

# WHAT PLACE FOR *JUS COGENS*? HOW MANFRED LACHS FORESAW NEW THINKING IN INTERNATIONAL SPACE LAW

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## I. INTRODUCTION

Manfred Lachs was a golden personality at the intersection of international and space law. He was a renowned Polish diplomat and academic born in 1914. As a member of the International Law Commission (ILC) between 1962 and 1966, he contributed significantly to the initial stages of the study on peremptory norms of international law when he participated in the work on the law of treaties. In 1966, he was appointed as a judge of the International Court of Justice (ICJ) and was elected as the President in 1973. Significant decisions rendered during those years include the *Barcelona Traction Case*<sup>1</sup> (1970) and the *Namibia Advisory Opinion*<sup>2</sup> (1971); both landmarks in the jurisprudence and development of *erga omnes* obligations.

In the space field, he was the first Chair of the Legal Subcommittee (LSC) of the Committee on the Peaceful Uses of Outer Space (COPUOS) from 1962 until 1966. In that capacity, he imprinted his expertise in the adoption of the Declaration of Legal Principles Governing the Activities in Outer Space,<sup>3</sup> and the Treaty on Principles

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*The views expressed in the present paper are those of the authors and do not necessarily reflect the views or positions of any institutions or entities they represent.*

<sup>1</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5).

<sup>2</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion* 1971 I.C.J. 16 (June 21).

<sup>3</sup> G.A. Res. 1962 (XVIII) (Dec. 13, 1963).

Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.<sup>4</sup> Undoubtedly, he deserves to be considered a pioneer of space law.<sup>5</sup>

At the crossover of his brilliant international and space acumen, he dissented for the first time in the *North Continental Shelf Cases* (1969).<sup>6</sup> In his dissenting opinion—although this was not an issue addressed by any other Judge nor the reason for his dissent—he argued that “the freedom of movement into outer space” had become international law created within a short period of time, reinforcing the idea that the time factor might not necessarily be a bar to the formation of a new rule of customary law, depending on the specific circumstances.<sup>7</sup>

Hand in hand with the legacy of Manfred Lachs, this article seeks to examine the possibility that unique doctrines of international law relating to the highest “rank” of international legal norms may have developed around certain provisions of the Outer Space Treaty. On the basis of the work carried out by the ILC, these principles will be put to the test in order to confirm or reject the hypothesis that at least Articles I and II of that instrument might be considered *jus cogens* norms. In such an endeavor, two conditions will be established against which the Outer Space Treaty needs to be scrutinized: do those provisions represent principles of general international law? and, if so, have they been accepted and recognized by the international community of States as peremptory?

This article concludes with a recommendation to include for further study by the ILC the extent to which (if at all) the fundamental principles of space law demonstrate a potential *jus cogens* character.

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<sup>4</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

<sup>5</sup> For a more detailed look at Manfred Lach’s scholarship, see Francis Lyall, *Manfred Lachs (21.4.1914 – 4.1.1993)*, in PIONEERS OF SPACE LAW 193, (Stephan Hobe ed., 2013).

<sup>6</sup> North Sea Continental Shelf (Ger. v. Neth., Ger. v. Den.) 1969 I.C.J. 3 (Feb. 28). The other dissenting opinion of Judge Lachs was in Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal Advisory Opinion 1982 I.C.J. 325 (July 20). See generally *Dissenting Opinion of Judge Lachs*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/sites/default/files/case-related/66/066-19820720-ADV-01-05-EN.pdf> (last visited Mar. 23, 2023).

<sup>7</sup> Ger. v. Neth., Ger. v. Den., 1969 I.C.J. 219 at 230.

II. THE CONCEPT OF *JUS COGENS* IN INTERNATIONAL LAW

As a general introductory remark, it is useful to refer to Robert Kolb, who identified five different criteria on which to define *jus cogens* norms: (a) as an expression of natural law; (b) as a hierarchic superior norm; (c) as a constitutional rule; (d) as a non-derogable norm; and (e) as a rule for conflict in successive treaties.<sup>8</sup> These criteria synthesize how the literature has interpreted the concept of *jus cogens* throughout past and more recent history.

It is possible to refer back to the Romans and see an early forerunner of peremptory norms in their concept of *jus strictum*.<sup>9</sup> The Greek notion of natural law also provided a source of explanation for the idea of peremptory norms.<sup>10</sup> In the sixteenth century, the School of Salamanca developed even further the possibility that certain rules govern the international community (*totus obiter*) without any possibility of derogation.<sup>11</sup> The nineteenth and twentieth centuries brought legal positivism into the scene, and the idea of public order from domestic law was transposed into international law. In effect, *jus cogens* norms are linked with the notion of public order because they are said to protect the public interest of the international community.<sup>12</sup>

Within that school, Alfred Verdross distinguished *jus cogens* from *jus dispositivum*; the former being absolute because it does not satisfy individual State's interests but rather those of the international community.<sup>13</sup> Moreover, in his 1937 precursory article on the matter, he explained that "treaties *contra bonos mores*" are void be-

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<sup>8</sup> ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW – *JUS COGENS*: A GENERAL INVENTORY 30-42 (2015).

<sup>9</sup> Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 885 (2003).

<sup>10</sup> James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215, 225 (2011).

<sup>11</sup> Luis Francisco Martinez Montes, *The School of Salamanca and the Emergence of Modern International Law*, GLOBAL SQUARE MAG., <https://www.globalsquaremagazine.com/2017/12/10/the-school-of-salamanca-and-the-emergence-of-modern-international-law/> (last visited Mar. 28, 2023).

<sup>12</sup> Carl Q. Christol, *Judge Manfred Lachs and the Principle of Jus Cogens*, 22 J. SPACE L. 33, 35 (1994).

<sup>13</sup> Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

cause they run against an ethical minimum accepted by the international community.<sup>14</sup> This moral element is articulated by the ICJ in its 1951 *Advisory Opinion on the Reservations to the Genocide Convention*, where the Court described genocide as “contrary to moral law.”<sup>15</sup> Furthermore, this natural law aspect was reinforced by expressing that the object of that treaty is “to endorse the most elementary principles of morality.”<sup>16</sup>

Having such an axiological role, *jus cogens* norms enjoy the highest rank in the international hierarchy.<sup>17</sup> They are regarded as superior because of their content, scope or effects.<sup>18</sup> More than “rules,” *jus cogens* are “norms” since they have a higher status than the former;<sup>19</sup> and thus they deserve a “quality label.”<sup>20</sup> As explained by the ILC in the commentaries to the Draft Articles on State Responsibility, peremptory obligations refer to “substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”<sup>21</sup>

Despite the fact that these precedents support the idea of *jus cogens* being a well-rooted concept, a modern approach finds the origin of peremptory norms in the aftermath of the Second World War, with the United Nations Charter and the earliest universal instruments on human rights.<sup>22</sup> The Convention on the Prevention

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<sup>14</sup> Alfred von Verdross, *Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties,"* 31 AM. J. INT'L L. 571, 573 & 574 (1937).

<sup>15</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, ¶ 23 (May 28). [hereinafter Reservations to the Genocide Convention].

<sup>16</sup> *Id.*

<sup>17</sup> Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 154 (2019) [hereinafter U.N. Doc. A/74/10]; Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 419 (2006) [hereinafter U.N. Doc. A/61/10].

<sup>18</sup> Int'l Law Comm'n, Rep. on the Work of Its Fifty-Seventh Session, U.N. Doc. A/60/10, at 223 (2005) [hereinafter U.N. Doc. A/60/10].

<sup>19</sup> Christol, *supra* note 12, at 34.

<sup>20</sup> Sue S. Guan, *Jus Cogens: To Revise a Narrative* 26 MINN. J. INT'L L. 461, 466 (2017).

<sup>21</sup> Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 283 (2001) [hereinafter U.N. Doc. A/56/10].

<sup>22</sup> Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules –The Identification of Fundamental Norms*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 21, 22 (Christian Tomuschat & Jean-Marc Thouvenin

and Punishment of the Crime of Genocide (Genocide Convention)<sup>23</sup> was the first instrument to codify such a grave violation of human rights as an international crime; however, it was only in 1951 that the prohibition on genocide was described by the ICJ as what later essentially became known as *jus cogens*.<sup>24</sup> Given the opportunity, the Court defined two consequences of the special character of the prohibition against genocide: the first being that the principles underlying the Genocide Convention are recognized by civilized nations as binding on States, even without any conventional obligation, and the second being the universal character of both the condemnation of genocide and the obligation to cooperate against it.<sup>25</sup>

In 1953, the second ILC Special Rapporteur on the law of treaties, Hersch Lauterpacht, made reference to “an absolute obligation towards a transcending and imperative international interest” as “a sense of moral obligation and international solidarity.”<sup>26</sup> In 1963, the second report by Humphrey Waldock provided a definition of *jus cogens* in the following terms: “a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law.”<sup>27</sup>

Following several years drafting by the ILC, the text of the Vienna Convention on the Law of Treaties<sup>28</sup> (VCLT) was adopted in 1969. It provides that a peremptory norm of general international law (*jus cogens*) “is a norm accepted and recognized by the international community of States as a whole as a norm from which no

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eds., 2006); Stefan Kadelbach, *Genesis, Function and Identification of Jus Cogens Norms*, 46 NETH. Y.B. INT'L. L. 147, 149 (2015).

<sup>23</sup> Convention on the Prevention and Punishment of Crimes of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>24</sup> International Court of Justice, *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, Sess. 2006 I.C.J. 6, ¶ 64.

<sup>25</sup> *Id.*

<sup>26</sup> H. Lauterpacht (Special Rapporteur), *Report on the Law of Treaties*, U.N. Doc. A/CN.4/63, at 127 (Mar. 24, 1953).

<sup>27</sup> Humphrey Waldock (Special Rapporteur), *Second Report on the Law of Treaties*, U.N. Doc. A/CN.4/156 and Add.1-3, at 39 (Mar. 20, Apr. 10, Apr. 30, & June 5, 1963).

<sup>28</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>29</sup> Article 64 of the VCLT foresees that any norm conflicting with a *jus cogens* norm is void.<sup>30</sup> This approach, based on consequences, is what Ulf Linderfalk has termed the “legal-consequences-as-criterion theory.”<sup>31</sup>

A final point that deserves some attention is the issue of identification of norms of *jus cogens*. It should be recalled that, in the context of the study of the then draft Article 37 of the VCLT, the ILC decided in 1963 not to include any examples of *jus cogens* norms for two reasons: first, the experts were cautious not to create confusion regarding the cases not mentioned, and secondly, they were aware that such a task would be time-consuming.<sup>32</sup>

In 2005, the Study Group on Fragmentation of International Law followed suit and did not elaborate any catalogue of *jus cogens* norms.<sup>33</sup> However, the following year, the ILC cited several examples in the context of its work on fragmentation of international law, namely the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid and torture, the right of self-determination, and basic rules of humanitarian law.<sup>34</sup>

The topic of this particular category of norms has been on the agenda of the ILC again since 2015.<sup>35</sup> The Special Rapporteur, Mr. Dire Tladi (South Africa), has produced five reports dedicated to the study of their nature, the requirements for their identification, their consequences and effects. The fourth report (2019) produced a non-exhaustive list of peremptory norms that the ILC had considered as such in its previous work<sup>36</sup> (that work includes the commen-

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<sup>29</sup> *Id.* at art. 53.

<sup>30</sup> *Id.* at art. 64.

<sup>31</sup> Ulf Linderfalk, *What Is So Special About Jus Cogens? – On the Difference between the Ordinary and the Peremptory International Law*, 14 INT’L COMM. L. REV. 3, 4 (2012).

<sup>32</sup> Int’l Law Comm’n, Rep. on the Work of Its Fifteenth Session, U.N. Doc. A/CN.4/163, at 199 (1963).

<sup>33</sup> U.N. Doc. A/60/10, *supra* note 18, at 224.

<sup>34</sup> U.N. Doc. A/61/10, *supra* note 17, at 419.

<sup>35</sup> Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 138 (2015).

<sup>36</sup> Dire Tladi (Special Rapporteur), *Fourth Report on Peremptory Norms of General International Law (jus cogens)*, U.N. Doc. A/CN.4/727, ¶¶ 60 & 137, (Jan. 31, 2019).

tary to draft Article 50 of the VCLT on treaties conflicting with peremptory norms, the report on fragmentation of international law, and the Draft Articles on State Responsibility).<sup>37</sup>

Neither that illustrative list nor the record of other possible *jus cogens* norms includes any principle of international space law.<sup>38</sup> Accordingly, in this article we seek to examine whether peremptory norms can be regarded as also including certain elements of existing international space law.

### III. THE DISTINCTION BETWEEN *JUS COGENS* NORMS AND *ERGA OMNES* OBLIGATIONS

One of the consequences of *jus cogens* norms is that they “create” *erga omnes* obligations, which are the concern of all States, due to the importance of the rights involved.<sup>39</sup> This assessment makes clear that, although interrelated, *jus cogens* and *erga omnes* are *not* synonyms. At first glance, there is a difference that sometimes is blurred: the former refers to norms, whereas the latter deals with ensuing obligations—i.e., the former give rise to the latter.<sup>40</sup>

As a starting point, *jus cogens* belongs to primary law and *erga omnes* to secondary rules on State responsibility.<sup>41</sup> In the same vein, some publicists described *jus cogens* as substantive law and *erga omnes* as procedural law.<sup>42</sup> In Weatherall’s view, *jus cogens* norms are directed towards the individual—although this is not always the case (for example with respect to the *jus cogens* norm relating to the right of a “peoples” to self-determination)—whereas

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(Reference is made to the prohibition of aggression, genocide, slavery, apartheid and racial discrimination, crimes against humanity, torture, the right to self-determination and basic rules of humanitarian law).

<sup>37</sup> *Id.* ¶ 56.

<sup>38</sup> *Id.* ¶¶ 122-123 (the right to life, the principle of non-refoulement, the prohibition of human trafficking, the right to due process (the right to a fair trial), the prohibition of discrimination, environmental rights, and the prohibition of terrorism).

<sup>39</sup> *Belg. v. Spain*, Judgment, 1970 I.C.J. Rep. at ¶ 33.

<sup>40</sup> MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 190 (2000).

<sup>41</sup> For further reference, see Articles 42 and 48 of the Draft Articles on State Responsibility. Int’l Law Comm’n, *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, U.N. Doc. A/CN.4/L.602/Rev.1 (July 26, 2001). See also Guan, *supra* note 20, at 26.

<sup>42</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 124 (6th ed. 2008); Kadelbach, *supra* note 22, at 163.

*erga omnes* obligations emerge as a consequence of the need to enforce *jus cogens* norms by States.<sup>43</sup>

*Jus cogens* focuses on the fundamental character of certain obligations, while *erga omnes* obligations focus on the legal interest, and responsibility, of (all) States in compliance.<sup>44</sup> A further distinction is that the *jus cogens* character determines the hierarchy of a norm, while the *erga omnes* character establishes the scope of application of the ensuing obligations.<sup>45</sup> Finally, in the ICJ *Wall Advisory Opinion*, Judge Rosalyn Higgins, in her separate opinion, explained that *erga omnes* obligations are linked to “a very specific issue of jurisdictional *locus standi*” and do not create substantive obligations on third States.<sup>46</sup>

Once again, the role of Judge Manfred Lachs comes to the forefront in this part if we recall that it was he who used the expression *erga omnes* in 1964 during the discussions on the then Article 62 of the VCLT relating to rules in a treaty becoming binding on third States through international custom (current Article 38 of the VCLT).<sup>47</sup> At that time, some of the ILC members reflected on treaties that would fall under that provision and mentioned as examples: “treaties for the neutralization or demilitarization of particular territories or areas,” specifically referring to the 1959 Antarctic Treaty.<sup>48</sup>

In 1970, the ICJ for the first time introduced the notion of *erga omnes* obligations in the famous *obiter dictum* in the *Barcelona Traction Case*.<sup>49</sup> Judge Lachs was a member of the bench at the time and it is possible to perceive his personal stamp here.<sup>50</sup> The

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<sup>43</sup> THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 351 (2015).

<sup>44</sup> U.N. Doc. A/56/10, *supra* note 21, at 112.

<sup>45</sup> ANTONIO REMIRO BROTONS ET AL., *DERECHO INTERNACIONAL: CURSO GENERAL [INTERNATIONAL LAW. GENERAL COURSE]* 230 (Trant Lo Blanch ed., 2010).

<sup>46</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136 (July 9), separate opinion of Higgins [hereinafter *The Wall Opinion*].

<sup>47</sup> Int'l Law Comm'n, Rep. on the Work of Its Sixteenth Session, U.N. Doc. A/CN.4/173, at 184 (1964).

<sup>48</sup> *Id.* at 184-185; Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

<sup>49</sup> *Belg. v. Spain*, 1970 I.C.J. at ¶¶ 33-34.

<sup>50</sup> RAGAZZI, *supra* note 40, at 8.

Court identified two features in these type of obligations: universality (they are binding upon all States), and solidarity (every State has a legal interest in their observance).<sup>51</sup>

Regardless of the fact that the Court did not specify if the origin of such obligations was a *jus cogens* norm, it did mention a few peremptory norms that, in effect, give rise to *erga omnes* obligations, such as the prohibition of aggression and genocide, and the rules protecting basic human rights.<sup>52</sup> Furthermore, the Court explained that: “others are conferred by international instruments of a universal or quasi universal character.”<sup>53</sup> The Court also examined the concept of *erga omnes* obligations in some other cases, both contentious and advisory.<sup>54</sup>

It is important to note that this category of obligations does not in and of itself establish a basis for the jurisdiction of the ICJ, which is instead grounded on the rule of consent, as acknowledged by the Court in the *East Timor Case* (1995)<sup>55</sup>—the mere existence of an obligation *erga omnes* does not automatically confer jurisdiction.<sup>56</sup>

Turning back to the relationship between *jus cogens* and *erga omnes*, it should be kept in mind that the ILC Study Group on Fragmentation of International Law considered this point thoroughly.<sup>57</sup> It acknowledged that the former holds a superior position, whereas

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<sup>51</sup> *Id.* at 17.

<sup>52</sup> *Belg. v. Spain*, 1970 I.C.J. at ¶ 34.

<sup>53</sup> *Id.*

<sup>54</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 147 (Feb. 26); Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion 1971 I.C.J. 16 ¶ 126 (June 21), *East Timor* (*Port. v. Austl.*), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 83 (July 8); The Wall Opinion *supra* note 46, at ¶¶ 155-156.

<sup>55</sup> *Port. v. Austl.*, 1995 I.C.J. at ¶ 29; *See Dem. Rep. Congo v. Rwanda*, 2006 I.C.J. at ¶ 64; *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at ¶ 147; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serb.*), Judgment, 2015 I.C.J. Rep. 3 ¶ 88.

<sup>56</sup> *Dem. Rep. Congo v. Rwanda*, 2006 I.C.J. at ¶ 64.

<sup>57</sup> U.N. Doc. A/61/10, *supra* note 17, at 419.

*erga omnes* does not imply any hierarchy, but only a special status.<sup>58</sup> It went on to conclude that all *jus cogens* norms have an *erga omnes* character, but that the reverse is not necessarily true.<sup>59</sup>

The following year, the ILC added that not all *erga omnes* obligations are established by peremptory norms and gave certain obligations relating to the global commons, enshrined in Article 1 of the Outer Space Treaty as an example.<sup>60</sup> This takes on particular relevance when dealing with outer space, which is generally—although not universally<sup>61</sup>—considered as a global commons.<sup>62</sup>

In his seminal work on the concept of *erga omnes* obligations, Maurizio Ragazzi drew upon three common elements of such obligations. By comparing the prohibition of aggression, the protection from slavery, the protection from racial discrimination and the prohibition of genocide, he came to the conclusion that they all refer to well-defined obligations in the form of negative duties or prohibitions; that they derive from rules of general international law having a *jus cogens* nature; and finally, that they all are instrumental to the realization of basic values such as the preservation of peace and the protection of human rights.<sup>63</sup>

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<sup>58</sup> U.N. Doc. A/60/10, *supra* note 18, at 223, ¶ 488.

<sup>59</sup> *Id.* at 224.

<sup>60</sup> U.N. Doc. A/61/10, *supra* note 17, at 421; U.N. Doc. A/74/10, *supra* note 17, at 192.; BROTONS ET AL., *supra* note 45, at 231.

<sup>61</sup> Consider the United States statement that “[o]uter space is a legally and physically unique domain of human activity, and the United States does not view space as a global commons.” Exec. Order No. 13914, 85 Fed. Reg. 20,161 (Apr. 10, 2020).

<sup>62</sup> Paul Meyer, *Outer Space and Cyberspace: a Tale of Two Security Realms*, (2016) <https://core.ac.uk/reader/56380350>; NATO Allied Command Transformation, *Assured Access to the Global Commons* (2011), at 4, <https://www.act.nato.int/> (last visited Mar. 21, 2023); Thérèse Delpech, *Nuclear Deterrence in the 21<sup>st</sup> Century: Lessons from the Cold War for a New Era of Strategic Piracy* (2012), <https://www.rand.org/pubs/monographs/MG1103.html> (last visited Mar. 21, 2023); Vladimir Kopal, *International Legal Regime on Outer Space: Outer Space Treaty, Rescue Agreement and the Moon Agreement*, in PROCEEDINGS OF THE UNITED NATIONS/NIGERIA WORKSHOP ON SPACE LAW 8, 9 (2006); Eligar Sadeh, *Evolution of Policy and Law for International Space Governance*, in 50 YEARS OF THE OUTER SPACE TREATY: TRACING THE JOURNEY 153, 154 (Ajey Lele ed., 2017); U.N. Secretary-General, *Our Common Agenda* (2021), [https://www.un.org/en/content/common-agenda-report/assets/pdf/Common\\_Agenda\\_Report\\_English.pdf](https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf) (last visited Mar. 21, 2023); Frans G. von der Dunk, *A Tale of Two Oceans: Governance of Terrestrial and Outer Space “Global Commons”*, (2012), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=spacelaw> (last visited Mar. 21, 2023).

<sup>63</sup> RAGAZZI, *supra* note 40, at 132-133.

More importantly for the purposes of this article, Ragazzi examined possible candidates of *erga omnes* obligations in addition to those included in the *Barcelona Traction dictum*. He examined the right to development as one giving rise not only to negative obligations (to refrain from doing something), but also to positive obligations (to actively engage in promoting equal access, share benefits, etc.).<sup>64</sup> Likewise, he assessed the protection of the environment as another possible candidate that, like the right to development, would expand the criteria taken from the ICJ jurisprudence.<sup>65</sup> Both examples have significant relevance when it comes to space law and the protection of global commons.

#### IV. IDENTIFICATION OF *JUS COGENS* NORMS IN INTERNATIONAL LAW

The draft conclusions adopted in 2022 by the ILC serve as a useful guidance for the determination and identification of *jus cogens* norms on the basis of Article 53 of the VCLT. According to draft conclusion number four, two criteria are necessary.<sup>66</sup>

##### *A. It Is a Norm of General International Law*

The ILC Study Group on Fragmentation acknowledged that there is no accepted definition of norms of general international law.<sup>67</sup> The *North Sea Continental Shelf Cases* reveal that the ICJ seems to have used general law and customary law as synonyms in the sense of “having equal force for all the members of the international community.”<sup>68</sup> Similarly, in the specialized literature, some authors equate general international law with customary law, yet having a special form of *opinion juris*.<sup>69</sup>

This is a core condition because, as a consequence of its general character, *jus cogens* norms are universally applicable—i.e., they are binding on all subjects of international law.<sup>70</sup>

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<sup>64</sup> *Id.* at 151.

<sup>65</sup> *Id.* at 154.

<sup>66</sup> Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10 at 29 (2022).

<sup>67</sup> U.N. Doc. A/61/10, *supra* note 17, at 410, n. 1017.

<sup>68</sup> Ger. v. Neth., Ger. v. Den. 1969 I.C.J. 3.

<sup>69</sup> RAGAZZI, *supra* note 40, at 53.

<sup>70</sup> U.N. Doc. A/74/10, *supra* note 17, at 155.

*B. It Is Accepted and Recognized as Jus Cogens by the International Community of States as a Whole.*

This consensual element constitutes what some authors have termed the *opinio juris cogentis*.<sup>71</sup> In Article 53 of the VCLT, the community of States as a whole becomes a new international actor capable of creating norms of a higher hierarchy.<sup>72</sup> This requirement means that the international community of States recognizes and accepts the norm as one from which no derogation is permitted and which can only be modified by a norm having the same character.<sup>73</sup> A large majority of States is required in this exercise of recognition and acceptance;<sup>74</sup> however, there is no need of acceptance by each and every State.<sup>75</sup> States are the main actors in the recognition and acceptance; however, there might be other actors giving context and contributing to its assessment.<sup>76</sup>

Even though universal acquiescence is not necessary, this requirement implies a prohibition of either unilateral derogation under domestic law or by an international agreement. Non-derogability means that States may not opt out from such provisions.<sup>77</sup>

In the *Advisory Opinion on the Reservations to the Genocide Convention*, the ICJ built the *jus cogens* nature of the prohibition of genocide upon the intent behind that instrument being universal in scope and its text having been unanimously adopted by the United Nations General Assembly.<sup>78</sup> Moreover, the Court considered that a common interest is protected by the convention, whose achievement is its *raison d'être*.<sup>79</sup> In effect, the criterion for the existence of *jus cogens* norms is the fact that they do not satisfy the individual interest of a State but that of the international community.<sup>80</sup>

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<sup>71</sup> BROTONS ET AL., *supra* note 45, at 233.

<sup>72</sup> VCLT, *supra* note 28, art. 53; Kirsten Schmalenbach, *Article 53, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 897, 899 & 910 (Oliver Dörr & Kirsten Schmalenbach ed. 2012).

<sup>73</sup> U.N. Doc. A/74/10, *supra* note 17, at 157 & 164.

<sup>74</sup> *Id.* at 167.

<sup>75</sup> Christol, *supra* note 12, at 37.

<sup>76</sup> U.N. Doc. A/74/10, *supra* note 17, at 167.

<sup>77</sup> Alexander Orakhelashvili, *Audience and Authority—The Merit of the Doctrine of Jus Cogens*, in *NETHERLANDS YEARBOOK OF INTERNATIONAL LAW* 118 (Maarten den Heijer & Harmen van der Wilt eds., 2015).

<sup>78</sup> Reservations to the Genocide Convention, *supra* note 15, ¶ 23.

<sup>79</sup> *Id.*

<sup>80</sup> Alfred Verdross, *Jus Dispositivum*, *supra* note 13, at 58.

V. IDENTIFICATION OF *JUS COGENS* IN SPACE LAW

Pursuant to Article III of the Outer Space Treaty, space activities shall be carried out in accordance with international law.<sup>81</sup> This provision confirms the premise that space law is part of the broader system of international law. In the words of Judge Vereshchetin: “[c]learly, this is but another affirmation of the well-established tenet of international law that human activities anywhere beyond national jurisdiction are governed by international law.”<sup>82</sup> Article 31(3)(c) of the VCLT is the legal foundation for this systemic integration,<sup>83</sup> according to which “treaties are a creation of the international legal system.”<sup>84</sup>

From this starting point, it is possible to examine the principles enshrined in the Outer Space Treaty under the lens of the international law relating to *jus cogens*, in line with what was described in the previous sections of this article. That said, this task has some potential complexities: on the one hand, the identification of peremptory norms is generally difficult due to the lack of State practice, which has been acknowledged by the ILC itself.<sup>85</sup> On the other hand, in the six decades since the start of the development of international space law, most State practice has been *not* to do something (e.g., engage in war in space) rather than positive action.

Within these possible constraints, we seek below to examine how the two conditions for *jus cogens* might be met in space law.

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<sup>81</sup> Outer Space Treaty, *supra* note 4, art. III. The full text of Article III is as follows: States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.

<sup>82</sup> V.S. Vereschetin, The Law of Outer Space in the General Legal Field (Commonality and Particularities), Adaptation from *Lecture Series of the United Nations Audiovisual Library of International Law*. Original: English (46 minutes), 2009, p. 4, [http://legal.un.org/avl/lis/Vereschetin\\_LOS\\_1.html](http://legal.un.org/avl/lis/Vereschetin_LOS_1.html) (last visited Mar. 21, 2023).

<sup>83</sup> Oliver Dörr, *Article 31*, in VIENNA CONVENTION ON THE LAW OF TREATIES. A COMMENTARY 521, 560 & 561 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

<sup>84</sup> U.N. Doc. A/61/10, *supra* note 17, at 413.

<sup>85</sup> Dire Tladi, Special Rapporteur, *Fifth Report on Peremptory Norms of General International Law (Jus Cogens)*, ¶ 15, U.N. Doc. A/CN.4/747 (2022).

### A. Norms of General International Law

The Outer Space Treaty contains several provisions that are currently considered custom (either pre-existing treaty law,<sup>86</sup> or subsequently crystallizing as such).<sup>87</sup> One of them is the freedom principle relating to the exploration and use of outer space enshrined in Article I.<sup>88</sup> Article II, embodying the principle of non-appropriation, is also categorized as general international law by scholars.<sup>89</sup> Likewise, Article III is a provision whose content is described as customary.<sup>90</sup>

There are barely any traces in the literature qualifying the prescriptions against military uses enshrined in Article IV<sup>91</sup> as customary. It is possible to cite the view of the representative of Sri

<sup>86</sup> Vladlen S. Vereshchetin & Gennady M. Danilenko, *Custom as a Source of International Law of Outer Space*, 13 J. SPACE L. 22, 25 (1985).

<sup>87</sup> See Cassandra Steer, *Sources and Law-Making Processes Relating to Space Activities*, in ROUTLEDGE HANDBOOK OF SPACE LAW 3, 8 (Ram S. Jakhu & Paul Stephen Dempsey eds., 2017); Ram S. Jakhu & Steven Freeland, *The Relationship between the Outer Space Treaty and Customary International Law*, in 67<sup>TH</sup> INTERNATIONAL ASTRONAUTICAL CONGRESS (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3397145](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397145) (last visited Mar. 21, 2023).

<sup>88</sup> See Stephan Hobe, *Article I - Outer Space Treaty*, in COLOGNE COMMENTARY ON SPACE LAW: VOLUME 1 25, 29 (Stephan Hobe, et al., eds., 2009); Henry H. Hertzfeld et al., *How Simple Terms Mislead Us: The Pitfalls of Thinking about Outer Space as a Commons*, at 3-4 (2015), <https://swfound.org/media/205285/how-simple-terms-mislead-us-hertzfeld-johnson-weeden-iac-2015.pdf>. (last visited Mar. 21, 2023).

<sup>89</sup> Bin Cheng, *The United Nations and the Development of International Law Relating to Outer Space*, in STUDIES IN INTERNATIONAL SPACE LAW 151, 189 (Bin Cheng ed. 1997) (online version, 2012); Steven Freeland & Ram Jakhu, *Article II - Outer Space Treaty*, in COLOGNE COMMENTARY ON SPACE LAW: VOLUME 1 44, 45-46 (Stephan Hobe, et al. eds., 2009); P.J. Blount, *Renovating Space: The Future of International Space Law*, 40 DENV. J. INT'L L. & POL'Y 515, 517 (2011); MARTHA MEJÍA-KAISER, THE GEOSTATIONARY RING. PRACTICE AND LAW 109 (2020); Le Bao Ngoc Pham, *Does the Outer Space Treaty Permit the Protection and Preservation of Cultural Heritage Sites on the Moon?*, in PROTECTION OF CULTURAL HERITAGE SITES ON THE MOON: VOLUME 24 27, 38 (Annette Froehlich ed., 2020); Ricky J. Lee, *Article II of the Outer Space Treaty: Prohibition of State Sovereignty, Private Property Rights, or Both*, 11 AUSTL. INT'L L.J. 128, 135 (2004).

<sup>90</sup> FRANCIS LYALL & PAUL B. LARSEN, SPACE LAW: A TREATISE 64 (2nd ed. 2018).

<sup>91</sup> Outer Space Treaty, *supra* note 4, art. IV. The Article states in full:  
States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.  
The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases,

Lanka to the United Nations General Assembly First Committee, who contended that the annual resolution on the Proposed Prevention of an Arms Race in Space (PAROS)<sup>92</sup> and its almost universal endorsement had turned this provision into customary law.<sup>93</sup>

For their part, the content of Article VI (responsibility for national activities), Article VII (liability for damage caused by a space object), and Article VIII (registration of space objects) are considered by several authors as constituting general international law.<sup>94</sup> With regard to Article IX, Sergio Marchisio suggested in 2009 that the obligations contained therein are in the process of becoming customary law,<sup>95</sup> whereas Nicolas Matte had already supported such a suggestion in the late 1980s.<sup>96</sup>

Generally, evidence of the customary character of such provisions can be drawn mainly from the following arguments: first, gen-

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installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited

<sup>92</sup> Proposed Prevention of an Arms Race in Space (PAROS) Treaty, U.N. Doc. A/Res./36/97 (1981). PAROS was finally put on the agenda of the Conference on Disarmament in 1981, after the General Assembly recognized the need for appropriate action to avoid an arms race in outer space in the final document of its Tenth Special Session in 1978.

<sup>93</sup> Ram Jakhu, *United Nations Principles on Outer Space*, in PROCEEDINGS OF THE UNITED NATIONS/NIGERIA WORKSHOP ON SPACE LAW 28, 37 (2006) (quoting Sergio Marchisio) <https://www.unoosa.org/documents/pdf/psa/activities/2005/nigeria/splawproc05.pdf> (last visited Mar. 21, 2023).

<sup>94</sup> Alexander Soucek, *International Law*, in OUTER SPACE IN SOCIETY, POLITICS AND LAW: VOLUME 8, 294, 340 (Christian Brünner & Alexander Soucek eds., 2011); Bin Cheng, *The United Nations*, *supra* note 89, at 176; *See also* Armel Kerrest & Lesley Jane Smith, *Article VII - Outer Space Treaty*, in COLOGNE COMMENTARY ON SPACE LAW: VOLUME 1, 126, 129 (Stephan Hobe, et al., eds., 2009).

<sup>95</sup> Sergio Marchisio, *Article IX - Outer Space Treaty*, in COLOGNE COMMENTARY ON SPACE LAW: VOLUME 1, 169, 181 (Stephan Hobe, et al., eds., 2009).

<sup>96</sup> Nicolas M. Matte, *Environmental Implications and Responsibilities in the Use of Outer Space*, 14 ANNALS AIR & SPACE L. 419, 439 (1989).

eral State practice is reflected by the fact that United Nations General Assembly Resolution 1962 (XVIII)<sup>97</sup>—in some sense the “predecessor” of the Outer Space Treaty—was adopted by consensus.<sup>98</sup> Secondly, Resolution 2222 (XXI), embodying the text of the Outer Space Treaty, was also adopted by consensus.<sup>99</sup> Moreover, such an assertion can be reinforced by the quasi-universal nature of this instrument (112 ratifications and 23 signatures as of January 2023).<sup>100</sup>

As a source of evidence, it is helpful to draw upon Member State responses between 2015 and 2021 to the questionnaire proposed by the Chair of the COPUOS Working Group on the Status and Application of the Five UN Treaties.<sup>101</sup> For instance, Indonesia answered the question regarding the existence of customary law stating that “provisions in the five United Nations Treaties on Outer Space that could be considered as forming part of international customary law are the article I (the freedom of exploration and use of outer space) and article II (the principle of non-appropriation) of the Outer Space Treaty 1967.”<sup>102</sup>

For its part, the Czech Republic asserted that “[...] the general principles of the Outer Space Treaty can be considered as forming part of international customary law due to the wide adherence to it

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<sup>97</sup> G.A. Res. 1962 (XVIII) (Dec. 13, 1963). This resolution laid down important principles, including the freedom of exploration (¶ 2), non-appropriation (¶ 3), applicability of international law (¶ 4), international responsibility (¶ 5); due regard (¶ 6), jurisdiction and control (¶ 7) and liability for damage (¶ 8).

<sup>98</sup> Michael J. Listner, *Evaluating Customary International Law in Space*, 11 MICH. J. INT'L L. 1 (2020), <https://www.mjlonline.org/evaluating-customary-international-law-in-space/>, (last visited Mar. 29, 2023).

<sup>99</sup> G.A. Res. 2222 (XXI), (Dec. 19, 1966).

<sup>100</sup> Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcommittee on its Sixty-First Sess., *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2022*, U.N. Doc. A/AC.105/C.2/2022/CRP.10 (2022). The updated status of the space treaties can be found at: <https://www.unoosa.org/oosa/en/our-work/spacelaw/treaties/status/index.html>.

<sup>101</sup> A question regarding the relationship between the Outer Space Treaty and customary law was added to the questionnaire in 2014, see Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Fifty-Third Session, U.N. Doc. A/AC.105/1067, at 34 (2014).

<sup>102</sup> Comm. on the Peaceful Uses of Outer Space Legal Subcomm. for its Fifty-Seventh Sess., Responses to the Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, U.N. Doc. A/AC.105/C.2/2018/CRP.16, at 5 (2018).

by the international community in the conduct of space activities.”<sup>103</sup>

For the Philippines, the answer was only limited to “[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all [hu]man-kind.”<sup>104</sup>

Both Austria and Germany considered additional provisions to fall within the same category. In effect, “[i]n the view of the Austrian delegation, the general principles contained in the Outer Space Treaty can be regarded as customary international law.”<sup>105</sup> Austria made express reference to Articles I, II, III, IV, VI, VI, VIII, IX and XI.<sup>106</sup> For its part, “[t]he German delegation is of the opinion that the general principles of the Outer Space Treaty (OST) have become international customary law since almost all States conducting activities in outer space have ratified the OST and act according to its provisions,”<sup>107</sup> referring to Articles I, II, III, VI, VII and VIII.<sup>108</sup>

The only country that has so far expressly denied the customary character of the Outer Space Treaty provisions has been Chile.<sup>109</sup>

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<sup>103</sup> Comm. on the Peaceful Uses of Outer Space Legal Subcomm. for its Fifty-Seventh Sess., Responses to the Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, U.N. Doc. A/AC.105/C.2/2018/CRP.12, at 5 (2018).

<sup>104</sup> Comm. on the Peaceful Uses of Outer Space Legal Subcomm. for its Sixtieth Sess., Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, Taking into Account the UNISPACE+50 Process, U.N. Doc. A/AC.105/C.2/2021/CRP.23, at 20 (2021) [hereinafter U.N. Doc. A/AC.105/C.2/2021/CRP.23].

<sup>105</sup> Comm. on the Peaceful Uses of Outer Space Legal Subcomm. for its Fifty-Sixth Sess., Responses to the Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, U.N. Doc. A/AC.105/C.2/2017/CRP.6, at 5 (2017).

<sup>106</sup> *Id.*

<sup>107</sup> Comm. on the Peaceful Uses of Outer Space Legal Subcomm. for its Fifty-Fourth Sess., Responses to the Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, U.N. Doc. A/AC.105/C.2/2015/CRP.11, at 3 (2015).

<sup>108</sup> *Id.*

<sup>109</sup> U.N. Doc. A/AC.105/C.2/2021/CRP.23, *supra* note 104, at 6.

In sum, it is possible to assert that there are several provisions in the Outer Space Treaty that would fulfill the first condition regarding the determination of a possible *jus cogens* norm.

*B. It Is Accepted and Recognized by The International Community of States as a Whole as a Jus Cogens Norm.*

We concur with Sue Guan, who assessed that Article 53 of the VCLT is a “curious combination” of naturalism and positivism,<sup>110</sup> since the consent ingredient is also present. The grounds for this are to be found in the legacy of the very system of Westphalian international relations and the legal doctrine emanating from the *Lotus* ruling.<sup>111</sup>

According to a relatively recent (2019) report of the ILC, evidence of the acceptance and recognition of *jus cogens* norms is to be found in public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.<sup>112</sup> Subsidiary mechanisms for the determination of the *jus cogens* nature of a norm when it is not possible to discern its character by the means previously set out include—similar to Article 38(1)(d) of the ICJ Statute<sup>113</sup>—international jurisprudence and the teachings of the most highly qualified publicists.<sup>114</sup> We examine each of these in turn.

### 1. State Manifestations

Delving into the *travaux préparatoires* of the Outer Space Treaty, it is possible to set out a few—at least implicit—traces of the State practice that might support the acceptance and recognition of specific principles of the Outer Space Treaty as having a *jus*

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<sup>110</sup> Guan, *supra* note 20, at 469-470.

<sup>111</sup> *SS Lotus (Fr. v. Turk.)*, 1927, P.C.I.J. (Ser. A) No. 10 (Sept. 7), at 18.

<sup>112</sup> U.N. Doc. A/74/10, *supra* note 17, at 168.

<sup>113</sup> Statute of the International Court of Justice, Art. 38, June 26 1945, 6 L.N.T.S. 391-413. According to Article 38, public international law consists of three primary sources: (1) international conventions, (2) international custom, as evidence of general practice accepted as law and (3) the general principles of law recognized by civilized nations. In addition, judicial decisions and the “teachings of the most highly qualified publicists of the various nations” may serve as subsidiary sources.

<sup>114</sup> U.N. Doc. A/74/10, *supra* note 17, at 190.

*cogens* nature, taking into account the definition of *jus cogens* in part II:

**United States:** “The United States had taken the position those principles [1962 resolution] constituted **international law** as it was **accepted** by the members of the United Nations.”<sup>115</sup>

**The Soviet Union:** “What happened in space was of profound concern to the whole [hu]mankind, as was **universally recognized** by States and by the public opinion all over the world.”<sup>116</sup> “The Soviet draft treaty was not, however, a mere statement of rights [...] it also contained provisions designed to protect the interests, not only of individual States, **but of all countries and of the international community as a whole**, would be protected.”<sup>117</sup>

**Canada:** “Space law would govern not only relations between States in outer space, but also relations between Earth **as a whole** and outer space.”<sup>118</sup>

**Italy:** “...three **fundamental** principles: firstly, that outer space should be a *res communis* accessible to all; secondly, that outer space and celestial bodies should not be subject to national appropriation; thirdly, that the exploration and use of outer space should be carried out in accordance with international law...”<sup>119</sup>

**Japan:** “The second principle reflected a **general recognition** among United Nations Members that outer space was a *res communis omnium*. No space activity by any State should be regarded as ground for a claim to territorial sovereignty in

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<sup>115</sup> Comm. On the Peaceful Uses of Outer Space, Summary Record of the Legal Subcomm.’s Fifty-Seventh Meeting at its Fifth Sess., U.N. Doc. A/AC.105/C.2/SR.57, at 5 (1966) (emphasis added) [hereinafter U.N. Doc. A/AC.105/C.2/SR.57].

<sup>116</sup> Comm. On the Peaceful Uses of Outer Space, Summary Record of the Legal Subcomm.’s 29th-37th Meeting at its Third Sess., U.N. Doc. A/AC.105/C.2/SR.29-37, at 11 (1964) (emphasis added) [hereinafter U.N. Doc. A/AC.105/C.2/SR.29-37].

<sup>117</sup> U.N. Doc. A/AC.105/C.2/SR.57, *supra* note 115, at 12 (emphasis added).

<sup>118</sup> Comm. On the Peaceful Uses of Outer Space, Summary Record of the Legal Subcomm.’s Second Meeting at its First Sess., U.N. Doc. A/AC.105/C.2/SR.2, at 6-7 (1962) (emphasis added) [hereinafter U.N. Doc. A/AC.105/C.2/SR.2].

<sup>119</sup> U.N. Doc. A/AC.105/C.2/SR.29-37, *supra* note 116, at 44 (emphasis added).

outer space or a celestial body.”<sup>120</sup> **Poland:** “His delegation reaffirmed its support for the two **essential** legal principles stated in the resolution [1721].”<sup>121</sup>

**Australia:** “The principle of the non-appropriation [...] was of the **greatest importance to [hu]mankind.**”<sup>122</sup>

**India:** “...those principles should be defined in a **Magna Carta** of outer space”.<sup>123</sup> “[...] the rule of *res communes* must prevail in cosmic space.”<sup>124</sup>

**Czechoslovakia:** “The rule that outer space was a *res communis omnium* implied that each State maintained its own freedom but none might infringe the freedom **of others.**”<sup>125</sup>

**France:** “Traditional international law was based on the concepts of **sovereignty** and continental **appropriation. No State** had yet attempted to apply those concepts in space.”<sup>126</sup>

**Romania:** “The principles should be acceptable to all States and the obligations arising from them acceptable to, **and accepted by, all States.**”<sup>127</sup>

When the United States planted the American flag on the Moon, the authorities clarified that this was intended “as a symbolic gesture of national pride in achievement and is not to be construed as a declaration of national appropriation by claim of sovereignty.”<sup>128</sup>

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<sup>120</sup> Comm. On the Peaceful Uses of Outer Space, Summary Record of the Legal Subcomm.’s Fifth Meeting at its First Sess., U.N. Doc. A/AC.105/C.2/SR.5, at 5 (1962) (emphasis added).

<sup>121</sup> Comm. On the Peaceful Uses of Outer Space, Summary Record of the Legal Subcomm.’s Sixth Meeting at its First Sess., U.N. Doc. A/AC.105/C.2/SR.6, at 7 (1962) (emphasis added).

<sup>122</sup> Comm. On the Peaceful Uses of Outer Space, Summary Record of the Legal Subcomm.’s Seventy-First Meeting at its Fifth Sess., U.N. Doc. A/AC.105/C.2/SR.71, at 15 (1966) (emphasis added).

<sup>123</sup> U.N. Doc. A/AC.105/C.2/SR.2, *supra* note 118, at 6.

<sup>124</sup> U.N. Doc. A/AC.105/C.2/SR.57, *supra* note 115, at 19 (emphasis added).

<sup>125</sup> U.N. Doc. A/AC.105/C.2/SR. 8 (Aug. 21, 1968), at 5 (emphasis added).

<sup>126</sup> U.N. Doc. A/AC.105/C.2/SR.57, *supra* note 115, at 16 (emphasis added).

<sup>127</sup> U.N. Doc. A/AC.105/C.2/SR.29-37, *supra* note 116, at 20 (emphasis added).

<sup>128</sup> Anne M. Platoff, *Where No Flag Has Gone Before: Political and Technical Aspects of Placing a Flag on the Moon* (1993) <https://escholarship.org/uc/item/93t5x9dq> (last visited Mar. 21, 2023).

## 2. Legislative Acts

*Apollo Lunar Landing Legacy Act*

The proliferation of space actors with the technological capacity to land on the Moon, and the renewed interest in this celestial body and its resources, laid the ground for this legislative initiative.<sup>129</sup> In 2013, a bill entitled Apollo Lunar Landing Legacy Act was introduced in the House. The aim was to preserve and protect the Apollo lunar landing sites for the benefit of present and future generations.<sup>130</sup> Those sites were defined in Section 4 as: “all areas of the Moon where astronauts and instruments connected to the Apollo program between 1969 and 1972 touched the lunar surface.”<sup>131</sup>

In addition, Section 8 provided that the Apollo 11 lunar landing site was to be submitted to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) for designation as a World Heritage Site.<sup>132</sup> However, the limitation imposed by the non-appropriation principle under space law is the very obstacle for its inclusion in that list, since one of the conditions under the World Heritage Convention is that the site must be within the territory of the State submitting the proposal.<sup>133</sup>

This is a core incompatibility between the UNESCO Convention and the Outer Space Treaty.<sup>134</sup> Although that shortcoming is recognized by the literature, publicists like Michelle Hanlon and Andrea Harrington agree that the protection of the scientific and historic value of these<sup>135</sup> and other sites that the international community are deemed to be of universal value, should be preserved for

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<sup>129</sup> Brian Fung, *Space: The Final Legal Frontier*, WASH. POST (Aug. 31, 2019), <https://www.washingtonpost.com/technology/2019/08/31/space-final-legal-frontier/>.

<sup>130</sup> H.R. 2617, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/2617>. This bill did not advance to a vote.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 8.

<sup>133</sup> UNESCO World Heritage Convention, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, art. 4.

<sup>134</sup> Diane Zajackowski, *Could the Moon's Cultural Heritage Be Inscribed on UNESCO's World Heritage List?*, in PROTECTION OF CULTURAL HERITAGE SITES ON THE MOON: VOLUME 24 13, 19 (Annette Froehlich ed. 2020) .

<sup>135</sup> In line with that, Article 7(3) of the Moon Agreement reads: “States Parties shall report to other States Parties and to the Secretary-General concerning areas of the Moon having special scientific interest in order that, without prejudice to the rights of other

future generations.<sup>136</sup> Such concerns have fueled a discussion regarding possible venues to protect space sites and whether a new international instrument is the solution.<sup>137</sup>

*Senate Bill 1694 - The One Small Step to protect Human  
Heritage in Space Act:*

The limitations already pointed out were followed by advocacy by concerned members of civil society, which ultimately paved the way for this law to be passed in 2019, which aimed to develop and extend best practices to preserve the lunar landing sites. A relevant part of this legislation reads: “[t]he lunar landing sites of the Apollo 11 spacecraft, the robotic spacecraft that preceded the Apollo 11 mission, and the crewed and robotic spacecraft that followed, are of *outstanding universal value to humanity*.”<sup>138</sup> There are at least 100

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States Parties, consideration may be given to the designation of such areas as international scientific preserves for which special protective arrangements are to be agreed upon in consultation with the competent bodies of the United Nations.” *See generally* The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 1363 U.N.T.S. 3, art. 3 [hereinafter Moon Agreement].

<sup>136</sup> Michelle L.D. Hanlon and Bailey Cunningham, *The Legal Imperative to Mitigate the Plume Effect: An “Aggravation and Frustration” that Imperils Our History and Our Future*, 43 J. OF SPACE L. 309 (2019); Andrea A. Harrington, *Preserving Humanity’s Heritage in Space: Fifty Years after Apollo 11 and Beyond*, 84 J. AIR L. & COM. 299, 376 (2019). It is appropriate to make reference to Article 4(1) of the Moon Agreement, which reads as follows: “The exploration and use of the Moon shall be the province of all [hu]mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations.” *See* Moon Agreement, *supra* note 135, art. 4.

<sup>137</sup> Zajackowski, *supra* note 134, at 7, 18-19. Hanlon offers a model by which such a new instrument can be developed. Michelle Hanlon, “*Due Regard*” for Commercial Space Must Start with Historic Preservation, 9 GLOBAL BUS. L. REV. 130, 151. *See also* Lixinski et; al., *Envisioning a Legal Framework for Outer Space Cultural Heritage*, 45 J. Space L. 1 (2021).

<sup>138</sup> S. 1694, 116th Cong. § 1 (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1694/text#:~:text=3358%5D%5D%20Public%20Law%20116,site%20artifacts%2C%20and%20for%20other/> (last visited Mar. 21, 2023) (emphasis added).

objects that were left at the Tranquility Base and have been catalogued.<sup>139</sup> In fact, there are more than 100 sites on the Moon that host objects and evidence of human activity.<sup>140</sup>

The scope of application of the One Small Step Act applies to lunar activities that require licensing under American federal regulations, but it has no applicability to activities controlled or undertaken by third States. This is in fact a necessary constraint to keep it in harmony with Article II of the Outer Space Treaty. However, some authors have criticized the “spillover effect” on to third States (or a kind of extraterritorial application of American law), due to the conditions that the United States may seek to impose on third countries based on this bill in future co-operational undertakings for lunar exploration.<sup>141</sup>

#### *The Case of Colombia*

Based on Article 44 of the International Telecommunication Union (ITU) Constitution, Colombia claimed that a segment of the geostationary orbit was a sovereign natural resource suprajacent to its territory.<sup>142</sup> That provision reads in the relevant part as follows:

“... that radio frequencies and any associated orbits, including the geostationary-satellite orbit, are **limited natural resources** and that they must be used rationally, efficiently and economically, in conformity with the provisions of the Radio Regulations, so that countries or groups of countries may have *equitable access to those orbits and frequencies, taking into account the special needs of the developing countries and the geographical situation of particular countries.*”<sup>143</sup>

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<sup>139</sup> Archaeological Inventory at Tranquility Base, LUNAR LEGACY PROJECT <https://spacegrant.nmsu.edu/lunarlegacies/artifactlist.html> (last visited Mar. 21, 2023).

<sup>140</sup> FOR ALL MOONKIND MOON REGISTRY, <https://moonregistry.forallmoonkind.org/> (last visited Mar. 20, 2023).

<sup>141</sup> Giulia Persoz, *One Small Step to Protect Human Heritage in Space Act as One Small Step Towards U.S. Space Dominance? The Case for a Multilateral Treaty Protection Regime*, in PROTECTION OF CULTURAL HERITAGE SITES ON THE MOON: VOLUME 24 41, 50 (Annette Froehlich ed. 2020).

<sup>142</sup> MEJÍA-KAISER, *supra* note 89, at 86.

<sup>143</sup> Constitution and Convention of the International Telecommunication Union, Dec. 22, 1992, 1833 U.N.T.S. 331 (emphasis added).

In support of such a claim, in 1976, Colombia and other Equatorial States issued the Bogota Declaration, which explicitly proclaimed that the geostationary orbit “must not be considered part of the outer space.”<sup>144</sup> These countries contended that Article II of the Outer Space Treaty was not applicable to this orbit.<sup>145</sup> In 1977, Colombia rejected being bound by that provision, and explicitly denied its peremptory nature in the terms of Article 53 of the VCLT, since “the international community did not endow it with such a nature.”<sup>146</sup>

The position of Equatorial States has modified as they progressively abandoned sovereign claims over the geostationary orbit in international fora.<sup>147</sup> Colombia itself ceased to claim sovereignty internationally and switched to the language of “equitable access.”<sup>148</sup> However, in 1999, the Colombian Constitution crystallized its sovereign claims domestically in Article 101, which reads in part as follows: “... Also part of Colombia is [...] the segment of the geostationary orbit, the electromagnetic spectrum and the space where it applies, in accordance with international law or the laws of Colombia in the absence of international regulations...”<sup>149</sup>

The following year (2000), the Legal Subcommittee of COPUOS—of which Colombia has been a member since 1977<sup>150</sup>—took note in its 39<sup>th</sup> session of a paper entitled “Some aspects concerning the use of the geostationary orbit,” stating that: “access to that orbit must take place, *inter alia*, in an equitable manner and

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<sup>144</sup> *Declaration of the First Meeting of Equatorial Countries*, JAPAN AEROSPACE EXPLORATION AGENCY [https://www.jaxa.jp/library/space\\_law/chapter\\_2/2-2-1-2\\_e.html](https://www.jaxa.jp/library/space_law/chapter_2/2-2-1-2_e.html) (last visited Mar. 21, 2023) [hereinafter *Declaration of Equatorial Countries*]. See also Verbatim Record of the 173rd Mtg. of the Comm. on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/PV.173, at 56 (1977) [hereinafter U.N. Doc. A/AC.105/PV.173].

<sup>145</sup> *Declaration of Equatorial Countries*, *supra* note 144.

<sup>146</sup> U.N. Doc. A/AC.105/PV.173, *supra* note 144, at 56-57.

<sup>147</sup> MEJÍA-KAISER, *supra* note 89, at 105. See also different arguments in favor and against in Juan Carlos Velazquez Elizarrás, *The Outer Space Law in Critical Time: Statehood, Monopolization or Universality?*, 13 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 583 (2013).

<sup>148</sup> MARTHA MEJÍA-KAISER, *supra* note 89, at 90 & 93.

<sup>149</sup> A translated version of the Constitution of Colombia is available at *Constitución Política de Colombia*, CONFERENCIA IBEROAMERICANA DE JUSTICIA CONSTITUCIONAL <https://www.cijc.org/es/NuestrasConstituciones/COLOMBIA-Constitucion.pdf> (last visited Mar. 23, 2023).

<sup>150</sup> G.A. Res. 32/196B, U.N. Doc. A/RES/32/196B (Dec. 20, 1977).

according to the ITU Radio Regulations.”<sup>151</sup>Such an agreement was noted with satisfaction in the 4th paragraph of UNGA Resolution 55/122.<sup>152</sup> One year later, in 2001, COPUOS agreed by consensus that the geostationary orbit is part of the outer space.<sup>153</sup>

So far, Colombia has only signed but has not ratified the Outer Space Treaty (apart from the Congo, Colombia is the only country from the signatories of the Bogota Declaration that has not ratified it).<sup>154</sup> This is not particularly understandable in light of the developments in COPUOS just mentioned. Furthermore, it is doubtful if it was even before then, because the 4th paragraph of the Bogota Declaration can be said to have worked for a long time as a disclaimer: “[t]he lack of definition of outer space in the Treaty of 1967 . . . implies that Article II should not apply to the geostationary orbit and therefore does not affect the right of the equatorial states that have already ratified the Treaty.”<sup>155</sup>

To date, Colombia has neither requested any authorization for placing satellites in its presumably claimed portion of the geostationary orbit, nor protested at the operation of those satellites,<sup>156</sup> although it had originally declared that such a requirement was necessary.<sup>157</sup> Furthermore, the Colombian Ambassador, Héctor Charry Samper, recognized in 1984 at COPUOS that Equatorial States were not claiming an absolute and exclusive sovereignty over the geostationary orbit in the classical sense, but rather only priority.<sup>158</sup>

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<sup>151</sup> Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Thirty-Ninth Session, U.N. Doc. A/AC.105/738, at 22 (2020).

<sup>152</sup> G.A. Res. 55/122, U.N. Doc. A/RES/55/122 (Dec. 8, 2000).

<sup>153</sup> Comm. on the Peaceful Uses of Outer Space, Rep. on Its Forty-Fourth Session, U.N. Doc. A/56/20, at ¶126 (2001); Comm. on the Peaceful Uses of Outer Space, Rep. of the Technical and Scientific Subcomm. on Its Thirty-Ninth Session, U.N. Doc. A/AC.105/786, at ¶ 132 (2002).

<sup>154</sup> Outer Space Treaty, *supra* note 4.

<sup>155</sup> *Declaration of Equatorial Countries*, *supra* note 144.

<sup>156</sup> MEJÍA-KAISER, *supra* note 89, at 95 & 108.

<sup>157</sup> U.N. Doc. A/AC.105/PV.173, *supra* note 144, at 56.

<sup>158</sup> ALVARO A. SEQUERA DUARTE, EL DERECHO ESPACIAL DE COLOMBIA [SPACE LAW OF COLOMBIA] 36, (2020); Ernesto Rodríguez Medina, *Nuestro Derecho al Espacio: La Órbita Geoestacionaria: Una Frustrada Regulación* [Our Right to Space: The Geostationary Orbit: A Failed Regulation], REVISTA DE TEMAS CONSTITUCIONALES 51, 67 (2006), <https://revistas-colaboracion.juridicas.unam.mx/index.php/elementos-de-juicio/articulo/view/10248/> (last visited Jan. 14, 2023).

### 3. Non-Binding Arrangements including Bilateral Agreements

#### *The Artemis accords (2020)*

The Artemis Accords advance the NASA-led Artemis program to build up co-operation with partners.<sup>159</sup> These arrangements were described by the United States as a set of principles or political commitments, thus giving rise to some uncertainty as to the real nature of these instruments: are they legally or only politically binding? On the one hand, these agreements restate binding principles enshrined in the Outer Space Treaty, such as non-appropriation.<sup>160</sup> On the other hand, they establish “a *political* commitment to the principle described [t]herein,” which also encompasses ideas such as the preservation of outer space heritage, including “historically significant human or robotic landing sites, artifacts, spacecraft, and other evidence of activity on celestial bodies.”<sup>161</sup>

### 4. Domestic Case Law

The twentieth century has witnessed a few private claims of ownership over the Moon and asteroids. The literature recounts the famous case of Dennis Hope, who established the Lunar Embassy in 1980, a company selling “extraterrestrial real estate,” or rather “unreal estate.”<sup>162</sup> Admittedly, he was not the first to claim “property rights” over celestial bodies. Reference can be made to the case of James Thomas Mangan, the inventor of Celestia as a “micro nation,” which even attempted to apply for membership at the United Nations in 1948.<sup>163</sup> In addition, lawyer Jenaro Gajardo Vera in 1954 registered the Moon as his own property under Chilean law, allegedly inherited continuously since 1857.<sup>164</sup>

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<sup>159</sup> Artemis Plan, Nasa’s Lunar Exploration Program Overview (Sep. 2000), [https://www.nasa.gov/sites/default/files/atoms/files/artemis\\_plan-20200921.pdf](https://www.nasa.gov/sites/default/files/atoms/files/artemis_plan-20200921.pdf)

<sup>160</sup> The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids, NASA, <https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf>

<sup>161</sup> *Id.* at art. 9 (emphasis added).

<sup>162</sup> VIRGILIU POP, WHO OWNS THE MOON? EXTRATERRESTRIAL ASPECTS OF LAND AND MINERAL RESOURCES OWNERSHIP 2 (2009).

<sup>163</sup> Virgiliu Pop, *The Nation of Celestial Space*, 22 SPACE POL’Y 205, 206, (2006).

<sup>164</sup> *La historia del chileno dueño de la luna*, CHILE CULTURA <https://eliecultura.gob.cl/cultural-sections/31/> (last visited Mar. 23, 2023).

Another lunar-related example is the Declaration of Lunar Ownership issued in 1966 by a group of citizens of Geneva, Ohio.<sup>165</sup> Finally, in 1996 a German citizen claimed to have inherited the Moon from his Prussian ancestors who owned it since 1756.<sup>166</sup>

Although some of these claims pre-existed the Outer Space Treaty, none of them have been widely recognized or “granted,” which supports the proposition that there was either a customary rule or a principle that protected outer space and celestial bodies from appropriation, or at least a factual hindrance (the lack of *corpus possidendi*). In 2004, the Board of Directors of the International Institute of Space Law (IISL) issued a statement on the basis of Articles II and VI of the Outer Space Treaty, underlying that “[t]he sellers of such deeds are unable to acquire legal title to their claims.”<sup>167</sup>

Another legal precedent is that involving Gregory Nemitz, an American citizen who claimed to be the owner of asteroid Eros 433 and invoiced NASA for rent.<sup>168</sup> The Court did not inquire into the interpretation of the Outer Space Treaty and dismissed the case on the basis that the plaintiff had not proven his alleged property rights over the asteroid.<sup>169</sup>

There is a twin case in China. The Lunar Embassy of China was a company established by Mr. Li Jie, which issued customers a “certificate” that purportedly ensured property ownership.<sup>170</sup> The

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<sup>165</sup> See POP, *supra* note 162, at 19.

<sup>166</sup> Frans G. von der Dunk, *The Dark Side of the Moon The Status of the Moon: Public Concepts and Private Enterprise*, in PROCEEDINGS OF THE FORTIETH COLLOQUIUM ON THE LAW OF OUTER SPACE 119, 120 (1997).

<sup>167</sup> *Statement by the Board of Directors of the International Institute of Space Law (IISL) on Claims to Property Rights Regarding the Moon and Other Celestial Bodies*, BLACK HOLES [https://black-holes.eu/resources/IISL\\_Outter\\_Space\\_Treaty\\_Statement.pdf](https://black-holes.eu/resources/IISL_Outter_Space_Treaty_Statement.pdf) (last visited Mar. 23, 2023).

<sup>168</sup> Armel Kerrest, *Outer Space as International Space: Lessons from Antarctica*, ANTARCTIC TREATY SUMMIT: 50 YEARS OF ACHIEVEMENTS AND CHALLENGES (2011), [www.atsummit50.org/media/book-18pdf](http://www.atsummit50.org/media/book-18pdf) (last visited Mar. 22, 2023); John G. Wrench, *Non-Appropriation, No Problem: The Outer Space Treaty Is Ready for Asteroid Mining*, 51 CASE W. RES. J. INT'L L. 437, 446 (2019).

<sup>169</sup> *Nemitz v. NASA*, 126 Fed. Appx. 343; *U.S. District Court Judge McKibben's Order to Dismiss*, THE EROS PROJECT FOR SPACE PROPERTY LAW <http://www.erosproject.com/order02.html> (last visited Mar. 22, 2023); POP, *supra* note 165, at 41-43.

<sup>170</sup> *The Man Who Sells the Moon*, N.Y. TIMES (Mar. 10, 2013), <https://www.ny-times.com/2013/03/11/opinion/the-man-who-sells-the-moon.html>

Haidian District People's Court ruled against the company in 2005, and two years later the appeals court upheld the decision.<sup>171</sup>

### 5. International Jurisprudence

The only ICJ jurisprudence making reference to space law – in Judge Lachs' dissenting opinion – is in the *North Sea Continental Shelf Cases* (1969). That was the first of only two international cases in which Judge Lachs dissented.<sup>172</sup> In the *North Sea Continental Shelf Cases*, he highlighted the freedom of movement in outer space as an example of custom with a limited temporal factor,<sup>173</sup> or what Bin Cheng called “instant custom.”<sup>174</sup>

### 6. Doctrine

Although primary sources of evidence are rather modest and not conclusive, it is still possible to resort to the subsidiary means proposed by the ILC, namely doctrine.

Commentators like Carl Christol pointed at early manifestations from scholars like Judge Hersch Lauterpacht, arguing as early as 1949 in favor of a *jus cogens* hierarchy for the freedom in outer space.<sup>175</sup> For his part, in 1956, C.W. Jenks considered that the prohibition of appropriation of outer space rests on grounds of international public policy.<sup>176</sup> Denying claims of sovereignty over outer space would serve the interests of the international community.<sup>177</sup>

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<sup>171</sup> *Selling Moon Plots Is Legal Lunacy*, L.A. TIMES (Mar. 18, 2007), <https://www.latimes.com/archives/la-xpm-2007-mar-18-fg-location18-story.html>.

<sup>172</sup> Press Release, Int'l Ct. Just., The International Court of Justice Pays Tribute to Judge Manfred Lachs (Poland), Former President of the Court, U.N. Press Release No. 2014/17 (Apr. 4, 2014); Oscar Schachter, *The UN Years: Lachs the Diplomat*, 87 THE AM. J. OF INT'L L. 414, 415 (1993).

<sup>173</sup> Ger. v. Den., Ger. v. Neth., 1969 I.C.J. 219 at 230.

<sup>174</sup> Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?* 5 INDIAN J. OF INT'L L. 125 (1965).

<sup>175</sup> Christol, *supra* note 12, at 42.

<sup>176</sup> C. Wilfred Jenks, *International Law and Activities in Space*, 5 INT'L & COMP. L. Q. 99, 113 (1956).

<sup>177</sup> D. Goedhuis, *Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law*, 19 COLUM. J. TRANSNAT'L L. 213, 214 (1981).

Another early assertion in this direction was made by Imre Csabafi pointing to the language of UNGA Resolution 1962 and Article I of the Outer Space Treaty. Csabafi concluded that the wording is similar to that used in the definition of *jus cogens*.<sup>178</sup> Moreover, he came to the conclusion that, in particular, the principle of non-appropriation has become *jus cogens*.<sup>179</sup> Han-Taek Kim considered the non-appropriation principle a customary rule “even developing into *jus cogens*”.<sup>180</sup>

Ram Jakhu, Steven Freeland and Kuan-Wei Chen agreed that the freedom of use and exploration and the non-appropriation are peremptory norms.<sup>181</sup> For his part, Zachos Palourias characterized the principle of non-appropriation as the *Grundnorm* of *corpus juris spatialis*.<sup>182</sup> P.J. Blount referred to UNGA Resolution 1721 (XVI) and contended that the principles enshrined in the first UNGA resolution on space matters (including the non-appropriation principle) “maintain a place of primacy in space law.”<sup>183</sup> In addition, he emphasized that its adoption without a vote is a clear indication of the international will.<sup>184</sup>

Yevgeniya Oralova argued that *jus cogens* rules in space law are reflected by concepts such as “common benefit” and “province of [hu]mankind” enshrined in the Outer Space Treaty, which reveal that space law protects common interests and values of the international community.<sup>185</sup> Other publicists have pointed at the very

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<sup>178</sup> IMRE ANTHONY CSABAFI, *THE CONCEPT OF STATE JURISDICTION IN INTERNATIONAL SPACE LAW: A STUDY IN THE PROGRESSIVE DEVELOPMENT OF SPACE LAW IN THE UNITED NATIONS* 46 (1971).

<sup>179</sup> *Id.* at 47.

<sup>180</sup> Han-Taek Kim, *The Non-Appropriation Principle and Corpus Juris Spatialis*, 35 *REVISTA DE LA SOCIEDAD DE DERECHO Y POLÍTICA AEROESPACIAL* 188 (2020).

<sup>181</sup> Ram S. Jakhu et al., *The Sources of International Space Law. Revisited*, 67 *ZLW* 606, 647-648 (2018).

<sup>182</sup> Zachos A. Paliouras, *The Non-Appropriation Principle: The Grundnorm of International Space Law*, 27 *LJIL* 37, 38 (2014).

<sup>183</sup> P.J. Blount, *Outer Space and International Geography: Article II and the Shape of Global Order*, 52 *NEW ENG. L. REV.* 95, 97 (2018).

<sup>184</sup> *Id.*

<sup>185</sup> Yevgeniya Oralova, *Jus Cogens Norms in International Space Law*, 6 *MEDITERRANEAN J. SOC. SCI.* 421, 422-423 (2015).

purpose of Article II, which is to avoid war and violence in outer space.<sup>186</sup>

Perhaps the most authoritative scholar is once again Manfred Lachs, who made an important contribution in this field as well: he argued that the peremptory nature of non-appropriation of outer space rests essentially on grounds of international public policy.<sup>187</sup> Regarding the wording “province of all [hu]mankind” in Article I, he was convinced that it had not only a moral but also a legal character.<sup>188</sup>

Our analysis above indicates a degree of support within the specialized literature to the freedom of exploration being regarded as a *jus cogens* norm. Even more solid consensus is found with respect to the principle of non-appropriation enshrined in Article II of the Outer Space Treaty<sup>189</sup> – a rule of progressive development as highlighted by Maureen Williams.<sup>190</sup> The reason behind this assessment is that, at the time of the Outer Space Treaty negotiations, it was already well-established and accepted that claims of sovereignty over outer space or parts thereof were incompatible with its *res communis omnium* nature.<sup>191</sup> The two space powers agreed to prevent “any land grab” because they were aware of the egregious consequences and human suffering that colonization on Earth had caused by the end of the previous century.<sup>192</sup> The ultimate goal was to avoid armed conflict in outer space.<sup>193</sup>

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<sup>186</sup> Robert Kelly, *Nemitz v. United States, a Case of First Impression: Appropriation, Private Property Rights and Space Law before the Federal Courts of the United States*, 30 J. SPACE L. 297, 306 (2004).

<sup>187</sup> Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 615 (1977) (quoting Manfred Lachs).

<sup>188</sup> Yvonne Schmidt, *International Space Law and Developing Countries*, in OUTER SPACE IN SOCIETY, POLITICS AND LAW: VOLUME 8 690, 695 (Christian Brünner & Alexander Soucek ed. 2011).

<sup>189</sup> Freeland & Jakhu, *supra* note 89, at 55 & 57; Cestmir Cepelka & Jamie H.C. Gilmour, *The Application of General International Law in Outer Space*, 36 J. AIR L. & COM. 30, 46 (1970); Ram S. Jakhu et al., *supra* note 181, at 647; Whiteman, *supra* note 187, at 626.

<sup>190</sup> Sylvia Maureen Williams, *The Law of Outer Space and Natural Resources*, 36 INT'L & COMP. L.Q. 142, 147 (1987).

<sup>191</sup> Freeland & Jakhu, *supra* note 89, at 49; OGUNSOLA O. OGUNBANWO, O., INTERNATIONAL LAW AND OUTER SPACE ACTIVITIES 78 (1975).

<sup>192</sup> Frans von der Dunk, *Some Remarks Further to Outer Space and International Geography: Article II and the Shape of Global Order by P.J. Blount*, 52 NEW ENG. L. REV. 125, 127 & 128 (2018).

<sup>193</sup> *Id.* at 133.

Other authors have pointed to practical reasons that would support the idea that sovereignty in outer space is not even feasible.<sup>194</sup> Within that group, Zachos Paliouras contended that areas unsusceptible to *corpus occupandi* or effective control “have *ipso facto* the status of *res communes omnium*.”<sup>195</sup> Thus, he considered that, even without Article II, sovereignty over outer space would be impossible due to the absence of one of the two essential elements for possession.<sup>196</sup> Fabio Tronchetti supported the special character of this rule by identifying it as the cardinal principle of outer space and contending that “any amendment or modification thereof should only be carried out by all States acting collectively.”<sup>197</sup> Despite acknowledging such a special nature, Tronchetti falls short of considering the non-appropriation principle a norm of *jus cogens*, instead calling it a “structural norm.”<sup>198</sup>

A small group of authors has even gone as far as to argue that the prohibition of installation or placement of nuclear weapons and weapons of mass destruction in outer space is also *jus cogens*.<sup>199</sup> Cestimir Cepelka and Jamie Gilmour included under the *jus cogens* category, in addition to the non-appropriation principle, the limitation on the use of outer space resources, the prohibition on the threat or use of force, and humanitarian rules concerning astronauts.<sup>200</sup> Ricky Lee contended that there is some support for considering Articles III and IV under this category.<sup>201</sup>

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<sup>194</sup> Samuel Kucherov, *Legal Problems of Outer Space. USA and Soviet Viewpoints*, in PROCEEDINGS OF THE SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 64, 66 (Andrew G. Haley & Welf Heinrich Prince of Hanover ed. 1960); Stephen Gorove, *On the Threshold of Space: Toward a Cosmic Law. Problems of the Upward Extent of Sovereignty*, in PROCEEDINGS OF THE FIRST COLLOQUIUM ON THE LAW OF OUTER SPACE 69, 72 (Andrew G. Haley & Welf Heinrich Prince of Hanover ed. 1959).

<sup>195</sup> Zachos A. Paliouras, *supra* note 182, at 41.

<sup>196</sup> *Id.* at 42-43.

<sup>197</sup> Fabio Tronchetti, *The Non-Appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in its Defense*, in PROCEEDINGS OF THE FIFTIETH COLLOQUIUM ON THE LAW OF OUTER SPACE (2007).

<sup>198</sup> *Id.*

<sup>199</sup> Ekta Rathore & Biswanath Gupta, *Emergence of Jus Cogens Principles in Outer Space Law*, 18 *ASTROPOLITICS* 1, 17 (2020).

<sup>200</sup> Cepelka & Gilmour, *supra* note 189, at 46-48.

<sup>201</sup> Ricky J. Lee, *The Jus ad Bellum in Outer Space: The Interrelation between Article 103 of the Charter of the United Nations and Article IV of the Outer Space Treaty*, in PROCEEDINGS OF THE 45<sup>TH</sup> COLLOQUIUM ON THE LAW OF OUTER SPACE 139, 141 (2002).

G.S. Sachdeva promoted what he named the “*jus cogens* Panchsheel” (five principles, in Sanskrit language) of space law: outer space as a province of humankind; freedom of access to outer space; international responsibility for national space activities; the prohibition of placement of nuclear weapons and weapons of mass destruction in orbit around the Earth; and the rescue and return of astronauts and space objects.<sup>202</sup>

## VI. CONCLUDING COMMENTS

This article has examined the concept of *jus cogens*, distinguished it from the separate notion of *erga omnes*, and analyzed the main provisions of international space law in light of the two criteria that the ILC has recently identified in the draft conclusions on the identification and legal consequences of peremptory norms of general international law, in order to assess whether they indeed do have a peremptory nature.

According to our analysis, it is possible to conclude that there are at least two important rules in international space law that might be considered as *jus cogens* norms: the common interest/freedom principle and the non-appropriation rule. This assertion is grounded on the recognition that both are customary rules and that they are generally accepted as peremptory. The latter was confirmed through State practice in the context of COPUOS, national legislation, bilateral agreements, domestic case-law, international jurisprudence and doctrine.

The conclusion that there are at least two *jus cogens* rules in international space law opens the door to the interrogation as to whether they create emerging obligations of an *erga omnes* character. It is safe to conclude that there are at least two provisions that clearly create *erga omnes* obligations: the first being the partial disarmament clause in Article IV of the Outer Space Treaty – as do most demilitarization clauses. In this regard, it is timely to recall that United Nations Secretary-General Guterres has recognized in

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<sup>202</sup> G. S. Sachdeva, *Select Tenets of Space Law as Jus Cogens*, in RECENT DEVELOPMENTS IN SPACE LAW. OPPORTUNITIES & CHALLENGES 7, 17-26 (R. Vencata Rao, V. Gopalkrishnan & Kumar Abhijeet eds., 2017).

the Agenda for Disarmament, that disarmament has “ensured respect for the principles of humanity”.<sup>203</sup>

The other provision in the same treaty that enshrines obligations imposed on the international community of States as a whole is Article IX, which relates to the avoidance of harmful contamination, and potentially harmful interference, as well as the importance of conducting activities in outer space with “due regard to the corresponding interests of all other States Parties”.

Both sets of *erga omnes* obligations emerge as a consequence of the principles enshrined in Articles I (common interest clause) and II (non-appropriation clause) of the Outer Space Treaty. Consequently, we do not agree with the assertion that some specific rules governing global commons create *erga omnes* obligations but do not have a *jus cogens* nature.

Although there is relatively little evidence of further norms of such a nature, the door remains open to consider the principles relating to the treatment of astronauts as *jus cogens* due to its underlying humanitarian concerns. However, this is an issue that will require further analysis in the face of future activities in outer space involving human personnel who are not necessarily fully trained professional ‘astronauts’, as the concept was originally envisaged. The need for humanitarian treatment being rendered to *any* person in outer space will prove to be the most fit-for-purpose solution, in line with the “sentiments of humanity” as expressed in the preamble of the Agreement on the Rescue of Astronauts, the Return of Astronauts and Return of Objects Launched into Outer Space.<sup>204</sup>

Notwithstanding our conclusions, there will likely be some scholars who remain skeptical about characterizing certain international space law rules as *jus cogens*, most importantly due to the intrinsic relation between those norms and the protection of most fundamental human rights. That said, the link between a peaceful, secure, safe and sustainable use of outer space and the resulting socio-economic benefit for people is uncontested. Furthermore, the causal nexus between socio-economic development, incorporating

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<sup>203</sup> *Securing our Common Future: An Agenda for Disarmament*, U.N. OFFICE FOR DISARMAMENT AFFAIRS, (2018) <https://www.un.org/disarmament/sg-agenda/en/>.

<sup>204</sup> Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 672 U.N.T.S. 119, preamble ¶ 4.

the exploration and use of outer space, and the basic realization of human rights is also increasingly evident.<sup>205</sup>

The international community does not need to sit idle and wait until certain action precipitates a disaster in outer space to consider the prohibition against that action as a *jus cogens* norm. In that regard, in this article we have sought to put forward a proactive rather than a reactive approach towards identifying possible new peremptory norms. The ILC might wish to consider whether these arguments are convincing enough to include “*jus cogens* in space law” as a specific issue for consideration in its future work, and we look forward to the ongoing discussions in this regard.

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<sup>205</sup> Steven Freeland, *The Regulation of Space Activities: A Human Rights Perspective*, in LIBER AMICORUM SERGIO MARCHISIO: IL DIRITTO DELLA COMUNITÀ INTERNAZIONALE TRA CARATTERISTICHE STRUTTURALI E TENDENZE INNOVATIVE: VOLUME 1 1057 (2022).