The Relationship between the United Nations Space Treaties and the Vienna Convention on the Law of Treaties*

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Abstract

A review of the United Nations Space Treaties from the perspective of the 1969 Vienna Convention on the Law of Treaties (VCLT) is both a very interesting academic exercise and an extremely difficult and complex proposition. This issue has so far not been fully addressed in space law literature, but it is clear that general public international law principles relating to treaties are relevant to the international regulation of outer space. Since there are several difficult issues involved in determining the precise nature of the relationship between the United Nations Space Treaties and the principles set out in the VCLT, this paper seeks to analyze certain treaty rules (both within the VCLT and/or under customary international law) to ascertain their relevance to the international treaty law relating to the exploration and use of outer space. In this way, it is hoped that this paper will clarify some of the more pressing and practical issues, including those that relate to: the obligations of signatories, the interpretation

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of the United Nations Space Treaties, the fulfilment of international obligations in good faith and the consequences of their non-fulfillment, the creation of rights and obligations for third States, the effect of a *jus cogens* norm, and situations amounting to a fundamental change in circumstances.

A Introduction

A review of the current standing of the five United Nations (UN) Space Treaties[1] from the perspective of the 1969 Vienna Convention on the Law of Treaties (VCLT)[2] is both a very interesting academic exercise and an extremely complex proposition. There are several difficult issues involved in determining the precise nature of relationship between the UN Space Treaties and the VCLT. However, in the interests of maintaining a clear focus, it is simply not possible to address all of them here.[3] Neither do we think it necessary to discuss the applicability or non-applicability of the VCLT in relation to each specific State, whether or not parties to UN Space Treaties.

Instead, this brief article seeks to review certain principles of the VCLT (or of customary international law as codified in the Convention) to ascertain their relevance to the UN Space Treaties. In this way, we hope to raise for further consideration some of the more pressing and practical issues.

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1 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies* (hereinafter referred to as the Outer Space Treaty), entered into force on 10 October 1967; *The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, entered into force on 3 December 1968; *The Convention on International Liability for Damage Caused by Space Objects*, entered into force on 1 September 1972; *The Convention on Registration of Objects Launched into Outer Space* (hereinafter referred to as the Registration Convention), entered into force on 15 September 1976; and *The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (hereinafter referred to as the Moon Agreement), entered into force on 11 July 1984.

2 *Vienna Convention on the Law of Treaties* (hereinafter referred to as the VCLT) adopted on 22 May 1969, opened for signature on 23 May 1969 and entered into force on 27 January 1980. Currently there are 111 States Parties and 45 Signatories to the Convention. The text of the Convention is available at 1155 U.N.T.S. 331.

3 For example, according to Article III of the Outer Space Treaty, the States Parties to the Treaty are obliged to "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." One question that arises is whether a State party to the Outer Space Treaty, but not a party to the VCLT (being a part of the corpus of international law), will nonetheless still be bound by the VCLT with respect to its space related activities.

B Applicability of the VCLT

One of the fundamental problems associated with an analysis of the relevance of the VCLT to the corpus of international space law relates to the preliminary question as to whether the VCLT can, in fact, apply at all. Indeed, there is serious doubt about the applicability of the VCLT to the UN Space Treaties and/or to certain States Parties to these Treaties. For example, India (a major space-faring nation) has neither signed nor acceded to the VCLT, but has ratified all the UN Space Treaties, except the Moon Agreement to which it is only a Signatory State. Another complicating factor is that the United States is only a Signatory State to the VCLT, but has not ratified it.

Secondly, the VCLT cannot be applied retroactively. The VCLT entered into force on 27 January 1980 and, according to Article 4 of the instrument, "the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States." As a consequence, it is generally regarded that the terms of the VCLT can, strictly legally speaking, only be applied to treaties that themselves have been "concluded" after that date.

Yet, even on this preliminary point, the position is not entirely clear. There remains some controversy with respect to the meaning of the term "concluded" used in Article 4. Does this mean that the VCLT does not apply to those treaties whose texts have been *adopted* prior to the entry into force of the VCLT, irrespective of when the treaties in question themselves come into force? Or does the restriction *only* become relevant where a treaty has come into force prior to 27 January 1980? Indeed, are there some other criteria, or is there some other point of time that may instead be the determining factor(s)?

On this issue, one commentator, who has thoroughly analyzed the provisions of Article 4 of the VCLT, asserts that "the precise time a treaty can be said to be 'concluded' is not defined with any certainty either by the Vienna Convention or by authors. It has been held to mean, so far as multilateral treaties are concerned, the date of the adoption of the text of the treaty, its signature or ratification by a State or its entry into force."[4] This does not, however, clarify the matter with absolute certainty.

As mentioned above, the VCLT entered into force in January 1980, i.e. after the "conclusion" of all the UN Space Treaties (with the possible exception of the 1979 Moon Agreement,[5] which entered into force on 11 July 1984). Therefore, from a legal perspective, and despite the uncertainties referred to above,

4 Paul V. McDade, "The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969", (1986) 35 I. C.L.Q. 499, 511.

5 Currently, there are 13 States Parties to the Moon Agreement (i.e. Australia, Austria, Belgium, Chile, Kazakhstan, Lebanon, Mexico, Morocco, the Netherlands, Pakistan, Peru, Philippines and Uruguay) and 4 Signatories (France, Guatemala, India, and Romania). The text of the Agreement is available at 1363 U.N.T.S. 3.

the VCLT is generally considered not to apply to any of the UN Space Treaties, except to the Moon Agreement.
Of course, if certain principles codified in the VCLT represent rules of customary international law at the relevant time, they might be applicable to treaties that were concluded prior to January 1980. Where a rule of customary international law has been incorporated into a treaty provision, both the rule and the provision could apply simultaneously to a given situation, agreeing with the International Court of Justice (ICJ) in the 1986 *Nicaragua* case,[6] asserts that: "treaty law and customary law can coexist and can be applicable side by side in the relations between the same States."[7]
Although this is generally the rule, it still requires due care in its practical application. In any particular situation, the applicable treaty and customary rules have a different normative base from each other,[8] and may ultimately apply differently in relation to a particular factual circumstance. In this regard, the ICJ has observed that:

> . . . [t]here are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence . . . Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application.[9]

It should be noted that Article 3 of the VCLT also recognised the possibility of treaty law and customary international law existing side by side.[10]
The issue of treaty interpretation is addressed later in this article.
On the issue of customary international law, it is clear that these principles are also applicable (where relevant and appropriate) to the use and exploration of outer space, a fact that has been the subject of commentary by some eminent

6 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) (Merits) (Judgment) [1986] ICJ Rep 14 (hereinafter referred to as *Nicaragua*).
7 Rudolf Bernhardt, "Custom and treaty in the law of the sea," *Recueil des Cours*, (1987) Vol. 205, 271.
8 Iain Scobbie, "The approach to customary international law in the Study", in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), 15, 47.
9 *Nicaragua*, para 178.
10 Article 3 (b) of the VCLT specifies that "The fact that the present Convention does not apply to international agreements concluded between States […] shall not affect: . . . . (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention…".

scholars.[11] Indeed, Judge Manfred Lachs has observed (albeit in a different context) that the applicability of customary principles to outer space began almost from the inception of the international law of space, when he stated:

> . . . [t]he first instruments that men sent into outer space traversed the air space of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be *established and recognised as law within a remarkably short period of time*.[12]

C Obligations of Signatories

Article 18 of the VCLT imposes an obligation on a Signatory State not to defeat the object and purpose of a treaty.[13] Ratification or accession to an international treaty is a matter of discretion for each Signatory State or any other State, as the case may be. However, according to Anthony D'Amato:

> . . . having signed the treaty through its agents, [a Signatory State is under] . . . an obligation to make every effort in good faith to obtain the consent of the sovereign, and not to act in the interim period in such a way as to prejudice the unperfected rights of the signatories to the treaty. Article 18 of the Vienna Convention on the Law of Treaties, while not explicitly referring to the principle of good faith, summarizes its substance by providing that a signatory, prior to ratification, 'is obliged to refrain from acts which would defeat the object and purpose' of the treaty.[14]

Notwithstanding its clear expression of the legal obligations attached to Signatory States, for a period of time, it was unclear as to precisely the extent to which Article 18 of the VCLT had any practical significance. This question has in more recent times taken on considerably greater significance. For example,

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11 See, for example, Vladlen S. Vereshchetin and Gennady M. Danilenko, "Custom as a Source of International Law of Outer Space" (1985) 13 *Journal of Space Law* 22.

12 *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. The Netherlands) (Dissenting Opinion of Judge Lachs) [1969] ICJ Rep 3, 230 (emphasis added).

13 Specifically, the Article provides that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

14 Anthony D'Amato, "'Good-Faith' in Encyclopaedia of Public International Law," (1992) 599-601. <http://anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf> (accessed on 1 September 2012), 599.

by 2002, the Bush Administration in the United States, which at the time was a Signatory State to the Rome Statute of the International Criminal Court,[15] had begun to embark on a strategy of entering into a large number of "Bilateral Immunity Agreements" designed to prevent American citizens from being surrendered to the International Criminal Court (ICC) in The Hague. One legal problem (among many) associated with this strategy[16] was that it would have the effect of limiting the effectiveness and operation of the ICC. As a consequence, there are strong arguments to suggest that this strategy was contrary to the "object and purpose" of the Rome Statute.

Eventually, in recognition of the fact that this may present problems for the United States *vis-à-vis* its obligations as a Signatory State to the Rome Statute, the US then proceeded to, in effect, "unsign" the treaty-an action that was unprecedented in international law, at least in relation to a significant multilateral convention. The United States government wrote to the UN Secretary-General (as depositary of the Rome Statute) in the following terms:

> This is to inform you . . . that the United States does not intend to become a party to the ICC Statute . . .Accordingly, the United States has no legal obligations arising from its signature [to the Rome Statute] on December 31, 2000. The United States requests that its intention not to become a party . . . be reflected in the depositary's status lists relating to this treaty.[17]

Then a question arises, as to how far the obligation on the part of a Signatory State not to act in a way which defeats the object and purpose of the treaty does or should extend. Is the fact that the peaceful use of outer space as a global commons is based and dependent upon the cooperation of States a factor in determining what Signatory States can and cannot do in relation to their Article 18 obligations? Indeed, because of the unique nature of outer space, does that obligation extend even further, such that, for example, it would require India or France, as Signatory States to the Moon Agreement, to embark upon good faith efforts directed towards attaining the required ratification for the Agreement? This is a particularly interesting issue when one considers that, similar to other common law jurisdictions, the negotiation, signing and ratification of international treaties are all essentially within the jurisdiction of Executive branch of the Indian government.

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15 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002).

16 For a discussion of the various actions taken by the United States in relation to the ICC and their legal consequences, see Steven Freeland *et al*, "The International Criminal Court: Politics, Justice and Impunity" in *Australian and New Zealand Society of International Law 11*th *Annual Meeting – International Governance and Institution: What Significance for International Law?* (Wellington, 2003), 319-326.

17 United States Department of State Press Statement, 6 May 2002, quoted in D.J. Harris, *Cases and Materials on International Law* (7th ed, 2010), 651.

While there is no international obligation to conclude a treaty, the negotiating States are expected to negotiate in good faith.[18] This is particularly important since, during the negotiations, some States are prompted to change their positions in order to accommodate the views of other States, or to reach compromises. For example, in order to reach a compromise on Article 11 of the Moon Agreement, the Soviet Union ultimately withdrew its objection to declaring the natural resources of the moon and other celestial bodies as the common heritage of mankind. Could one retrospectively consider that the States that actively participated in the negotiation of this Agreement and later did not sign or eventually did not make any good faith attempt to adhere to the treaty had negotiated the Agreement in bad faith?
Of course, one could also ask similar questions with regard to other major space faring nations in terms of their obligations of good faith, both before and after ratification. It is this second issue that is dealt with below.

D Obligation to Fulfill International Obligations as a Party in Good Faith

Article 26 of VCLT provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." It has been noted in paragraph 3 of the preamble to the VCLT that the principle of good faith and the *pacta sunt servanda* rule are universally recognized. Anthony Aust states that "The *pacta sunt servanda* rule embodies an elementary and universally agreed principle fundamental to all legal systems, and is of prime importance for the stability of treaty relations."[19] In similar vein, Bin Cheng is of the opinion that "[p]erformance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally."[20]
As a corollary to the *pacta sunt servanda* principle, Article 27 of the VCLT makes clear that States cannot attempt to justify non-compliance with their

18 Case Concerning Delimitation of The Maritime Boundary in the Gulf of Maine Area, (Canada v. United States of America), [1984] ICJ Rep 57, para. 112. (hereinafter referred to as Gulf of Maine). For detailed analysis, see Elizabeth J. Shafer, "Good Faith Negotiation, the Nuclear Disarmament Obligation of Article VI of the NPT, and Return to the International Court of Justice," presented at International Seminar, "Abolition of Nuclear Weapons, War and Armed Forces," sponsored by the University of Costa Rica Faculty of Law and the International Association of Lawyers Against Nuclear Arms, January 26, 2008, San Jose, Costa Rica. Available online at <http://lcnp.org/wcourt/goodfaith-shafer.pdf> (accessed on 11 August 2012).

19 Anthony Aust, *Modern Treaty Law and Practice* (2007), 179.

20 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 115. A treaty is a mutual understanding of all the States Parties to the treaty. "It can never be what one party understands; but it always must be what both parties understood to the matters agreed upon." (Franco-Venezuelan Mixed Claims Commission, 1902, as quoted in Bin Cheng, *ibid*).

treaty obligations by reference to their domestic laws, even if those domestic laws are "legal" under the constitutional framework of that State.[21] Thus if a US court were to allow private ownership of outer space or any celestial body (noting that this was discussed and disallowed in the *Nemitz* case)[22] on the basis of the American constitutional or other US national law, would such a judgment[23] be considered contrary to the provisions of Article II of the Outer Space Treaty? The judgment might be perfectly valid under the US law, but it would be contrary to the US' obligation under the rule of customary international law as codified under Article 27 of the VCLT.[24]

To elaborate on the matter of fulfilling an international obligation in good faith, under the 1975 Registration Convention there exists a positive obligation on a Launching State: (a) to register a launched space object into its national registry of space objects; and (b) to inform the UN Secretary-General of the establishment of such a register.[25] Every State of registry is required to submit

21 Article 27 of VCLT specifies that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This rule is without prejudice to Article 46 of the VCLT, which in turn specifies that "(1). A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance (2). A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

22 *Nemitz v. US*, Slip Copy, 2004 WL 316704, D. Nev., April 26, 2004. Nemitz appealed the case to the Ninth Circuit Court of Appeals, and the lower court's dismissal of the case was upheld "for the reasons stated by the district court." *Nemitz v. NASA*, 126 Fed. Appx. 343 (9th Cir. (Nev.) Feb. 10, 2005) (Not selected for publication in the Federal Reporter, No. 04-16223. Non-selection for publication in the Federal Register may mean that the ruling does not establish a legal precedent for future cases).

23 According to Article 4 (1) of the International Law Commission's 2001 Draft Articles on State Responsibility, "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.": see Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001) (hereinafter referred to as "Draft Articles on State Responsibility").

24 Of course, one must be aware of the current position of the US Supreme Court as expressed in *You +1'd this publicly. Undo*
Medellín v. Texas, 552 U.S. 491 (March 25, 2008), at 2: "While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis."

25 Articles II and IV of the Registration Convention. Currently there are 55 ratifications to the Convention, 4 signatures, and 2 acceptances of rights and obligations.

the specified information about its launched space objects to the UN Secretary-General "as soon as practicable," which should be understood to mean without significant delay.[26]
However, the reality is that the number of registrations with the UN of space objects launched into outer space has been steadily decreasing, which is evidence that States have not been fulfilling their obligations under the 1975 Registration Convention. According to the 2006 ILA Space Law Committee Survey Report:[27]

> . . . the 1975 Registration Convention, however, has been only timidly supported by the international community.
> Before the 1975 Registration Convention, and under UNGA Resolution 1721B (XVI), 129 objects were launched into outer space in 1972, all of which were registered (0% unregistered objects).
> In 1990, 165 objects were launched into outer space of which 160 were registered (9% unregistered objects).
> In 2002, 92 objects were launched into outer space of which 73 were registered (20% unregistered objects).
> In 2004, 72 objects were launched into outer space of which only 50 were registered (30.5% unregistered objects). Indeed we are going downhill in this regard.

A specific example of non-registration of a satellite is that of an American satellite Iridium 33 destroyed in 2010 by debris from Soviet satellite COSMOS 2251.[28] Iridium 33 was not registered with the UN as required by the Registration Convention, as well as Article VIII of the Outer Space Treaty.[29]

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26 Articles II and IV of the Registration Convention. For details on the registration of space objects, refer to the searchable Index of Objects Launched into Outer Space registered with the UN in accordance with the Registration Convention and UNGA Resolution 1721 B (XVI), available at <www.oosa.unvienna.org/oosa/showSearch.do> (accessed on 1 September 2012).

27 International Law Association (ILA) Space Law Committee, "Legal Aspects of the Privatisation and Commercialisation of Space Activities: Remote Sensing and National Space Legislation", Second Report for the 2006 ILA Toronto Conference, Introduction by Maureen Williams.

28 For a detailed legal analysis of the Iridium-Cosmos collision, see Ram S. Jakhu "Iridium-Cosmos Collision and its implications for Space Operations" in Kai-Uwe Schrogl, *et al* (eds.) *Yearbook on Space Policy: 2008/2009*, Springer, 2010, 254-275.

29 In fact, not only Iridium 33, but also several other Iridium satellites numbering from 27 to 33 and 62 to 68 have not been registered by the US with the UN. The official US Registry of Space Objects Launched into Outer Space, which is maintained by the US Department of State's Bureau of Oceans and International Environmental and Scientific Affairs, lists Iridium 33 (with International Code 1997-051C; and NORAD 24946), for which the US is the flag State, and affirms that the satellite was not registered with the UN by the US. See US Space Objects Registry, 2 Nov. 2009 <http://usspaceobjectsregistry.state.gov/registry/dsp_DetailView.cfm> (accessed on 11 August 2012).

It should be kept in mind that, under international law, State responsibility applies both to positive and to negative obligations. According to the ILC Draft Articles on State Responsibility, "Every internationally wrongful act of a State entails the international responsibility of that State."[30] The words "internationally wrongful act" imply that both positive actions by, and omissions of, a State may trigger its responsibility. In other words, failure to comply with positive obligations and prohibitions imposed by international law entails international responsibility. Moreover, unlike national legal systems, the basis of State responsibility under international law is typically not based on fault, negligence or risk, but rather on the mere fact of a breach of an international obligation. International responsibility may result from any breach or omission irrespective of its degree of seriousness. "International responsibility is thus not to be seen merely a means to allocate risks but, more generally, as a tool to enforce standards of conduct imposed on States and an attempt to maintain the rule of law within the international sphere."[31]

To summarise, those States that are not registering their launched space objects with the UN are not fulfilling their obligations as required by the Registration Convention. Consequently, their actions (and omissions) are contrary to the *pacta sunt servanda* requirements set out in Article 26 of the VCLT.

A situation of positive obligations is further revealed by the provisions of Article VI of Outer Space Treaty, which specifies that:

> States Parties to the Treaty shall bear *international responsibility* for *national activities in outer space*, including the moon and other celestial bodies, whether such activities are carried on by *governmental agencies or by non-governmental entities,* and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require *authorization and continuing supervision* by the *appropriate State* Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization. (Emphasis added).

In this Article, the term "international responsibility" means responsibility at the international level and includes "liability" as determined under the general international law of State responsibility, particularly pursuant to the Draft Articles on State Responsibility, except where modified by international space law. One should consider "national activities" to include not only the activities of "public" or "governmental" entities, but also all those that could be *linked* or *connected* to a State, or its nationals, territory or facility. In addition, "activities in outer space" or "activities carried on in outer space" are those activities that

30 Article 1 of the Draft Articles on State Responsibility.

31 Hugh M. Kindred *et al, International Law: Chiefly as Interpreted and Applied in Canada,* (2006) 7th Edition, 636.

are related to the exploration and use of outer space, even though at a given time they might not be taking place "in" outer space, such as the launch of a vehicle or its payload before reaching outer space, or any attempted launch. The terms "governmental agencies" or "non-governmental entities" include public or private entities, natural or juridical persons, to be determined according to applicable domestic law but also, if the need arises, according to the principles of international law specifically dealing with nationality (dual or dominant nationality).[32]

The Outer Space Treaty does not provide any specific definition of the words "authorization and continuing supervision." The nature and scope of these words are essentially to be determined under applicable national laws and regulations, subject to any possible maximum or minimum standards depending upon the politico-economic regulatory policies of each State, and also subject to applicable international law rules. Similarly, the term "appropriate State" is also not defined. In order to ensure that national space activities are carried out in conformity with the Outer Space Treaty, including general international law and the UN Charter,[33] the States Parties to the Treaty must be in a position to exercise jurisdiction over the concerned entity. The applicable general international law for exercising jurisdiction over an entity could be based on territoriality, nationality, protective, and universality, and is determined under the relevant national laws and regulations dealing with, for example, the State of incorporation, place of headquarters, share-holdings of the concerned private entity. This is important not only for the purpose of determining international responsibility, but possibly also with regard to the exercise of diplomatic protection under international law.[34]

The Outer Space Treaty does not impose a specific obligation on a State Party to implement Articles VI and VII. Nor does the Treaty prescribe the adoption of a specific type of national law, regulation or procedure for the purpose of such implementation. However, if a State Party to Outer Space Treaty fails to meet the requirements of Articles VI and VII of the Outer Space Treaty, it would be responsible, and possibly liable, pursuant to Article 26 of the VCLT.

The fulfillment of State's international obligations in good faith includes an obligation to negotiate in good faith and with the genuine intention of achieving a positive result.[35] In its Judgment of 25 September 1997, the ICJ held that both Hungary and Slovakia were under legal obligation to negotiate in good faith to ensure the achievement of the objectives of the 1977 Budapest Treaty

32 Principles of international law dealing with dual or dominant nationality, as applied by the ICJ in *The Nottebohm Case* (Liechtenstein v. Guatemala), [1955] ICJ Rep 4 are relevant.

33 Article III of the Outer Space Treaty.

34 *Case Concerning Barcelona Traction, Light and Power Company, Limited,* (Belgium v. Spain) [1970] ICJ Rep 3.

35 Gulf of Maine, para. 112.

concerning their project on the Danube River.[36] In the context of the UN Space Treaties, since 1994, one-third of the States Parties to the Moon Agreement (with the concurrence of the majority of the States Parties) have been under obligation to request the UN Secretary-General to convene a conference of the States Parties to review this Agreement. Further, the States Parties in question are obliged to consider the question of establishing an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon and other celestial bodieson the basis of the principle that the natural resources of the Moon and other celestial bodies are the common heritage of mankind.[37] This obligation is to negotiate in good faith and with the genuine intention of achieving a positive result for creating the envisioned international regime. Failure to comply with such obligations on the part of concerned States may be considered violation of these duties.

E Rules of Interpretation of Treaties

A large majority of international disputes mainly involve the interpretation of the applicable international treaties. Therefore, notwithstanding the existence of various methods, schools and approaches[38] applicable to the proper interpretation of such treaties, it is extremely important to precisely determine the rules of interpretation, in order to determine the "correct" meaning of the terms used in the applicable treaty(ies). There have been and there are several means (modes-rules) of treaty interpretation applied by numerous international judicial and semi-judicial bodies. This subject has been extensively and critically discussed by numerous international law publicists and several judicial tribunals, both national and international. However, Articles 31 and 32 of the VCLT are believed to have created uniformity in such rules. A question arises as to whether these Articles are applicable to the interpretation of any provision(s) of the UN Space Treaties.
The ICJ has on several occasions confirmed that both Article 31 and Article 32 of the VCLT reflect customary international law and has applied these rules to treaties that pre-date the VCLT.[39] For example, in 1999, the Court interpreted

36 *Case Concering Gabcíkovo-Nagymaros Project* (Hungary v. Slovakia), [1997] ICJ Rep 92.

37 Article 18 of the Moon Agreement.

38 The three main schools or approaches to treaty interpretation are the textualist, intentionalist and teleological schools.

39 See, for example, *Case concerning the Territorial Dispute* (Libyan Arab Jamahiriya v. Chad) (Judgment) [1994] ICJ Rep 6, para. 41; *Case concerning Maritime Delimitation and Territorial Questions* (Qatar v. Bahrain) (Judgment) [1995] ICJ Rep 6, para. 33; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 94; *Namibia South West Africa (Legal Consequences for States of the Continued Presence of South Africa)* (Advisory Opinion) [1971] ICJ Rep 3, para. 94; *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Jurisdiction) [1973] ICJ Rep 3, paras. 24 and 36.

and applied the rules codified in Articles 31 and 32 of the VCLT, when considering the meaning of a treaty that was concluded in 1890.[40] As a consequence, these rules of interpretation might also be applicable to space law treaties such as the Outer Space Treaty. Thus, it should be noted that, in the absence of ambiguity in the terms of a particular treaty provision, it would be inappropriate to "read into" that provision certain rules so as to reflect what *should* be, particularly as such rules do not appear from "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

F Treaties Creating Obligations for Third States

Article 35 of VCLT specifies that "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." Article II of the Outer Space Treaty specifies an obligation not to appropriate outer space and celestial bodies.[41] Does this impose an obligation on those States that are not parties to the Treaty? If, for example, there is no express acceptance of the obligation of non-appropriation of outer space and celestial bodies, this would not be binding on the non-parties. However, if the non-appropriation principle is considered to have become part of customary international law, then, according to Article 38 of the VCLT,[42] the prohibition of appropriation as incorporated in Article II of the Outer Space Treaty, as well as the customary international law, will be binding on non-parties as well.
Moreover, the language of Article II is such that it is not confined to the States Parties to the Outer Space Treaty, but makes a general declaration of non-appropriation of outer space and celestial bodies. Thus, it is believed that Article II creates obligations that are incumbent upon all States towards the international community as a whole ("obligations *erga omnes*").[43]

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40 *Case Concerning Kasikili / Sedudu Island* (Botswana v. Namibia) (Judgment) [1999] ICJ Rep 1045, para 18.

41 Article II of the Outer Space Treaty: "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." For a detailed discussion of the meaning and implications of Article II of the Outer Space Treaty, see Steven Freeland and Ram Jakhu, "Article II", in Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law, Volume I – Outer Space Treaty*, (2009), 44.

42 Article 38 of VCLT creates an exception to the rule under Article 35 by stating that a rule in a treaty becomes binding on third States through international custom; i.e. "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

43 *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase), Judgment of 5 February 1970, [1970] ICJ Rep 3.

In this regard, one should also note the provisions of Article 48 of the Draft Articles on State Responsibility. According to this Article, if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole, any State other than an injured State is entitled to invoke State responsibility. The invoking State "may claim from the responsible State (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition . . . ; and (b) performance of the obligation of reparation . . . , in the interest of the injured State or of the beneficiaries of the obligation breached."

G Treaties Creating Rights for Third States

Article 36 (1) of VCLT specifies how a treaty may create rights for the States that are not parties to the treaty; i.e. "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides."

Article I of the Outer Space Treaty establishes legal principles that appear to create rights for States Parties to benefit from the exploration and use of outer space, as well as the freedom of such exploration and use without discrimination of any kind.[44] Does this provision create these rights also for the States that are not parties to the Treaty? The language of Article I is such that it is not confined to the States Parties to the Treaty, but rather seems to make a declaration of common interest and freedom of exploration and use by *all* States. On this basis, all States Parties to the Outer Space Treaty must respect the rights specified in Article I of those States that are not parties to the Outer Space Treaty.

44 Article I of the Outer Space Treaty specifies that "The 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 mankind. Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."

H Effect of Rule of *Jus Cogens*

Article 53 of VCLT incorporates provisions dealing with the treaties that might conflict with a peremptory norm of general international law ("*jus cogens*").[45] If a State Party withdraws of the Outer Space Treaty, will that State still be bound by the legal principles incorporated in its Articles I and II? This may be a hypothetical question, but one observer has noted that, in view of "the development of the Bush space exploration initiative, . . . the administration [was] … reviewing whether or not [it wanted] . . . to be signatory" to the 1967 United Nations Treaty on the Peaceful Uses of Outer Space."[46] One could also ask whether two or more States could validly conclude an international treaty to claim sovereignty (or ownership) over outer space (or a part of it),[47] or any celestial body? Since the provisions of Articles I and II of the Outer Space Treaty can arguably be considered to represent *jus cogens* norms,[48] the answer to this question should be in the negative.

I Fundamental Change in Circumstances

Article 62(1) of the VCLT specifies that "A fundamental change of circumstances [*rebus sics stantibus*] which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."

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45 Article 53 of the VCLT specifies that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

46 Beth Dickey, "Bush administration may rethink space treaty", October 25, 2004, <www.govexec.com/defense/2004/10/bush-administration-may-rethink-space-treaty/17901/> (accessed on 1 September 2012).

47 For example, under the so-called Bogota Declaration, several equatorial States claimed their sovereignty over parts of the Geostationary Orbit above their respective territories. For details of these claims and their analysis, see Ram Jakhu, "The Legal Status of the Geostationary Orbit", VII *Annals of Air and Space Law*, (1982), 333-352.

48 For details, see Ram Jakhu, "Legal Issues Relating to the Global Public Interest in Outer Space", 32 *Journal of Space Law*, (2006), 31-110.

In view of the necessity of maintaining full respect for the rule of *pacta sunt servanda*, a State's right to terminate or withdraw from a treaty, in particular one that is multilateral in nature, is to be applied restrictively and only in exceptional cases. Moreover the burden of proof for justifying the exceptional circumstances in the case of *rebus sics stantibus* is on the terminating or withdrawing State(s). The ICJ has considered that, for a fundamental change of circumstances to be a valid ground for termination of, or withdrawal from, a treaty, it must be such that "their effect would radically transform the extent of the obligations still to be performed . . . A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty."[49]

Moreover, if a treaty has been violated by parties to a treaty, can such a mutual violation result in the termination of that treaty? Again, the ICJ has expressed that a "reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal noncompliance."[50]

Therefore, for example, if States Parties to the Moon Agreement were to terminate, or withdraw from, the Moon Agreement, they must comply with the requirements of Article 62 of the VCLT.

J Conclusion

This brief paper has sought to raise a number of questions relating to the impact on the international legal regulation of outer space that may result from the VCLT, either in terms of the specific provisions of that Treaty and/or to the extent that the VCLT codifies rules of customary international law applicable at the time the UN Space Treaties were concluded. Most of the questions raised here were of an open-ended nature, and the answers are not entirely straightforward or clear. What is emphasized, however, is that there *is* a relationship between the general treaty rules reflected in the VCLT and the *lex specialis* of space law, at least to the extent that these have not been expressly negated by those treaties. Those involved with the international legal regulation of outer space must therefore make themselves aware of this relationship and the consequences that it gives rise to.

49 *Case Concerning Gabçíkovo-Nagymarcos Project* (Hungary v. Slovakia) [1997] ICJ Rep 62, para. 104.

50 *Ibid*, para. 114.

An even more fundamental point that the authors seek to raise here is that the international regulation of outer space is "embedded" in international law. It is not an esoteric and separate paradigm. This is a logical consequence of the wording of Article III of the Outer Space Treaty, which requires that activities in the exploration and use of outer space are to be carried on "in accordance with international law, including the Charter of the United Nations".[51] It is therefore crucial that all space lawyers become fully conversant with the principles of general public international law, so as not to regard space law as operating in a legal vacuum. In this regard, there are many areas open for future research, and it is hoped that this paper stimulates further discussion and debate on this point.

All of this is not to ignore the fact that there are many issues that represent considerable challenges as to how international law, as applied to the international legal regulation of outer space, will be able to cope with future activities in space. The way in which the rules are further developed and adapted to meet these challenges will be important not only for outer space itself, but also for future generations living on earth.

51 See Steven Freeland, "In Heaven as on Earth: a Question for Analysis or a Statement of Fact?", comments from the Chair at a symposium, "In Heaven as on Earth: The Interaction of Public International Law on the Legal Regulation of Outer Space", Bonn, Germany, 1-2 June 2012 (on file with authors – to be published in 2013).