate."[3] The Court itself pronounced on the subject that: "Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[4]

We can imply from these attempts at defining the "twilight zone," that another crucial distinction between the two concepts is that there is a certain element of discretion[5] that the Court can exercise when it ponders questions regarding the admissibility of a claim brought before it, and materialized in a submission, as opposed to the questions pertaining to the jurisdiction of the Court, where it not only has the right but also the duty to render a decision if it determines that it has jurisdiction over the matter.

Another crucial practical consideration to keep in mind when an objection concerns the admissibility of the claim or the jurisdiction of the Court is that jurisdictional objections can typically be raised at any stage of the

[2] Jan Paulsson, Gerald Aksen, Robert Briner (eds) "Jurisdiction and Admissibility",, *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, 2005, pp. 601, 607.

[3] Yuval Shany, Cesare P.R. Romano, Karen J. Alter, Chrisanthi Avgerou (eds), "Jurisdiction and Admissibility", *The Oxford Handbook of International Adjudication*, 2013, p. 788.

[4] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6), para. 29..

[5] The Court uses this term especially when referring to the admissibility of requests for an Advisory Opinion.

proceedings before the Court and are not subject to the doctrine of waiver.[6] The ICJ has long recognized an implied duty to be vigilant herself on all matters of jurisdiction, the parties merely drawing the attention of the Court to such issues: "The Court's position, in regard to jurisdiction, cannot be compared to the position of municipal courts, amongst which jurisdiction is apportioned by the State, either *ratione materiae* or in accordance with a hierarchical system. This division of jurisdiction is, generally speaking, binding upon the Parties and implies an obligation on the part of the Courts ex officio to ensure its observance. Since in such cases the raising of an objection by one Party merely draws the attention of the Court to an objection to the jurisdiction which it must ex officio consider, a Party may take this step at any stage of the proceedings."[7] On the other hand, issues of admissibility, if not raised before the merits are addressed, will be generally considered waived.[8]

Other authors have also described the concept of jurisdiction to pertain to the *propriety of the Court's deciding the case*.[9] This was meant to refer to questions regarding the personal capacity of the claimant to appear before the Court, the legal nature of the claim and the title of jurisdiction that entails the consent of the parties.[10] On the other hand, admissibility is to be understood as being concerned with *formal or material defects in the claim as formulated,* assuming that the Court could, in principle, consider a case of that nature.[11]

Judge Fitzmaurice has also attempted to clarify the matter in his separate Opinion in *the Northern Cameroons* case: "A given preliminary objection may on occasion be partly one of jurisdiction and partly of receivability, but the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application

---

[6] Chittharanjan F. Amerasinghe, *Jurisdiction of International Tribunals* (2002), Kluwer Law International, , p. 244.

[7] *Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26)*

[8] Chittharanjan F. Amerasinghe, *op.cit.*

[9] Robert Kolb, *The International Court of Justice* (2013), Hart Publishing, p. 202.

[10] *Ibid.*

[11] *Ibid.*

of such a provision, then it will normally be an objection to the receivability of the claim."[12]

In terms of the importance that should be awarded to matters of jurisdiction, the late Shabtai Rosenne put it very well when saying that: "Jurisdiction is the link between the general political organization of international society and the functioning of the Court. It is the channel through which the law-applying organ receives its power to decide a case with binding force for the parties to that case. The question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more. When a respondent raises a matter of jurisdiction – the term is taken from Article 36, paragraph 6, of the Statute as will be explained later – it frequently indicates the absence of political agreement that the Court should entertain the case. These are not mere technical issues. This imposes an attitude of caution in everything relating to jurisdiction."[13]

Having thus briefly analyzed the importance of distinguishing between the two concepts and how this distinction is typically described in the literature and ICJ case law, we can now turn our attention to a more specific question in the realm of admissibility and jurisdiction: what is the nature of the Monetary Gold principle as applied by the International Court of Justice?

2. The Monetary Gold Principle

At first glance, when considering the various definitions and characterizations of the two concepts, it might seem that the issue of indispensable third parties, specifically the Monetary Gold principle, pertains more to admissibility than to jurisdiction. Indeed, because it relates to the subject-matter of submissions, the principle is very close to constituting question of admissibility. In other words, its application very much depends on the way the submissions themselves are articulated.[14] However, the principle actually pertains to the *exercise* of jurisdiction, rather than to the admissibility of a claim or to the Court's jurisdiction to adjudge the matter itself.[15]

---

[12] The Northern Cameroons (Cameroon v. U. K.), 1963 I.C.J. 15 (Dec. 2), pp.102-103.

[13] Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (2006),Martinus Nijhoff,, p. 803.

[14] Pierre d'Argent, *The Monetary Gold Principle: A Matter of Submissions*,Symposium on Zachary Mollengarden & Noam Zamir "The Monetary Gold Principle: Back to Basics", p. 150.

[15] *Ibid.*

Upon closer examination of the actual Monetary Gold case, it becomes evident that this was not an issue related to any formal or material defects in the initial claim, defects that the claimant could have potentially corrected through a subsequent amended claim. Rather, the Monetary Gold principle seems to address a deeper, more fundamental question regarding the Court's jurisdiction and the way in which it might exercise the judicial function in accordance with the Statute. Specifically, this highlights the limitation that the Court cannot adjudicate a case if an indispensable third party has not given its explicit consent to be bound by the proceedings.

Therefore, the issue is fundamentally about the title of jurisdiction, or more precisely, the lack of such a title, which prevents the Court from ultimately exercising its jurisdiction in cases involving parties like Albania who have not consented to the Court's authority. This underscores the principle's focus on the jurisdictional legitimacy required for the Court to proceed with a case, rather than merely the admissibility of claims presented to it. It may look like just a "matter of submissions",[16] but it runs deeper than that.

States have also argued that the Court ought to find a claim *inadmissible* on the grounds that the interests of third parties will be affected. This was the case, for example, in the *Land and maritime boundary between Cameroon and Nigeria* (Preliminary objections, 1998), where Nigeria argued that the Court must find the application *inadmissible* (did not plea for the Court to refuse to exercise its jurisdiction)[17] because the requested maritime delimitation in the Gulf of Guinea regarded the interests of five coastal States between which there was no agreement as to the means of resolving the matter.

The Court initially rejected the preliminary objection because it deemed it to be a question that should be examined at the merits stage, where it finally declared that it could not accept that there was an overall inadmissibility, in that case, preventing it from deciding the dispute, preserving thus its ability of adjudication to the maximum practical extent possible.[18] It appears then that the correct way to deal with the rule represented by the Monetary Gold principle (the indispensable third party rule) is to characterize it as a matter of *jurisdiction* (lack of consent of the third party), or rather as a matter of the Court's *exercise* of its own jurisdiction, as opposed to a matter of *admissibility*

[16] *Ibid.*

[17] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), ICJ Reports 1998, para. 112.

[18] Robert Kolb, *The International Court of Justice* (2013), Hart Publishing, p. 576.

of a certain claim (which entails that there is a defect with the claim that could potentially be overcome by introducing another, amended claim, later).[19]

As we have seen, the Monetary Gold principle borrows defining characteristics from both admissibility and jurisdictional rules. Most notably, it is a matter of careful framing of the case on the Claimant's side that will ultimately result in whether the Court will assess the submissions and arrive at the conclusion that the Monetary Gold rule *precludes* it from exercising its jurisdiction. This is highly uncommon in jurisdictional matters because they typically cannot be resolved simply by the claimant configuring the dispute differently by way of its submissions.

The subtle intricacies that arise when an objection is raised for the absence of indispensable third parties was very well illustrated by professor Pierre d'Argent: "For instance, in Armed Activities on the Territory of the Congo (DRC v. Uganda), had the DRC requested from the Court that it adjudge and declare that Uganda conspired with Rwanda to use force illegally, the principle could have been triggered. However, the principle was not engaged by the DRC's carefully worded submissions, not even by the one relating to the fighting between the respondent and the alleged third absent state (i.e., Rwanda) that occurred in the city of Kisangani. The fact that the Court, instead of addressing the entire dispute through the lens of the Monetary Gold principle, limited its possible relevance to one of the Congolese submissions only highlights the true object of the principle. It relates to the subject-matter of the submissions, rather than to the subject-matter of the dispute as such."[20]

There have been mentions regarding the character of the Monetary Gold Principle in seminal works of international law scholarship such as Brownlie's Principles of International Law, which squarely places it in the realm of admissibility: "An objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time. Examples include undue delay in presenting the claim, failure to exhaust local remedies, mootness, and *absence of a necessary third party*."[21]

At the same time, the author defines objections relating to jurisdiction as follows: "Objections to jurisdiction relate to conditions affecting the parties' consent to have the tribunal decide the case at all. If successful, jurisdictional

[19] Robert Kolb, *The International Court of Justice* (2013), Hart Publishing, p. 576-577.

[20] Pierre d'Argent, *op. cit.*

[21] James Crawford, *Brownlie's Principles of International Law* (2019), Oxford University Press, p. 667.

objections stop all proceedings in the case, since they deprive the tribunal of the authority to give rulings as to the admissibility or substance of the claim."[22]

However, if we look closely at the indispensable third-party doctrine, we can easily observe that an objection on the matter does indeed relate to consent, just not the consent of the parties that are before the Court, *but of a party that ought to be*. The Monetary Gold principle reveals thus a matter of fundamental legitimacy and authority of the international dispute resolution system envisaged by the Statute of the International Court of Justice and the essentially consensual nature of it.

The Monetary Gold Principle has historically been interpreted narrowly by the Court. This approach prevents a broad application of the principle, which would otherwise obstruct the Court's jurisdiction over a great deal of cases. Given that a decision often impacts the legal interests of third parties that did not give their consent for the ICJ to decide the dispute, a broader interpretation could significantly reduce the Court's caseload if it entailed a requirement for individual consent from all interested third parties.

As such, the restriction imposed by the Monetary Gold principle is a relatively limited one[23] because it *only* applies to this particular scenario: The Court must logically decide first a dispute over which it doesn't have jurisdiction, in order to be able to decide the dispute over which it has jurisdiction. This logical succession of disputes that are inextricably linked so that the legal interests of a third party would form "the very subject matter of the decision" is a rare occurrence. In fact, only two cases in the history of the Court's jurisprudence have found an actual application of the principle (*The Monetary Gold removed from Rome* and *The East Timor* cases).

In the case of *Certain phosphate lands at Nauru* (Nauru v. Australia, Preliminary objections, 1992), the Court has made it clear that the principle does not apply if there are simultaneous effects of the Court's judgment on third parties if there is not also a logical priority of one question over the other. In that case, Nauru's application concerned the administration of certain phosphate lands jointly exploited by Australia, New Zealand, and the UK. However, Nauru could only bring a claim before the Court against Australia because only Australia had a valid title of jurisdiction on which the claim could be based. It was clear that, because the projects were jointly administered, a judgment that found Australia in violation of international

[22] *Ibid.*

[23] *Ibid.*, p. 569.

obligations, would incur that New Zealand and the UK were also in violation of the same international obligations.

However, the Court decided that it was able to exercise its jurisdiction in this case because the decision would have only *incidental* (though simultaneous) effects on the legal interests of third States.[24] The Court highlighted that third States are typically protected by Article 59, which provides that a judgment is binding only between the parties involved and pertains solely to the specific case decided. In this instance, determining the responsibility of New Zealand and the United Kingdom was not necessary for determining Australia's responsibility, even though any findings could have implications for the legal situation of those two States.[25]

Respondent States have often attempted to broaden and extend the application of the Monetary Gold principle to serve their own legal interests and specific purposes in various proceedings. However, the International Court of Justice has always remained vigilant in not conceding to these efforts, for the aforementioned reasons. Therefore, the Monetary Gold principle remains applicable in a limited scope, addressing specific legal scenarios that are not frequently encountered in the Court's typical caseload.

3. A Potential Key to Interpretation

There exists a scarcity of comprehensive legal literature that thoroughly explores the fundamental essence of the Monetary Gold principle. Specifically, it remains uncertain whether this principle primarily concerns matters of the Court's jurisdiction, the admissibility of claims, or if it constitutes a distinct and separate legal concept altogether. This article aims to answer that specific question, on what is the nature of the Court’s self-imposed limit to adjudicate, stemming from its Statute, which has come to be known as the Monetary Gold principle.

As we have seen, the Monetary Gold principle limits the Court's jurisdiction in a way that incorporates defining characteristics from both objections to admissibility and jurisdiction. This hybrid character calls for a different and more nuanced approach when addressing the scope and nature of this principle as applied by the ICJ. This jurisdiction limitation is one of a more fundamental nature, similar to mootness, which may result in the refusal of

[24] *Ibid.*, p. 571.

[25] Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds.), *The Statute of the International Court of Justice - A Commentary*, (2019), Oxford University Press, p. 730.

the Court to exercise its jurisdiction on grounds such as propriety.[26] There have been certain doctrinal interpretations according to which the self-imposed limit stemming from the Monetary Gold rule implies the exercise of the Court's discretion, entailing a certain margin of appreciation on the part of the Court.[27]

However, this cannot be accepted when considering the wording of the ICJ's judgments regarding the Monetary Gold principle, as the Court often uses much stronger language, implying a peremptory limitation[28] rather than an exercise of discretion. For example, when Portugal tried to overcome the Monetary Gold obstacle by arguing that the *jus cogens* right of self-determination of peoples, which was central to the proceedings, should be prioritized over Indonesia's sovereignty (the latter being the focus of the Monetary Gold rule),[29] the Court said: "Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court *cannot act*, even if the right in question is a right *erga omnes*."[30]

In the *Monetary Gold removed from Rome* case, the Court used similar wording: "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania (…) Where (…) the vital issue to be settled concerns the international responsibility of a third State, *the Court cannot*, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."[31]

Furthermore, the term *precluded* has been also utilized by the Court and the parties when referring to the Monetary Gold principle in the *Certain phosphate lands at Nauru* case: "But the absence of such a request in no way *precludes* the Court from adjudicating upon the claims submitted to it,

[26] Chittharanjan F. Amerasinghe, *op.cit.*, p. 238.

[27] *Ibid.*

[28] *Ibid.*

[29] Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds.), *op. cit.*, p. 733.

[30] East Timor (Port. v. Austl.), 1995 I.C.J. 91 (Order of June 30), pp. 90, 102, para. 29.; Bogdan Aurescu, Ion Gâlea, Lazăr Elena, Ioana Oltean, "*Scurtă culegere de jurisprudență*", Hamangiu, 2018

[31] Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds.), *op. cit.*,p. 729.

provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for."[32]

As well as in the next paragraph where it rejected the Australian objection: "In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the Monetary Gold case (…) Australia, moreover, recognizes that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom previous to the determination of Australia's responsibility. It nonetheless asserts that there would be a simultaneous determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally ***precluded*** by the fundamental reasons underlying the Monetary Gold decision. The Court cannot accept this contention."[33]

As evident from the Court's strong wording when discussing the effects of a finding that applies the Monetary Gold principle (it *cannot act*, it is *precluded* from exercising its jurisdiction), this rule represents a peremptory limitation to the Court's jurisdiction, rather than an exercise of its discretion. The Court cannot fulfill its judicial function when the interests of an indispensable third party would form "the very subject matter of the decision" because it would essentially go against its own Statute. The consent-based jurisdiction that the Court exercises under its Statute cannot permit such an irregularity as adjudicating a case between consenting parties while essentially and necessarily judging a case between non-consenting parties.

Thus, this is the key to interpretation that this article seeks to propose. We can assert that an objection invoking the Monetary Gold principle due to the absence of an indispensable third party might hold a more fundamental (peremptory) position than the typical objections the Court usually addresses regarding jurisdiction or admissibility. While an objection based on this principle effectively challenges the Court's *jurisdiction,* it does so indirectly; the title of jurisdiction presented to the Court by the parties to the case can be perfectly valid, and the Court could still be precluded from *the exercise of that jurisdiction.* It is not a problem with the top of the jurisdiction pyramid but rather with its foundation.

---

[32] Certain phosphate lands at Nauru (Nauru v. Australia, Preliminary objections, 1992), ICJ, p. 260-261, pp. 54.

[33] *Ibid.*, p. 261, pp. 55.

4. Conclusions

In conclusion, the Monetary Gold principle and the indispensable third-party doctrine are crucial because they directly pertain to the core exercise of the judicial function, albeit having very narrow practical applicability nowadays due to the way the Court (rightly) confined their interpretation. There was a risk that extensively interpreting this doctrine would impede a great deal of potential dispute resolution before the ICJ and essentially give precedence to the consent of non-participating third-party States over the consent of the States appearing before the Court. However, the Court conclusively dealt with that risk by confining the interpretation of the doctrine to a particular scenario, both temporally and logically, as we have seen above.

Furthermore, applying this principle involves the interpretation and correct application of the Court's own Statute, thus underscoring its essential role in maintaining the integrity and proper functioning of the Court's judicial processes. The significance of the Monetary Gold principle lies in its ability to ensure that the Court does not overstep its statutory bounds by effectively adjudicating cases involving non-consenting parties, thereby safeguarding the consent-based jurisdiction that underpins the Court's authority and legitimacy in the international arena.

Bibliography

Bogdan Aurescu, Ion Gâlea, Lazăr Elena, Ioana Oltean, "*Scurtă culegere de jurisprudență*", Hamangiu, 2018

James Crawford, *Brownlie's Principles of International Law*, 9th edition, Oxford University Press, Oxford, 2019

Chittharanjan F. Amerasinghe, *Jurisdiction of International Tribunals*, Kluwer Law International, The Hague, 2002

Robert Kolb, *The International Court of Justice*, Hart Publishing, Oxford, 2013

Jan Paulsson, Gerald Aksen and Robert Briner (eds), *Jurisdiction and Admissibility*, *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, International Chamber of Commerce, Paris, 2005

Pierre d'Argent, *The Monetary Gold Principle: A Matter of Submissions*, *Symposium on Zachary Mollengarden & Noam Zamir*, *The Monetary Gold Principle: Back to Basics*, 2024.

Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005*, Martinus Nijhoff Publishers, The Hague, 2006

Yuval Shany, *Jurisdiction and Admissibility*, in Cesare P.R. Romano, Karen J. Alter, and Chrisanthi Avgerou (eds), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2013

Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, and Christian Tomuschat (eds), *The Statute of the International Court of Justice - A Commentary*, 3rd edition, Oxford University Press, Oxford, 2019

Case Concerning East Timor (Portugal v. Australia), International Court of Justice, 30 June 1995

Certain Phosphate Lands at Nauru (Nauru v. Australia), International Court of Justice, Preliminary Objections, 1992

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), International Court of Justice Reports, 1998

Monetary Gold, Judgment, International Court of Justice Reports, 1954

Northern Cameroons (Cameroon v United Kingdom), International Court of Justice, Preliminary Objections, Judgment, International Court of Justice Reports, 1963

Oil Platforms (Islamic Republic of Iran v United States of America), International Court of Justice Reports, 2003

Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland), Permanent Court of International Justice Reports, Series A No. 15, 1928

The Statute of the International Court of Justice