Why a Philosophy of International Space Law?

*José Monserrat Filho**

> "While there will be a society with legal ordering, the need to think about justice, about the structure and function of the legal rule, about the behaviors that should be encouraged or suppressed, and finally about the type and level of order that should govern that society will also persist."
>
> Mario G. Losano (1939), Italian philosopher of law.[1]

International law has recently emerged as an active field of philosophical research. Several valuable books have been published on various aspects of the topic, from different viewpoints.[2] Although it is a modern, important and

* Brazilian Association of Air and Space Law (SBDA), Brazilian Society for the Advancement of Science (SBPC), Brazilian Space Agency (AEB), jose.monserrat.filho@gmail.com.

1 Mario G. Losano, *in* Prologue for the Brazilian edition to *The Contemporary Philosophy of Law* (*A Filosofia Contemporânea do Direito – La Filosofia del Diritto Contemporanea*), Brasil, Sao Paulo: WMF Martins Fontes, 2006, pg. XIII. Losano is Professor of philosophy of law and legal informatics at the University of East Piemonte, Alessandria, and at the School of Public Law Doctorate, University of Torino, Italy.

2 Besson, Samantha, and Tasioulas, John, *The Philosophy of International Law*, United States, New York: Oxford University Press, 2010; Casella, Paulo Borba, *Fundamentos do direito internacional pós-moderno* (*Foundations of the postmodern international law*), Brazil, Sao Paulo: Quartier Latin, 2008; Trindade, Antônio Augusto Cançado, *A humanização do direito internacional* (*The humanization of international law*), Brazil, Belo Horizonte: Del Rey, 2006; Koskenniemi, Martti, *The Politics of International Law*, UK: Hart Publishing, 2011, and *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960*, UK: Cambridge University Press, 2002; Lejbowicz, Agnès, *Philosophie du droit international – L'impossible capture de l'humanité*, France, Paris: Presses Universitaires de France, 1999; Delmas-Marty, Mireille, *Trois défis pour un droit mondial*, France, Paris: Éditions du Seuil, 1998; Chemillier-Gendreau, Monique, *Humanité et souverainetés – Essai sur la function du droit international*, France, Paris: Éditions la Découverte, 1995; Miller, Lynn H., *Global Order – Values and Power in International Politics*, USA, Colorado: Westview Press, 1994, ; Lachs, Manfred, *Le monde de la pensée en droit international – Theories et pratique*, France, Paris: Economica, 1989; Schachter,

promising branch of international law, international space law (ISL) has not received the same consideration. There are very few works on the philosophy of the law of outer space and space activities, despite the intensification and the increasing necessity of these activities. However, a philosophical approach is essential to achieve a deeper knowledge of the roots, the historical meaning, the sense, the nature, the functions and the value of this relatively new branch of international law.

Lacking an encompassing philosophical approach, ISL faces the risk of being seen as a poor and fragile tool – shallow, pragmatic, casuistic, uncertain, vague, without direction, without far-reaching goals, and without perspectives. In this context, the philosophy of ISL can be defined as a special domain for reflection and open discussion on the highest conceptual and normative issues of ISL, aiming at trying to determine the sense and the weight of its fundamental values – humanistic, democratic, and ethical ones – as well as the relevant actions that could be indispensable for its progressive development and real effectiveness.

Martti Koskenniemi maintains that "public international law hovers between cosmopolitan ethos and technical specialization."[3] Does the same occur with ISL?

The present paper aims to address this and other related questions.

I. Introduction

In a remarkable book published in 1972, Manfred Lachs (1914-1993) recalls the reaction of Bertrand Russell (1872-1970) to the arrival of man on the Moon on 19 July 1969: "The great mathematician and philosopher of our age, Bertrand Russell, urged men to keep away from the Moon and other planets: 'For my part, I should wish to see a little more wisdom in the conduct of affairs on Earth before we extend our stringent and deadly disputes to other planets'."[4] Four days before the historic episode, Russell wrote: "I cannot see that we have any reason to rejoice in the prospect".[5]

Regardless of whether Bertrand Russell was right or not in this case, he was exercising rigorously his role of philosopher. He was simply trying to think deeply

---

Oscar, *International law in theory and practice*, The Netherlands, Dordrecht: Martinus Nijhoff Publishers, 1991.

3 Koskenniemi, Martti, *The Politics of International Law*, United Kingdom: Hart Publishing, 2011, pg. 331.

4 Lachs, Manfred, *The Law of Outer Space – An Experience in Contemporary Law-Making*. First published 1972 by A. W. Sijhoff International Publishing Company, and reissued in 2010 – on the occasion of the 50th anniversary of the International Institute of Space Law – by Martinus Nijhoff Publishers, Leiden, The Netherlands. See the quoted information at pg. 3.

5 Bertrand Russell published in London's *The Times*, 15 July 1969, pg. 9, the article "*Why man should keep away from the Moon.*"

on what kind of behavior the inhabitants of the Earth were taking to other planets. In other words, what kind of civilization are we taking to outer space? We still do not have many comprehensive and deep answers to these challenging questions.[6] And probably they will pursue us for a long time, at least while we have lethal disputes on our planet and plans to install weapons in Earth's orbits, which could convert outer space in a new theater of war, beyond the land, the sea and air space.

It is the philosophical thinking – consciously or not, liking it or not, with or without our will – that nurtures and guides the political and legal debate around these crucial issues. The usefulness of philosophy is closer to us than many can imagine.

Certainly not by chance, the Cologne Commentary on Space Law (CoCoSL)[7] considers as part of the "general philosophy" of the Outer Space Treaty,[8] the clauses relating to the common benefits and common province of mankind, both included in its Article I paragraph 1. In fact, the Outer Space Treaty embodies a general philosophy that it is necessary to know very well, because it is the core, the essence, the soul not only of the treaty itself but of all space law.

But the philosophical issues of the Outer Space Treaty are not limited to the very important clauses of Article I. They also include other, not less relevant topics, set out in the Preamble, as "the great prospects opening up before mankind as a result of man's entry into outer space"; "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes"; the "broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes"; "the development of mutual understanding and to the strengthening of friendly relations between States and peoples." Other Articles equally propose substantial philosophical considerations, on "the free exploration and use of outer space, including the Moon and other celestial bodies, by all States without discrimination of any kind, on a basis of equality and in accordance with international law"; "the freedom of scientific investigation in outer space, including the Moon and other celestial bodies" and "the actions of States to facilitate and encourage international co-operation in such investigation"; "the international responsibility of States for their national space activities carried on by governmental agencies or by non-governmental entities", "the required

---

6 See for instance: Sagan, Carl (1934-1996), *Pale Blue Dot: A Vision of the Human Future in Space*, USA: Random House, 1994; and Grinspoon, David, *Lonely Planets: The Natural Philosophy of Alien Life*, USA: Harper Collins, 2004.

7 Cologne Commentary on Space Law (CoCoSL), Volume 1, Outer Space Treaty, Hobe, Schmidt-Tedd – Schrogl (Editors) and Goh (Assistant Editor); Deutschland: Carl Heymanns Verlag, 2009, pg. 37.

8 See <www.unoosa.org/oosa/en/SpaceLaw/gares/html/gares_21_2222.html>. The Article I, paragraph 1, says: "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".

authorization and continuing supervision of the space activities of the non-governmental entities by the appropriate State"; "the conduction of space activities with due regard to the corresponding interests of all other States".
While the philosophical approach is, in principle, theoretical, it necessarily has at the same time a strong practical impact, inasmuch as it contributes to a deeper understanding of any questions debated and, this way, it helps find more consistent and convincing concrete solutions.
In order to verify the indispensable role of the philosophical approach, it is worth building a chain or a cascade of basic and coherent reflections about how to justify it in different legal levels, taking us from the general to the particular, or more specifically, from philosophy to space law, passing by the law in general and by international law, in a great system of concentric circles.

II. Why a Philosophy?

Let us start by the answer of Socrates (469-399 B.C.): "The unexamined life is not worth living." In other words, life is not worth living if you do not know as much as possible as it is and how it works. The phrase by the classical Greek philosopher – considered one of the founders of modern Western philosophy – can be seen as the most succinct and the positive praise of philosophy.
More than two thousand years later, Robert Audi (1941), an American philosopher, delivers a wide introduction to this matter: "Philosophy pursues questions in every dimension of human life, and its techniques apply to problems in any field of study or endeavour. No brief definition expresses the richness and variety of philosophy. It may be described in many ways. It is a reasoned pursuit of fundamental truths, a quest for understanding, a study of principles of conduct. It seeks to establish standards of evidence, to provide rational methods of resolving conflicts, and to create techniques for evaluating ideas and arguments. Philosophy develops the capacity to see the world from the perspective of other individuals and other cultures; it enhances one's ability to perceive the relationships among the various fields of study; and it deepens one's sense of the meaning and variety of human experience."[9]
"Only philosophy deals with whole reality," Godoffredo da Silva Telles Junior (1915-2009), synthesized.[10]

---

9 Audi, Robert, text prepared for the American Philosophical Association's Committee on the Status and Future of the Profession and Committee on Career Opportunities, approved by the APA Board of Officers in October 1981.

10 Telles Junior, Godoffredo da Silva, *Duas palavras* (*Two words*), in *O que é a filosofia do direito?* (*What is the Philosophy of Law?)*, Alaôr Caffé Alves, Celso Lafer, Eros Ribeiro Grau, Fábio Konder Comparato, Godoffredo da Silva Telles Junior, Tercio Sampaio Ferraz Junior; (Edition in Portuguese) Brazil, Sao Paulo: Manole, 2004, pg. 15. Telles Junior was a great Brazilian jurist, Professor of Philosophy and General Theory of Law for forty five years, and deservedly received the title Professor Emeritus of the Faculty of Law, Sao Paulo University (USP).

Marilena Chaui (1941), Brazilian philosopher, in her stimulating little book "Welcome to Philosophy", underlines a very practical issue. She discusses the usefulness of Philosophy: "The first philosophical teaching is to ask what it means to be useful? For what and for whom is something useful? What is useless? Why and to whom is something useless?" Chaui reminds us that "the common sense of our society considers useful, things which give prestige, power, fame and wealth. But philosophy mistrusts common sense and could not accept this notion of the useful. How does philosophy see its own usefulness?" Chaui's answer is broadly useful: "Philosophy is the most useful of all knowledge that human beings are capable of, if it is useful to recognize one's own ignorance and abandon the naivety and the prejudices of common sense; adopt a critical and reflective attitude that investigates the origin and meaning of reality and of human practices; seek the knowledge of oneself; not be guided – thanks to the exercise of the reason – by the submission to the dominant ideas and the established powers; seek to understand the significance of the world, culture, history; know the meaning of human creations in the arts, sciences and politics; give each of us and to society means to be aware of ourselves and our actions, in a practice that seeks freedom and happiness for all."[11]

In his turn, the American philosopher Gary Gutting emphasizes the confrontational and renovating side of philosophy: "We need critical thinking and creativity: the ability to detect a tacit but questionable assumption, and to develop new ways of understanding issues – in short, to think beyond what 'everyone knows'."[12]

Last but not least, the Department of Philosophy of Harvard University, USA, responds to the question "Why philosophy?," offering a very didactic summary of the issue: "Philosophy is the systematic and critical study of fundamental questions that arise both in everyday life and through the practice of other disciplines. Some of these questions concern the nature of reality: Is there an external world? What is the relationship between the physical and the mental? Does God exist? Others concern our nature as rational, purposive, and social relationship between the physical and the mental? Does God exist? Others concern our nature as rational, purposive, and social the physical and the mental? Does God exist? Others concern our nature as rational, purposive, and social beings: Do we act freely? Where do our moral obligations come from? How do we construct just political states? Others concern the nature and extent of our knowledge: What is it to know something rather than merely believe it? Does all of our knowledge come from sensory experience? Are there limits to our knowledge? And still others concern the foundations and implications of other

11 Chaui, Marilena, *Boas-vindas à Filosofia* ("*Welcome to the philosophy*"), edited in Portuguese, Brazil, Sao Paulo: Martins Fontes, 2010, pp. 42,43. Chaui is retired professor, Faculty of Philosophy, Letters and Human Sciences (FFLCH), University of Sao Paulo (USP).

12 From Gray Gutting's article "*What do I teach?*" published in The New York Times, 22 May, 2013. Gary Gutting is professor of philosophy at the University of Notre Dame, and Editor of the Notre Dame Philosophical Reviews.

disciplines: What is a scientific explanation? What is the status of evolutionary theory versus creationism? Does the possibility of genetic cloning alter our conception of self? Do the results of quantum mechanics force us to view our relations to objects differently?" The summary still adds: "The aim in Philosophy is not to master a body of facts, so much as think clearly and sharply through any set of facts. Towards that end, philosophy students are trained to read critically, analyze and assess arguments, discern hidden assumptions, construct logically tight arguments, and express themselves clearly and precisely in both speech and writing. These formidable talents can be applied to philosophical issues as well as others, and philosophy students excel in fields as varied as law, business, medicine, journalism, and politics."[13]

Two final remarks emerge as irresistible: 1) There is nothing more logical than to think that all physical and social life manifestations in general, including the law, are simply unthinkable without the wide and deep vision of philosophy; and 2) Philosophy "is like Penelope's web which must be started anew every day," as Hegel[14] well noted, because life evolves with each new day.

III. Why a Philosophy of Law?

Reflection about law is as old as the law itself, although the use of the term "philosophy of law" began in the nineteenth century, thanks to the book by Hegel (1770-1831) entitled "Elements of the Philosophy of Law," published in 1821.[15]

The philosophy of law is a special line of philosophical thought. Its evolution is a crucial chapter in the history of intelligence, justice and human civilization. However, as the French jurist Michel Troper (1938) says "a reflection on the law will only be authentically philosophical if it escapes from the stagnation caused by dogmas." Different expressions of dogmatism have dangerously affected the history of ideas. Reductionist perspectives often tried to force the law to be born only from the facts. Rather, it is up to the law "to discover the meaning and value of the legal buildings which form the structure of the entire socio-political organization."[16] Hence the evolution of the juridical-philosophical thought.

Michel Villey (1914-1988), French historian and philosopher, has a short and very illustrative explanation on the raison d'être and the usefulness of philosophy of law: "Why do I need to know the train schedules, if I have no idea of

13 See <*www.fas.harvard.edu/~phildept/undergradprogram_whyphilosophy.html*>.

14 Hegel, Georg Wilhelm Friedrich, *Elements of the Philosophy of Right* (1821).

15 Troper, Michel, *A filosofia do direito* (from the original *La philosophie du droit*, Paris: Press Universitaires de France, 2003), Edition in Portuguese, Brazil, Sao Paulo: Matins Fontes, 2008, p. 13.

16 *Id ibidem*, p. XX.

the destination of the travel, nor of the station where I should embark?"[17] The philosophy of law leads us to reflect in an embracing way on the motivations and the fate of human actions and their legal implications

Miguel Reale (1910-2006), Brazilian philosopher and jurist, author of "Philosophy of Law", a book considered a classic in Brazil among dozens of others, wrote in the preface to the first edition of his famous work, in 1953: "I never understood the law as pure abstraction, logic or ethics, detached from the social experience. In this regard, the law should sink its roots in order to become stronger and receive the oxygen that tones the ideals of justice."[18] Reale made a point of quoting Francisco Carnelutti (1879-1965), eminent Italian jurist: "As one advances in the path of law more and more the problem of the 'meta-jurídico' (beyond the juridical text) unveils its decisive importance, and the jurist becomes convinced more and more that if he knows only the law, actually he does not know even the law."[19] In short, for Reale, it is impossible to deal with the legal experience without dealing with social facts, values and norms at the same time. It is just the interdependence among fact, value and norms that allows dealing with the law as an independent system in all aspects, according to Celso Lafer.[20]

Fábio Konder Comparato (1936), Brazilian jurist, considers the philosophy of law to be a kind of compass. He says: "It is impossible to try to reduce the law to a mere technique, because that way it goes completely without compass." To Comparato "the considerations of human rights are fundamental to understanding the law and the directions of the current civilization." Moreover, he sees the law as part of ethics: "The incessant influence of the Moral over the Law is undeniable." Hence his question: "Does the law have its source exclu-

17 Villey, Michel, Filosofia do Direito – Definições e fins do direito – os meios do direito (Philosophy of law – Definitions and objectives of law – The resources of law), Edition in Portuguese, Brazil, Sao Paulo: Martins Fontes, 2008, pg. 7. Villey is former professor at the University of Strasbourg.

18 Reale, Miguel, *Filosofia do Direito* (*Philosophy of Law*); Brazil, Sao Paulo: Saraiva, 2002 (20th edition in Portuguese), pg. XXV.

19 Carnelutti, Francesco, *Tempo Perso* (*Lost time*), Italy, Bologna, 1952, pg. 8.

20 Lafer, Celso, *Filosofia do direito e princípios gerais: considerações sobre a pergunta "O que é a filosofia do direito?"* (*Philosophy of law and general principles: considerations on the question "What is the philosophy of law?"*), in *O que é a filosofia do direito?* (*What is the Philosophy of Law?)*, Alaôr Caffé Alves, Celso Lafer, Eros Ribeiro Grau, Fábio Konder Comparato, Godoffredo da Silva Telles Junior, Tercio Sampaio Ferraz Junior; (Edition in Portuguese) Brazil, Sao Paulo: Manole, 2004, pg. 56. Lafer, Professor Emeritus of Sao Paulo University (USP), Professor of Philosophy of Law and International Law at USP, was twice minister of foreign affairs (1992 and 2001-2002), and is a member of the Brazilian Academy of Science and of the Brazilian Academy of Letter.

sively in power, or does it have necessarily support in the social consciousness, in the collective consciousness?"[21]

Telles Junior, already quoted, used to emphasize the comprehensive scope of law: "The philosopher of law feels that the law has letter and spirit. We could almost say that the letter has body and soul. The truth is that law, to the jurist, is not limited to its letter. Law also finds itself in his thinking and in his intention."[22] However, he made a caveat: "The law, whatever its letter, should not be applied against its spirit."

Celso Lafer (1941), Brazilian jurist, also prefers to go beyond the letter of law. According to him, the philosophy of law is "the field of lawyers with philosophical interests instigated, in its reflection, by the problems for which they find no solution within the positive law." Logically, Lafer says that "the task of philosophy of law is to think about what is positive law." In other words: "The philosophy of law, as a result of legal experience, is precisely to prove, to test the concepts of positive law in the game between thinking and knowing."[23]

In the same line, Losano underlines: "The philosophy of law is not an antiquated discipline or detached from reality: it is much more one of those basic research that bear fruit in the long term because they identify the evolutionary lines of the society in which they are immersed." For Losano, this is an "innovative aspect of an ancient discipline." Not by chance, in many fields "the view of the philosopher of law is increasingly decisive for the legislator."[24]

For a clearheaded legislator, it is clearly necessary and fair to go from the particular to general, and back to the particular, in order to have the fullest comprehension of each subject under discussion. Going further, and considering the fundamental requirements of our time, there can be no doubt that peace, democracy and sustainable development are necessarily legal constructions, and law is the irreplaceable instrument to forge, secure and develop such historical achievements. In reality, the double call by the Italian philosopher of law and political sciences Norberto Bobbio (1909-2004) to reason and law as tools for building and maintenance of peace and democracy are more than ever indispensable today.[25]

Thus, it is natural that peace, democracy and sustainable development became crucial contemporary issues for the philosophy of law. The best words to con-

---

21 Comparato, Fábio Konder, *O Direito como parte da Ética* (*Law as part of Ethics)*, in *O que é a filosofia do direito?* (*What is the Philosophy of Law?)*, Alaôr Caffé Alves, Celso Lafer, Eros Ribeiro Grau, Fábio Konder Comparato, Godoffredo da Silva Telles Junior, Tercio Sampaio Ferraz Junior; (Edition in Portuguese) Brazil, Sao Paulo: Manole, 2004, pgs. 7-10. Comparato is Professor Emeritus of the Law Faculty, Sao Paulo University (USP).

22 Telles Junior, Godoffredo da Silva, *id ibidem*, pg. 27.

23 Lafer, Celso, id ibidem, pgs. 55-56.

24 Mario G. Losano, *in* Prologue for the Brazilian edition to *The Comtemporary Philosophy of Law* (*A Filosofia Contemporânea do Direito – La Filosofia del Diritto Contemporanea*), Brazil, Sao Paulo: WMF Martins Fontes, 2006, pgs. XI-XII.

25 Comanducci, Paolo (compilador), Análisis y derecho, México, DF, 2004, pg. 35.

clude this chapter seem to be those of Losano used as the epigraph to this paper: "While there will be a society with legal ordering, the need to think about justice, about the structure and function of the legal rule, about the behaviors that should be encouraged or suppressed, and finally about the type and level of order that should govern that society will also persist."

IV. Why a Philosophy of International Law?

Agnès Lejbowicz, Professor of Philosophy at Besançon, France, stresses that "we perform a philosophical reflection on contemporary international law just for seeking to decipher our time." For her, "history flows in contemporary legal constructions, including those of international law that still seem mysterious because, in part, they neglect philosophical research, despite their impact on humanity."

Neglecting the philosophical research on constructions of international law could be an attempt to reduce them to mere bureaucratic and powerless decisions able to prevent any impact on humanity, particularly on the international public opinion.

Martti Koskenniemi thus evaluates the effects of this neglect: "In absence of an overarching standpoint, legal technique will reveal itself as more evidently political than never before. But precisely at this moment it has lost the ability to articulate its politics: when everything is politics, Schmitt wrote, nothing is. Without the ability to articulate political visions and critiques, international law becomes pragmatism all the way down, an all-encompassing internationalization, symbol, and reaffirmation of power."[26]

Lejbowicz sees various approaches to the study of law in general, and international law in particular: historical, to understand its evolution; sociological, to identify the relationships between society and individuals; axiological and deontological, to specify the social purposes and values that law reflects; logical, to examine the formalism of legal reasoning; and, finally, phenomenological, to understand law's existential meaning. Lejbowicz prefers the latter approach for being the basis of all the others.[27] Moreover, law gives a structure to the community by ordering its relational life, and this way contributes decisively to answer the existential question of living together.

More than ever this is a challenging question. Monique Chemillier-Gendreau remarks on the topic: "Whenever a human being acts inhumanely, all thought of humanity changes and every human being is affected by it. Is the advent of humanity as a community possible without going through this? The shortcom-

---

26 Koskenniemi, Martti, *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960*; 2002, pg. 516. The quoted Carl Schmitt (1888-1985) was a German philosopher, jurist, political theorist, and professor of law.

27 Lejbowicz, Agnès, *Philosophie du droit international – L'impossible capture de l'humanité* (*Philosophy of international law – The impossible capture of humanity*), France, Paris: Presses Universitaires de France, 1999, pgs. 1-2.

ings of current international law are, in any case, an obstacle to reaching this aim".[28]

Philosophical thought is vital to deep understanding the whole process of birth, adoption, application, and assessment of the effectiveness of the norms of international law, as well as of their acting to achieve justice. This process is an integral part of the increasingly complex systems of international relations among states, international organizations both intergovernmental and non-governmental, public and private entities, as well as legal and physical persons, acting regionally and/or globally.

As Celso Lafer emphasizes, International law anticipates the great contemporary discussion about the general principles performing a function of expanding law not only logically, but axiologically.[29]

In this context, "a purely technocratic approach to international law has its perils, even for the practitioner", as Oscar Schachter (1915-2003), Hamilton Fish, Professor Emeritus of International Law and Diplomacy at the Law School of Columbia University, cautions. He explains: "In a non-hierarchical system, lacking a supreme authority, a claim of legal force ultimately rests on the underlying postulates of the system. Disputes as to the applicable principle of law are more likely than not to implicate such premises. In many cases, the 'rules of recognition' (in International law, the 'sources') cannot be applied without understanding the broader theory and functions of the system as a whole". Not by chance, Schachter recalls an aphorism of Immanuel Kant (1724-1804), which is seen as a synthesis of rationalism and empiricism: "Concepts without precepts are empty; precepts without concepts are blind." That is, it is necessary to relate concepts and practices to give content to the concepts, as it is also necessary to relate concepts and practices to give meaning and direction to the practices.

International law, for Schachter, is not a "brooding omnipresence in the sky" because "it is much more than a simple body of rules and obligations. It involves crucial purposive activities undertaken by governments and international organizations, directed to a variety of peaceful, constructive, and social ends. Today more than ever we have the right and the duty to update, amplify and improve increasingly these vital activities. In that sense, we cannot overlook the less tangible realm of ideas and ideals that both reflect and influence the demands of peoples and the conduct of governments, international organizations and global entities. The teleological examination of the values and ends assumed by law in general and by international law in particular open to us the possibility to understand more clearly the purposive and instrumental role of the legal recourses."

Schachter argues: "We hardly can understand the relation of doctrine and practice, the connections between principles and specific decisions, without broadening our conception of international law to embrace the aims, interests and

28 Chemillier-Gendreau, Monique, *Humanité et souverainetés – Essai sur la function du droit international*, France, Paris: Éditions la Découverte, 1995, pg. 375.

29 Lafer, Celso, *id ibidem*, pgs. 60-61.

values of those engaged in making and applying the law. We have to consider the effect of the law on those aims, interests and purposes. It is essential to our analysis to take into account the concrete problems and conflicts that give rise to legal rules and legal solutions. We ought also to consider the socio-historical dimension, especially those major transformations in society that profoundly affect the structure and process of international law." Schachter also pays much attention to "the crucial role of power in the relations of States" and to its specific impact on the international law. For him, "international law is not an ideal construct, created and given effect solely in terms of its internal logic. Nor can it be understood only as an instrument to serve human needs and aims (though it is that, too). International law must also be seen as the product of historical experience in which power and the 'relations of forces' are determinants. Those States with power (i.e., the ability to control the outcomes contested by others) will have a disproportionate and often decisive influence in determining the content of rules and their application in practice." Then, Schachter formulates a question that deeply affects all the international law to this day: "Are the powerful States above the law?"[30]

In reality, today it is still possible for powerful States to act ostensibly beyond or out of the law, but this is becoming increasingly difficult. Since the adoption of the United Nations Charter in 1945, as the fundamental base of contemporary international law, great powers have often used the principle of self-defense (Art. 51 of the Charter) to justify their military actions against other States. However, in fact, these actions hardly can be legally justifiable. Their justification has been seen as a mere pretext – dubious, fragile, and unconvincing. From the philosophical viewpoint, Besson and Tasioulas consider that the most pressing issues of international law today are primarily of a normative character. On one side, "the ambit of authority claimed by international law has grown exponentially in recent years, with the proliferation of international legal institutions and norms entailing that many more aspects of life on our planet is now governed by international law than ever before in human history. For example, post-war institutions such as the United Nations, and its juridical arm, the International Court of Justice, have been joined in recent years by new institutions, such as the World Trade Organization (WTO), the International Criminal Court (ICC), a plethora of human rights treaty bodies, regional organizations and courts, and so on." On the other side, "the emergence and intensification of various problems with a strong global dimension – widespread violations of human rights, the proliferation of weapons of mass destruction, the rise of terror networks and the 'war on terror' launched by some States in reaction to them, the mutual interdependence and vulnerability wrought by economic globalization, the environmental crisis, the threat posed by pandemics, illegal movement of people across state boundaries, and so on – all appear to outrun the problem-solving capacity of any individual state or group of

30 Schachter, Oscar, *International law in theory and practice*, The Netherlands, Dordrecht: Martinus Nijhoff Publishers, 1991, pgs. 2-6.

states to deal with adequately, and seem to necessitate the development of appropriate international legal frameworks."
For Besson and Tasioulas, "a manifestation of the pressing nature of these normative questions is that even those international relations and post-modern theorists who purport to desist from any form of ethical advocacy often seem, at least to their opponents, to be operating with a normative agenda. But surely is it preferable to be explicit about one's normative commitments? And this self-consciousness is in turn a necessary preliminary to defending, or else revising or abandoning that agenda in light of criticisms it attracts, as well as the results of trying to implement it in practice. Now, of course, it is possible to adopt a self-critical normative approach to international law without drawing on anything recognizable as a tradition of philosophical thought." Nonetheless, Besson and Tasioulas maintain the conviction that the philosophical tradition in which Hart and Rawls are central figures has an important contribution to make to both a philosophical and normative approach.[31]
Richard Falk (1930), an American jurist, quoted by Benson and Tasioulas, asks a philosophical question in his book "The Declining of World Order", published in 2004: "Can we be hopeful about the future?" And he himself answers: "The wrecking of world order, if that is what it is, also has dialectical effects encouraging receptivity to bolder think about the goals of the struggle against these dark forces – including a reevaluation of the spiritual message of the great world religions and the possibility of constructing human security on a foundation of nonviolent politics."[32]
Notwithstanding, the famous French philosopher Edgar Morin (1921) has a positive message in his more recent book "How to live in time of crisis?": "We are in a period of planetary crisis and do not know what will come of this; all that would be able to generate the possibility of transcending this crisis will be good news."[33]
More than ever, can we reach a really progressive international law without the benefits of philosophical thought?

V. Why a Philosophy of International Space Law?

Sir Ian Brownlie (1932-2010), a British practising barrister, specializing in international law, calls attention to the danger of studying specialized areas of international law without regard to international law as a whole.[34] Brownlie was

31 Besson, Samantha, and Tasioulas, John, *The Philosophy of International Law*, United States, New York: Oxford University Press, 2010, pg. 4.

32 Falk, Richard A., *The declining of world order – America's Imperial Geopolitics*, USA, New York: Routledge, 2004, pg. XI. Falk is Professor Emeritus of international law at Princeton University.

33 Morin, Edgar, *Como viver em tempo de crise?* (*How to live in time of crisis?*), (edition in Portuguese) Brazil, Rio de Janeiro: Bertrand Brasil, 2013, pg. 26.

34 Ian Brownlie gives this view in his article on "Problems of Specialization", published in the book edited by Bin Cheng entitled "*International Law: Teaching and Prac-*

right. In fact, international space law forms an integral part of public international law. As establishes Art. III of Outer Space Treaty, all space activities shall be carried out "in accordance with International law, including the Charter of United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding." It is also true, as Bin Cheng remarks, that "space law has helped considerably to throw light on many aspects of international law."[35]

It means that previous considerations related to international law are also applicable to international space law, although this branch has its particularities.

It is symptomatic that in our extremely complex and unstable XXI century there is already an important book on space policy and law based on a philosophical approach – "The Fair and Responsible Use of Space – An International Perspective,"[36] published in 2010. The editors cautioned: "Everyday life would be seriously degraded, if not impossible, without the utilization of space-based science and technology. This holds true for the present generations, but also for the ones to come. Accordingly, space has to be preserved for the future. Sustainability can be achieved through a fair and responsible use of space."

Increasing perils for human space activities are created by the growing number of space debris, as well as by the adopted plans to install weapons in outer space, with the consequent transformation of Earth's orbits into battlefields.

The referred to book originated in the conference with the same title, hosted by the European Space Policy Institute (ESPI) and organized jointly by the International Academy of Astronautics (IAA) and by the Secure World Foundation (SWF), 20-21 November 2008 at Vienna, Austria. The event's conclusions and policy recommendations addressed peaceful uses of outer space, the Space Situational Awareness, and space benefits for developing countries. The event also debated data sharing issues, Space Traffic Management, the role of the United Nations in space affairs, as well as the suitable structure for the international system in this field.

The first article in the book focuses on "The General Concepts of Fairness and Responsibility", by Wolfgang Rathgeber[37], German researcher at ESPI in the area of space security. He explores ideas of the philosopher John Rawls (1921-2002), author of the famous work "A Theory of Justice". Rawls in turn developed the theory of social contract of the philosophers John Lock (1632-1704), Jean Jacques Rousseau (1712-1778) and Immanuel Kant (1724-1804).

---

tice", 1982, pgs. 109-113. See such information in Cheng, Bin, *Studies in International Space Law,* USA: New York: Oxford University Press, 1997, pg. VIII. Cheng is Professor Emeritus of Air and Space Law, *University College London (*UCL), specialising in public international law, air law, and space law.

35 Cheng, Bin, *id ibidem*, pg. LXI.

36 *The Fair and Responsible Use of Space – An International Perspective*, Rathgeber, Wolfgang, Schrogle, Kai-Uwe, Williamson (Editors), Volume 4 of Studies in Space Policy, Edited by the European Space Policy Institute; Germany: Springer Wien New York, 2010.

37 Rathgeber, Wolfgang, *The general concepts of fairness and responsibility, in The Fair and Responsible Use of Space – An International Perspective, op. cit., pgs. 1-10.*

In Rawls's view, as Rathgeber recalls, the principle of utility is not compatible with the cooperation of equals aiming at mutual benefits, which is characteristic of a well-ordered society. Norms of this principle are used to decrease the prospects of living for some persons in order to maximize the welfare of others. Applied to space activities, the principle of utility certainly tends to amplify the already immense inequality among countries.

Theoretically and practically speaking, Rathgeber observes: "Responsibility and justice as fairness also contributes to each other. Justice and fairness supports responsible behavior by providing a basis for stability that allows for assessing different paths of actions and pertinent consequences. Responsible behavior facilitates justice as fairness, because members of society will be more apt to accept rules that limit their freedom if they know that all other members think about the possible consequences their actions might cause and restrict themselves accordingly. The two concepts of responsibility and justice as fairness are closely interwoven; in fact, it is hard to imagine one without the other."

The question is that, as Rathgeber states, "developed and powerful space actors will not be inclined to agree to principles that diminish the favorable position that they hold. Still, these are the kind of principles looked for." Here, there is a contradiction and a unity of principles. The contradiction is between the principles of responsibility and justice as fairness, on one side; the tendency of developed and powerful space actors inclined to refuse the principles able to reduce their favorable position, on the other side. The unity is between the principles refused by powerful space actors, and the principles looked for by thinkers, scholars and jurists.

In conclusion, the legal definitive philosophical question in space activities seems to be this one: What principles, rules and practices are we introducing in outer space, as the heritage of human civilization? And, dialectically, what will be the impact of such principles, rules and practices on the social, cultural and economic development on our planet, and on future space activities?