Democracy's Final Frontier: The Democratic Dilemma of Private Actor Influence on the Formation and Interpretation of International Space Law under Article VI of the Outer Space Treaty

Darcey McDonald

Institute of Air and Space Law, McGill University, Montreal

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Abstract

The role of private actors in international law is evolving, particularly in international space law. This thesis examines the democratic implications of the rule of attribution contained in Article VI of the Outer Space Treaty (OST), which attributes the actions of private actors in outer space to their respective states. It argues that this framework, while essential for accountability in the burgeoning space sector, creates a democratic deficit by enabling private actors to influence the formation and interpretation of international space law without being subject to direct obligations under the treaty.

This thesis examines the rules of attribution outlined in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), tracing their evolution into principles of general applicability across international law for determining state practice. It establishes that Article VI of the Outer Space Treaty, as a specialised rule of attribution, not only assigns responsibility but also influences treaty interpretation and the formation of customary international law. The Treaty's broad and general provisions leave significant room for interpretation, granting states and other actors flexibility in shaping its application. However, when the normative validity of international law is derived from the will of states, as this thesis argues, a broad interpretation of attribution becomes increasingly problematic. This concern is amplified by the ability of a few states to shape international law for all, particularly when private actors' actions are included as state practice. The resulting democratic deficit is particularly troubling, as private actors often have interests and motivations that diverge from those of states, potentially undermining the sustainable and responsible use of outer space. This dynamic risks setting a dangerous precedent as space activities and actors continue to expand.

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Le rôle des acteurs privés dans le droit international évolue, et ce, particulièrement dans le droit international de l'espace. Cette thèse examine les implications démocratiques de la règle d'attribution contenue dans l'article VI du Traité sur l'espace extra-atmosphérique (OST), qui attribue les actions des acteurs privés dans l'espace extra-atmosphérique à leur État respectif. Elle soutient que ce cadre, bien qu'essentiel pour la responsabilité dans le secteur spatial en plein essor, crée un déficit démocratique en permettant aux acteurs privés d'influencer la formation et l'interprétation du droit international de l'espace sans avoir d'obligations directes en vertu du traité. Cette thèse examine les règles d'attribution énoncées dans les Articles sur la responsabilité des États pour fait internationalement illicite (ARSIWA) en retraçant comment ils sont devenus des principes d'applicabilité générale à travers le droit international dans la détermination de ce que constitue une pratique étatique. Ce faisant, elle établit que l'article VI du OST, en tant que règle d'attribution spécialisée, a non seulement le rôle d’attribuer la responsabilité, mais aussi celui de façonner l'interprétation des traités et la formation du droit international coutumier. Lorsque la validité normative du droit international découle de la volonté des États, comme l'affirme cette thèse, cette conception large de ce que constitue l’attribution devient de plus en plus problématique. Le principal problème provient du déficit démocratique ainsi créé : les acteurs privés ont des intérêts et des motivations différents de ceux des États et leur comportement peut donc être contraire à l'utilisation durable et responsable de l'espace extra-atmosphérique.

Table of Abbreviations

ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CIL	Customary International Law
ICJ	International Court of Justice
ILC	International Law Commission
LEO	Low Earth Orbit
OST	Outer Space Treaty
UN	United Nations
UNCOPUOS	United Nations Committee on the Peaceful Uses of Outer Space
VCLT	Vienna Convention on the Law of Treaties

Chapter 1 : International Legal Theory

1.1 Introduction

1.1.1 Background

When Russian forces advanced into Ukraine in early 2022, Ukrainian communications networks were at risk of collapse. In response, SpaceX's Starlink stepped in, providing satellite internet access that allowed Ukrainian forces to maintain critical communication channels.[1] Though a private company, SpaceX's actions aligned with the strategic interests of the United States and Western allies, blurring the line between state practice and private influence in space. This unprecedented involvement of a private actor in a sovereign conflict raises fundamental questions about the role of private companies in shaping the norms and expectations of international space law. What happens when private actors, with their own interests and technologies, wield influence on par with states? How do these actions affect the formation and interpretation of international legal norms, especially when their conduct aligns so closely with state policy? What happens when the conduct of private actors doesn't align with the position of states?

While the focus of this thesis is international space law in times of peace, this example of SpaceX's involvement in the Russia/Ukraine conflict demonstrates the pressing issue that international space law is faced with in light of the influence of private actors. The issue becomes exponentially more pressing as a result of the rapidly increasing role of private actors in

[1] "How Elon Musk's satellites have saved Ukraine and changed warfare" (5 January 2023), online (website): <https://www.economist.com/briefing/2023/01/05/how-elon-musks-satellites-have-saved-ukraine-and-changed-warfare?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=18156330227&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gad_source=1&gclid=Cj0KCQiA_qG5BhDTARIsAA0UHSIHRrb7lOP4crxlFInpYqX0uof5LEnki0JSw3OPIi9hIWqZ_IyEiBUaAuBQEALw_wcB&gclsrc=aw.ds >

space.[2] Article VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter OST) asserts, in part, that states "shall bear international responsibility for national activities in outer space… whether such activities are carried on by governmental agencies or by non-governmental entities."[3] Traditionally, this is understood as a rule of attribution to ensure state accountability for its national activities and protect the sustainable and responsible use of space, as it requires states to ensure their national activities conform with the OST. However, in a changing international landscape where non-state actors are beginning to take to the stage of international law and rules of attribution are seen to "reflect the overall changing international landscape"[4], the theoretical and practical impact of Article VI is highly contentious.

As Klabbers notes, "The actual rights and obligations emanating from treaties, custom or other sources … are distributed through notions concerning participation in the international legal system."[5] This observation encapsulates the central issue explored in this thesis: the relationship between the sources of international law, their normative character, the process by which they are formed and interpreted and the potential role for private actors in this process. Specifically, it examines the potential of Article VI of the OST to alter the traditional notion of statehood in outer space and the impact of this shift on the distribution of normative authority within the international legal system. From a theoretical perspective, the identity and the

[2] Cf European Space Policy Institute, "The Rise of Private Actors in the Space Sector" (July 2017), online (PDF): <https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-report-The-rise-of-private-actors-Executive-Summary-1.pdf>

[3] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,* 27 January 1967, 610 UNTS 205 at Article VI *[OST]*.

[4] Christina Binder and Stephan Wittich "A Comparison of the Rules of Attribution in the Law of State Responsibility, State Immunity and Custom", in Gábor Kajtár, Başak Çali and Marko Milanovic, eds, *Secondary Rules of Primary Importance in International Law: attribution, causality, evidence and standards of review in the practice of international courts and tribunals*, (Oxford: Oxford University Press, 2022) 242 at 243 *[Binder and Wittich]*.

[5] Jan Klabbers, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Jarna Petman and Jan Klabbers, eds, *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (Leiden: Martinus Nijhoff, 2003) 351, at 351 *[Klabbers, Recognition]*.

identification of international law are separate but closely related questions. This thesis seeks to examine the bridge between these two enquiries, and the effect of Article VI of the OST and the growing prevalence of private actors in international space on the identity and identification of international law. On one end of the spectrum, some say that international law is merely what the International Court of Justice would apply in a given circumstance[6]: on the other hand, some would argue that international law is not law at all.[7] What one considers the nature of international international law, and its source of validity, directly impacts the influence that private actors exert over the interpretation and formation of international space law norms.

In a practical sense, the involvement of private actors in creating and interpreting international legal norms has the potential to create a democratic deficit. A democratic deficit is created in both a broad and narrow sense. Broadly, a democratic deficit arises because the interests of private actors often diverge from those of states, undermining the OST's purpose of ensuring the sustainable and responsible use of space. Narrowly, the deficit occurs because states are expected to represent the interests of their citizens in creating and upholding international law, but private actors do not fulfil this representative role.

While Article VI OST raises both theoretical and practical questions, addressing the role of private actors in the formation of international space law requires reconciling practical realities with theoretical principles. This challenge unfolds amid growing concerns over the fragmentation of international law,[8] alongside the distinct demands of specialised fields such as outer space law. The role of non-state actors often remains somewhat detached from international

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[6] Thirlway, "The Sources of International Law" in Malcolm Evans ed, *International Law* 3rd ed (Oxford: OUP, 2010) 95 at 98-99 *[Thirlway, Sources]*.
[7] Herbert L. A. Hart, *The Concept of Law,* 2nd ed (Oxford: Oxford University Press, 1994) at 214 *[Hart]*.
[8] See generally, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UN Doc A/CN.4/L.702, (2006), Report of the Study Group of the International Law Commission at 9 *[ILC Fragmentation Report]*.

law's theoretical foundations[9]; however, this thesis seeks to bridge that gap. Striking a balance between these intersecting issues is no simple task: reconciling diverse international interests while fostering the sustainable and responsible development of outer space proves to be an exceedingly complex endeavour.

It is relatively uncontroversial to say that the national legislation of states, in authorising and supervising their private actors, is state practice.[10] In this manner, the private actors indirectly impact the formation and interpretation of international space law, as the national legislation reacts to the actions of private actors in order to regulate them.[11] However, a greater question lies in whether the actions of non-state actors, by virtue of the *lex specialis* rule of attribution in Article VI of the OST, can be considered as state practice and therefore directly influence the formation and interpretation of international space law. To answer this question, there are several further questions which must be asked: questions of primary and secondary rules, questions of the subjects of international law, questions of the nature of Article VI and questions of democracy. In a rapidly expanding space sector, private actors are set to shape the industry: but can they also shape the interpretation and formation of the international law that governs peaceful activities in outer space?

Before addressing these questions, it is necessary to briefly consider the role of international organisations. International organisations play a vital role in international law, particularly in areas like outer space, where activities are costly and often beyond the capacity of individual states. However, this thesis does not focus on international organisations because they

[9] Andrea Bianchi "The Fight for Inclusion: Non-State Actors and International Law" in Ulrich Fastenrath et al, eds, *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 39 at 42 *[Bianchi]*.
[10] *See e.g.* Phillip De Man, "State practice, domestic legislation and the interpretation of fundamental principles of space law" (2017) 42 Space Pol'y 92 at 94.
[11] *ibid*, at 93-94.

are recognized as subjects of international law.[12] Their possession of legal personality means their involvement in international law does not pose the same challenges as that of private actors, who are not recognized as subjects. This thesis instead examines how private actors, lacking formal subject status, may nonetheless influence the formation and interpretation of international law - through mechanisms like Article VI's attribution clause - thereby contributing to a democratic deficit.

Another related issue which warrants mention is the International Telecommunications Union (ITU). ITU, the UN agency for information and communication technologies,[13] has the possibility of membership for Sector Members. As a Sector Member, private actors can join ITU, contributing to technical discussions, study groups and therefore exerting influence over the standard setting process.[14] While Sector Members do not having voting rights in the decision making forum[15], they still are directly involved in the rule-making process. ITU, on its face, seems to explicitly allow private actors to contribute to the making of international obligations. However, the internal mechanisms of the ITU can be differentiated from the problems which arise from Article VI on the basis there is no democratic deficit in the ITU. The lack of democratic deficit arises because private actors are *explicitly* allowed membership and included in the decision making processes. There is a transparency as to their influence, and the power which private actors hold is sufficiently limited by the fact they do not have voting rights. They therefore are representative of the interests of the sector, which can be taken into account, but do not themselves form the regulations in ITU. Additionally, Sector Members are bound to follow

[12] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 at 179 *[Reparation for Injuries]*.
[13] International Telecommunication Union, *"About the International Telecommunication Union"*, online (website): <https://www.itu.int/en/about/Pages/default.aspx>.
[14] *Constitution of the International Telecommunication Union* (22nd December 1992) 1825 UNTS 143, UN Reg No I-31251 at Article 3(3).
[15] *Cf ibid* at Article 3(2), where Member States *are* granted voting rights.

the regulations made by ITU.[16] The issue with Article VI of the OST lies in a fundamental lack of transparency: by incorporating private actors into the conduct of the state, it enables these actors to influence the interpretation and formation of international legal rules without openly acknowledging their role. This opacity undermines the legitimacy of the process. Furthermore, the ability of private actors to shape norms while not being directly bound by the obligations they influence exacerbates a democratic deficit. The existence of the ITU and its explicit recognition of Sector Members does not diminish or contradict this thesis' argument: Article VI of the OST uniquely creates a democratic deficit by treating private actors' actions as state practice, thereby allowing them to contribute to the formation and interpretation of norms without accountability or transparency.

The potential for private actors to influence soft law also ought to be briefly mentioned: through a variety of different legal channels there is the potential for private actors to influence the creation of soft law norms,[17] which have the potential to crystallise into norms of international law through customary international law[18] or be enforceable under the general principle of due diligence.[19] Such considerations also lie outside the scope of this thesis, which addresses the role of private actors in forming state practice, for the purposes of the formal sources of law contained in Article 38 of the Statute of the ICJ.

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[16] *ibid* at Article 3(1).
[17] See, for eg, United Nations, *Report of the Committee on the Peaceful Uses of Outer Space on its Sixty-Second Session* (*A/74/20*), 2019 at 68 para 4, where the consultation of stakeholders in the industry took place in forming the *Guidelines for the Long-Term Sustainability of Outer Space Activities,* UNCOPUOS, 62nd sess, A/74/20 (2019).
[18] Christine Chinkin, "The Challenge of Soft Law : Development and Change in International Law" (1989) 38:1 Intl & Comp Q 850 at 851.
[19] See, for eg, *Pulp Mills on the River Uruguay (Argentina/ Uruguay),* Judgment, [2010] ICJ Rep 14 at para 209 and 224 *[Pulp Mills],* in which the ICJ held that due diligence involved compliance with industry standards and best practices. In Pulp Mills, the technical standard applied was the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission.

This thesis, in Chapter 1, seeks to first determine from where rules in international law derive their normative character. The conclusion reached is that the will of states is what grants validity to international norms. In reaching this conclusion, there is a careful analysis of state practice, as both evidence of what norms are and the source of validity for such norms, and the role state practice plays in making up the will of a state. However, 'state practice' does not exist as an abstract concept: state practice is a conglomeration of actions of individual people, which have been attributed to the state.[20] Chapter 2 of this thesis will consider what rules of attribution have been adopted across international law for the purpose of determining what exactly is the practice of a state. Article VI of the OST will then be examined as a rule of attribution, considering the potential of private actors to form and interpret international law in international space law (and thus make up what grants international law its normative character, in line with what is established in Chapter 1). Chapter 3 will reflect upon the capacity of private actors to influence the formation and interpretation of international space law, with a particular focus on the democratic deficit resulting from this influence. It will explore the most effective path forward, aiming to reconcile the desire to prevent the fragmentation of international law with the specific needs of international space law and the imperative to address the democratic deficit currently present in the formation of international law.

1.1.2 Research Questions

The primary research question to be answered in this thesis is the following:

[20] See *German Settlers in Poland*, Advisory Opinion, (1923) PCIJ (ser B) No 6 at 22.

To what extent is the growing influence of private actors in outer space on the formation and interpretation of international law creating a democratic deficit ?

This research question will be answered pursuant to the investigation of the following sub-questions:

1. How do rules of international law gain their validity as norms?
2. Can state practice, for purposes of formation and interpretation of international law, include the conduct of private actors by virtue of Article VI of the Outer Space Treaty?
3. Does the reconciliation of the argument that international legal norms derive their validity from the will of states, including state practice, with the broadening of what constitutes state practice in the context of outer space inherently create a democratic deficit?
4. Should state practice, for purposes of formation and interpretation of international law, include the conduct of private actors by virtue of Article VI of the Outer Space Treaty?

Question 1 will be addressed in Chapter 1, Question 2 in Chapter 2 and Questions 3 and 4 in Chapter 3.

1.1.3 Methodology

This thesis adopts a structured approach to address the main research question: "To what extent is the growing influence of private actors in outer space on the formation and interpretation of international law creating a democratic deficit?" Each chapter will engage with a specific sub-question using relevant methodologies to analyse both theoretical and practical dimensions

of private actors' influence on international law in the context of outer space. Primarily, across the thesis, the approach is doctrinal.

The thesis is largely grounded in a positivist legal perspective, which serves as the guiding framework across all chapters, focusing on objective analysis of legal norms and their foundations within state practice and international law. This thesis employs a combination of theoretical, doctrinal, interpretative, practical consequence, and new governance analyses to investigate the implications of private actors' influence in outer space on the democratic legitimacy of international law. By systematically addressing each sub-question, the thesis will provide a comprehensive answer to the research question, evaluating both the foundational and practical dimensions of private conduct as state practice in international space law.

In Chapter 1, to address sub-question 1, theoretical legal analysis will be employed. This chapter will investigate the foundational basis of international legal norms, specifically focusing on positivist theories of norm creation. Key methodologies include positivist legal theory, examining how norms gain legitimacy and authority in international law, with emphasis on sources of law, state consent and intent, and the role of state practice and secondary sources, using legal scholarship to trace the evolution and validity of norms in international law, especially theories on state-based norm formation. This chapter provides the theoretical foundation for subsequent analyses, particularly with respect to whether private conduct could be incorporated into state practice without undermining normative legitimacy.

Chapter 2, in order to answer sub-question 2, will employ doctrinal legal and interpretative analysis. This chapter seeks to interpret existing legal frameworks to clarify the potential inclusion of private conduct within state practice. Key methodologies include doctrinal

legal analysis of primary sources of international law, in line with Article 38 of the ICJ Statute, to define what constitutes "state practice" and how it might accommodate private conduct and an interpretative analysis of Article VI OST. Through systematic interpretation, the chapter will assess the scope and implications of Article VI's rule of attribution for private actors. State practice and legal scholarship will be used to examine how far the attribution of private conduct to states extends within international law's framework. This analysis will focus on the interpretative methods outlined in the Vienna Convention on the Law of Treaties, assessing how Article VI might substantively alter the boundaries of state practice by integrating private actors' activities.

Chapter 3 addresses both sub-questions three and four which concern the democratic implications and practical justifications for including private actors in state practice. Two methodological approaches will be used to examine these issues: firstly, practical consequence analysis, for sub-questions three and four. For both sub-questions, this approach will evaluate the real-world impacts of broadening state practice to include private actors. The analysis will focus on potential democratic deficits that could emerge from this shift, considering the challenges it may pose to traditional state accountability and legitimacy in the formation and interpretation of international law. Secondly, a New Governance analysis will be used to address whether it is desirable to include private conduct within state practice, for the purposes of interpretation and formation of international law: this approach will examine alternative regulatory frameworks and approaches to Article VI OST that may accommodate the unique roles of private actors in space without compromising democratic values.

Through these methodologies, Chapter 3 will assess both the theoretical and practical considerations of including private actors in the formation and interpretation of international law,

particularly in the space sector. The analysis will aim to identify whether such inclusion could undermine democratic legitimacy and suggest ways to potentially mitigate any democratic deficits.

1.2 International Law and Theory

1.2.1 Nature of International Law

1.2.1.1 What is international law?

The nature of international law is a question on which much ink, time and thought has been spent. There is a vast body of nuanced and thorough academic literature which considers this specific issue, of greater breadth than is possible to address in a singular thesis. How this thesis chooses to define international law is as a system of norms which were created to regulate interstate relations, drawing inspiration from the definition given to international law by Kelsen in his acclaimed work *'Introduction to the Problems of Legal Theory'* in 1934.[21] Such a definition finds support in the traditional works of Oppenheim[22] and Grotius[23], alongside more modern works of, *inter alia*, Shaw[24], Hart[25] and Brownlie.[26]

One cannot discuss what international law is without mentioning state consent, upon which much analysis of international law is based. Since there is no overarching authority above

[21] Hans Kelsen, *Introduction to the Problems of Legal Theory,* translated by Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon, 1992) at 107 *[Kelsen]*.
[22] Lassa Oppenheim, *International Law; a Treatise*, 8th ed by Hersch Lauterpacht (London, UK: Longmans, Green, 1955) at 4.
[23] *Cf* Martine Julia Van Ittersum, 'Hugo Grotius: The Making of a Founding Father of International Law', in Anne Orford, and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 82.
[24] Malcolm Shaw, *International Law*, 8th ed (Cambridge: Cambridge University Press) at 2.
[25] Hart, *supra* note 7 at 236
[26] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 15 *[Brownlie's]*.

states, international law relies on states' voluntary commitment to norms, treaties, and customary practices. All law comes from states: international law is by states for states. The focus on states is reflected in the state-centric approach often taken in literature: "states are, at this moment of history, still at the heart of the international legal system".[27] International legal obligations must "emanate from their own free will"[28] in order to be binding. Consent is therefore the cornerstone of international law: such a claim is relatively uncontroversial, with even the ICJ having recognised that consent is the "very basis of international law."[29] The fact that a state is only bound by international law to the extent that it has consented to be bound is both widely acknowledged and accepted.[30] Consent is important in the formation of international law as treaties do not bind states that are not party to them[31] and therefore have not consented to be bound. Consent to the content of a rule is also a key requirement in the formation of customary international law.[32]

Hart finds issue with such 'voluntarist' theories of international law: he argues that treating all international obligations as self imposed is the "counterpart in international law of the social contract theories of political science."[33] He believes that theories based on consent fail to explain the normative value of law, how international law can bind states and to discharge "any examination of the actual character of international law."[34] However, what Hart fails to consider is the possibility of consent-based obligations being a characteristic of international law, rather

[27] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Oxford University Press, 1994) at 39 *[Higgins]*.
[28] *The Case of the S.S. "Lotus" (France v Turkey)* (1927) PCIJ (Ser A) No 10, at 18 *[Lotus]*.
[29] *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 226 at 21 *[Threat or Use of Nuclear Weapons]*.
[30] Ronald Dworkin, "A New Philosophy for International Law" (2013) 41:1 Philosophy & Pub Affairs 2 at 5 *[Dworkin]*.
[31] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1115 UNTS 331, Article 34 *[VCLT]*.
[32] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America), Merits, [1986] ICJ Rep 14 at 188 *[Nicaragua]*. ICJ states that when ascertaining *opinio juris* what is important is that states have demonstrated consent to the content of a rule.
[33] Hart, *supra* note 7 at 224.
[34] Hart, *supra* note 7 at 224.

the source of where international law derives its validity and normative character. International law is based on consent: this is a descriptive fact. Consent itself is not enough to explain the normative character of international law.[35]

Such a descriptive fact exists independently from where international law derives its validity - these are two entirely different issues. Not all theories about international law are based upon the derivation of validity. The character of international law and what gives international law normative force are two entirely separate enquiries[36], something which Hart fails to recognise when he states that voluntarist theories of international law have "been inspired by too much abstract dogma and too little respect for the facts."[37] However, this does not mean that consent can be the basis for legal validity. Attempting to ground the validity of law solely in state consent, without requiring that consent to be demonstrated through actual practice, presents a problem: if consent is enough to bring about validity, then it becomes a necessary element for establishing binding law.[38] This statement is something which is simply not true: if it were to be true, general principles of law would not be binding and customary international law would not be binding on new states.

Instead, consent is merely an observation as to the nature of international law and a factor which contributes to its legitimacy.[39] Discussion of state consent has therefore been included in the section on the 'nature of international law' rather than the discussion of the derivation of validity of international obligations within this thesis. International law can indeed be based on consent, while its normative validity might come from a different source. This analysis will

[35] Max Planck Encyclopedias of International Law (online), *Max Planck Encyclopedia of Public International Law,* "Consent" (Oxford, Oxford University Press, 2022) at para 2 *[Consent MPEPIL]*.
[36] Thomas Franck, "Legitimacy in the International System" (1988) 82 AJIL 705, at 705.
[37] Hart, *supra* note 7 at 226.
[38] Hugh Thirlway, *International Customary Law and Codification : An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff,1972), at 56 *[Thirlway]*.
[39] Consent MPEPIL, *supra* n 35 at para 4.

proceed on this assumption, exploring what that separate source of validity might be (while maintaining that international law is predominantly based on the consent of states).

1.2.1.2 The validity of legal obligations

The question of where international law derives its validity from is a question which has generated enormous literature. The reason for the enormous literature is because the theoretical basis of international law is an essential discussion in order to understand the conceptual foundation upon which the law rests: such an understanding is essential to understand where international law draws its validity from as a normative system. However, the answer is neither straightforward nor clear. This thesis will take a predominantly a positivist lens, but will undertake a brief note on the competing theoretical bases of natural law.

Traditionally, the validity of international law was often derived from natural law. This derivation from natural law is owed to the religious origins of international law.[40] However, while the origins of international law may have been *based* on natural principles of justice, international law cannot owe its validity to such principles. This is for two reasons: firstly, legal rules contain specific details and arbitrary distinctions that would not logically be part of a system of moral rules[41] and secondly, the fact that law changes and evolves, often as a result as human involvement, does not sit well with the concept of natural rules of human morality[42] which, in the view of a natural lawyer, bestows the normative nature to law. Morality cannot change by human intervention and instead is an objective standard.[43] The character of

[40] Randall Lesaffer, "Roman Law and the Intellectual History of International Law" in Anne Orford, and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 38, at 44–5.
[41] Hart, *supra* note 7 at 229.
[42] Hart, *supra* note 7 at 185.
[43] *Cf* John McDowell, "Values and Secondary Qualities" in Ted Honderich ed, *Morality and Objectivity : A Tribute to J. L. Mackie* (Boston: Routledge, 1974) 110; John M Finnis, *Fundamentals of Ethics* (Washington DC: Georgetown University Press, 1983) at Chapter 3.

international law is fundamentally different from that of morality, and while law contains much of what is morally important, it cannot derive its validity from morality.

Positivism

Positivist legal thought is the theory that law is a system of rules created by human authorities, and its validity depends on social facts - such as enactment by a recognized authority - rather than on morality or ethics. Early positivists, the most influential being Austin, derived the normative character of norms from law being an order made by a sovereign backed by a threat of sanction.[44] This behaviourist theory of law reduces law to commands issued by a sovereign which are followed because of threat of sanction in the case of non-compliance. Command theory can be briefly dismissed on the basis of its failure to account for certain types of law which are especially prominent in international law: power-conferring rules, customary rules, self-binding rules and complex rules.[45] Command theory especially fails on account of the definitive lack of sanctions in international law[46]: international law is still adhered to despite this lack of sanctions and therefore Command theory is not a useful consideration for the present circumstances.

Hart's approach to legal positivism is among the most seminal contributions to modern jurisprudence. In *The Concept of Law*, Hart presents legal systems as a "union of primary and secondary rules."[47] Primary rules are obligations, and "actions that individuals must or must not do"; secondary rules are the rules used to determine the existence of primary rules, to "specify

[44] John Austin, *The Province of Jurisprudence Determined*, Wilfred Rumble ed (Cambridge: Cambridge University Press, 1995) at 27. See Lecture I for complete discussion.
[45] Hart, *supra* note 7 at 20-25.
[46] Hart, *supra* note 7 at 220.
[47] Hart, *supra* note 7 at 79.

the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[48] Hart describes three key secondary rules: rules of change, rules of adjudication and the rule of recognition. Rules of change are power conferring rules which allow for modification and elimination of primary rules, responding to the problem of statis in legal systems.[49] The rules of adjudication are also power conferring rules, which give individuals power to solve disputes under the law and determine what is a breach of the law, a response to the problem of inefficiency.[50] The final secondary rule is the rule of recognition, the most important of the secondary rules. This is because the rule of recognition defines how the legal validity of a system can be determined.[51] This rule responds to the problem of uncertainty, where individuals may not know what the rules of a legal system are.[52] The rule of recognition could take a number of forms, simple or complex: what matters is that the rule, in whatever form, acknowledges that it is authoritative in ascertaining what the rules of that legal system are.[53] The rule of recognition in Hart's theory is grounded in the internal point of view of legal system participants, especially officials, who accept the rule of recognition as the standard for conferring legal validity. This acceptance enables them to identify primary rules of obligation that guide behaviour within the system.[54]

In the absence of secondary rules, there is no law according to Hart: a regime of mere primary rules is a social structure, which cannot be considered a legal system.[55] When there are no secondary rules which provide for how those primary rules operate, are applied and are recognised, the system of rules cannot be considered a legal system. Hart believes that

[48]Hart, *supra* note 7 at 94.
[49]Hart, *supra* note 7 at 95.
[50]Hart, *supra* note 7 at 96.
[51]Hart, *supra* note 7 at 100-110.
[52]Hart, *supra* note 7 at 95.
[53]Hart, *supra* note 7 at 94-95.
[54]Hart, *supra* note 7 at 102.
[55]Hart, *supra* note 7 at 214.

international law falls into this category: the absence of law-making institutions means that international law is only a regime of primary rules.[56] The fact that the content of international law is vast and complex does not impact the fact that there is no rule of recognition, in Hart's mind.[57] International law is merely a social structure - Hart compares international law to rules of etiquette, which are binding and rules but not necessarily law.[58]

Kelsen also argues for a hierarchical approach to determining the validity of legal norms under the remit of legal positivism. In *Introduction to the Problems of Legal Theory*, Kelsen argues that law is a hierarchical system of norms rooted in a foundational "basic norm" (*grundnorm*), which underpins the validity of all other norms in the legal system. Each norm derives its authority from a higher norm, creating a structure where laws are valid not because they are morally just, but because they follow the procedural structure established by this foundational norm.[59] However, while the rule of recognition and the basic norm are similar in that they are what the normative value of law can be derived from, they differ in the fact that the rule of recognition is a social fact, but the basic norm is a presupposition.

Hart and Kelsen, while both legal positivists, also differ in the fact that Kelsen believes that international law fits within his framework of the grundnorm and therefore can be considered a valid system of legal norms. In international law, the underlying norm which grants validity to legal norms is that of *pacta sunt servanda*.[60] He understands *pacta sunt servanda* to mean that 'agreements must be kept', and that the norm that agreements must be kept underpins all legal obligations in an international system, granting them their normative value.[61]

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[56]Hart, *supra* note 7 at 214.
[57]Hart, *supra* note 7 at 227.
[58]Hart, *supra* note 7 at 234.
[59] Kelsen, *supra* note 21 at 57.
[60] Kelsen, *supra* note 21 at 108-110.
[61] Hans Kelsen, *Principles of International Law* 2nd ed by Robert Tucker (New York: Holt, Rinehart and Winston, 1966) at 314 *[Kelsen, Principles]*.

Hart considers Kelsen's thesis that *pacta sunt servanda* acts as the basic norm / rule of recognition in international law, but spends very few words dismissing this theory, on account of the fact that not all obligations are founded on *pacta*.[62] The argument that not all international obligations are based on agreement is a reasonable challenge to Kelsen's thesis, especially in light of general principles of international law and customary international law, both sources of law under Article 38 of the Statute of the ICJ.[63] Agreement does not grant validity to these legal norms: however, Kelsen's analysis shows that the idea of a basic norm can be applied to international law.

There are two ways in which one can disagree with Hart. The first is to say that secondary rules are not necessary for international law to be valid: you disagree with his entire thesis. This approach has been taken by academics such as Finnis, and acknowledged by academics such as Brownlie. Finnis bases the validity of a legal system on natural law, basing the authority of rules upon the furthering of the common good.[64] Brownlie acknowledges that international law does not have secondary rules, but he states that this "matters less if one accepts the view that secondary rules do not play such a decisive role in maintaining the more basic forms of legality."[65] Such a disagreement with Hart's entire thesis is not what this author seeks to do.

The second possibility of disagreement arises in a case where one agrees that law is a union of primary and secondary rules, but disagrees on Hart's assertion that there are no secondary rules in international law. That is what this thesis seeks to do, primarily for two reasons. Firstly, the lack of uncertainty, statis and inefficiency in international law; secondly, the

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[62] Hart, *supra* note 7 at 234.
[63] *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993 at Article 38 (1)(b) *[Statute of the ICJ]*.
[64] John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 244.
[65] Ian Brownlie, "The Reality and Efficacy of International Law" (1982) 52:1 BYBIL 1, at 8.

distinction in international law between usage and custom. In relation to the first reason, Hart says that international law is not law because it is a system of primary rules only, with no secondary rules.[66] Hart also argues that the secondary rules of recognition, change and adjudication remedy the defects of uncertainty, statis and inefficiency respectively. Using abductive reasoning, surely the fact that international law does not suffer from problems of uncertainty, statis and inefficiency means that there must be secondary rules which have remedied these defects? International law is always evolving and considering the examples, *inter alia*, of international environmental law and international criminal law alongside the ICJ's evolutionary approach[67] there is no problem of statis. Disputes in international law are resolved through courts, tribunals, or diplomatic means, all of which operate under secondary rules of adjudication. These rules confer power on adjudicative bodies to interpret obligations when states consent to their jurisdiction. While inefficiencies may arise when states refuse consent, this reflects the consensual nature of international law, not the absence of adjudicative rules. The secondary rules of adjudication exist regardless of whether states adhere to them, as evidenced by the structured processes available through international courts and tribunals. Thus, the inefficiency is not due to a lack of adjudicative function but to the voluntary nature of its application. This abductive reasoning supports the existence of secondary rules, challenging Hart's assertion that international law is not law.

Finally, states know what international obligations are and how they are bound to act, evidenced by general compliance with principles of international law: there is no problem of uncertainty. It can be deduced from this that there therefore must exist secondary rules in

[66] Hart, *supra* note 7 at 214.
[67] See *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment, [2009] ICJ Rep 213 at paragraph 66 *[Navigational Rights]*.

international law, evidenced by the fact that there are no problems of statis, uncertainty or inefficiency in international law.

Secondly, Hart compares rules of international law to rules of etiquette, which are binding and rules but not necessarily law, as a result of his perceived lack of secondary rules.[68] However, if rules of international law are not law, and merely etiquette between states, how does one draw a line between binding obligations of customary international law and non-binding customary practices?[69] There is clearly a difference between ceremonial salutes at sea[70] and parking allowances made for diplomatic vehicles[71] (customary practice for states but not a binding obligation) and binding rules of customary law, which states believe themselves to be bound by. For example, the principle of state immunity is a widely accepted rule of customary international law[72] which states believe themselves to be bound by, as evidenced by incorporation into their national legislation.[73] There has to be something which sets these norms apart[74]: rules such as the principle of state immunity and parking allowances for diplomatic vehicles must be differentiated on some basis. In Hart's analysis, they have the same legal value: this cannot be accepted. There therefore must be something which affords legal validity to binding norms of international law: a rule of recognition must exist.

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[68] Hart, *supra* note 7 at 234.
[69] See Brownlie's, *supra* note 26 at 21, for examples of non-binding customary practices.
[70] *ibid*, at 21.
[71] See generally *Parking Privileges for Diplomats* (1971) 70 ILR 396.
[72] See *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgement, [2012] ICJ Rep 99 at para 57 *[Jurisdictional Immunities]*.
[73] See for eg State Immunity Act 1978 (UK), 1978, c 33; Foreign Sovereign Immunities Act of 1976, 28 USC § 1602-1611(US); State Immunity Act, RSC 1985, c S-18 (Canada).
[74] *Cf* Robert Jennings, 'What is International Law and how do we tell when we see it?' in BS Markesinis and JHM Willems Eds, *The Cambridge-Tilburg Law Lectures, Third Series 1980* (The Hague, The Netherlands: Kluwer, 1983) 3 at 28 *[Jennings]*, where Jennings acknowledges that "it should be remembered at the outset that in considering the sources of international law, we are looking not only at the tests of validity of the law - the touchstone of what is law and what is not - but also at the ways in which law is made and changed."

The rule of recognition in international law

Having established that international law necessitates the existence of secondary rules and a rule of recognition in international law, the next step is to consider what that rule of recognition is. This thesis submits that the rule of recognition in international law is the will of states. The will of states is a broad concept, encompassing both internal (how states perceive a rule and their attitude towards it) and external (how states act) components. This mirrors Hart's conception of the rule of recognition as an internal point of view which officials use to guide their behaviour.[75] Validating rules of international law through the will of states by reference to both their internal perception and external action is an approach which is evidenced by the way in which treaty law forms. Article 11 of the VCLT states that "the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[76] This provision establishes that an obligation becomes binding when it is internally accepted (through consent) and this consent is demonstrated by state action, such as signature or exchange of instruments. Articles 12–16 of the VCLT specify the forms this action can take. However, the treaty does not acquire binding force until the requisite practice, evidencing an internal acceptance of the rule, is carried out. This illustrates how the will of states, both internal and external components, confers normative validity upon an international legal obligation, serving as a rule of recognition.

Consent makes up *part* of the rule of recognition, meaning that theoretically the conception is in keeping with the nature of international law broadly, but consent is not from where the validity is derived in and of itself. The distinction between consent and the will of

[75] Hart, *supra* n 7 at 88-89.
[76] VCLT, *supra* n 31 at Article 11.

states lies in the fact that in international law consent is passive,[77] but the will of the states is active.[78] Consent generally implies a state's one-time acceptance of a rule or agreement: by contrast, the will of the state is an active, ongoing process of intention and engagement, where the state continually affirms, interprets, and applies the rule. This distinction is what marks state consent as a characteristic of international law but the will of states being what grants international rules their normative value.

When considering what gives international law its normative character, the language of 'rule of recognition' is most appropriate, rather than 'basic norm', as state practice is a social fact, as opposed to a presupposition. The analysis of the will of states being what grants norms their legal validity is justified because international obligations, in both treaties and customary international law, are formed by how states perceive obligations and act upon this perception. The manner in which a state acts evidences their internal perception of that rule.[79] Treaties are defined by the will of states, because the content of obligations is established by reference to the intentions of parties and how parties act, through interpretation.[80] This idea will be fully analysed and expanded upon in section 1.2.4.3. The formation of customary international law is based on the belief of a state that an obligation is binding and how states act in furtherance of that obligation.[81] The importance of state practice in giving legal validity to norms of customary international law will be considered fully in section 1.2.4.1. It can therefore be said that the way that the will of states gives validity to primary norms of international law.

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[77] See, for eg, section 1.2.4.3, *below* for discussion of "tacit" agreement in treaty interpretation.
[78] See Lotus, *supra* n 28 at 18, where the PCIJ states that binding obligations arise from the will of states, which is actively expressed through convention or general practice.
[79] *Cf* Thirlway, *supra* n 38 at 58-59.
[80] See VCLT, supra n 31 at Article 31 (1) and (3)(b) respectively. See also *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, [1999] ICJ Rep 1045 at para 49 *[Kasikili/Sedudu Island]*; *Russian Indemnity (Russia v. Turkey)* (1912) Arbitral Award, 11 RIAA 421 at 433 (Permanent Court of Arbitration)(Arbitrators:His Excellency Monsieur Lardy et al) *[Russian Indemnity]*.
[81] Statute of the ICJ, *supra* n 63 at Article 38(1)(b).

The will of states as the source of validity of legal norms finds support in academic literature. For example, Judge Higgins states that "when decisions are made by authorised persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is legal decision making. In other words, international law is a continuing process of authoritative decisions."[82] For Judge Higgins, international law gains its character from the decisions made within established practices, giving it authoritative and normative force. Rather than viewing international law strictly as a system of rules, she presents it as a dynamic process of decision-making, where authority is derived through practice, the institutions engaged in legal deliberation and their perception of such rules. In this sense, authoritative practice (i.e. practice accompanied by an internal view that that rule is binding), rather than abstract rule structures alone, provides the foundation for international law's normative character.

Similarly, Brownlie observes that "the basis of obligation in international law is found in the practice of states, which regard certain processes, not limited to treaty-making, as generating legal rights and obligations and which normally conduct themselves with international legal rules in mind."[83] Thus, how states conduct themselves, while considering what they believe is a binding rule, reflects what they consider normative, as evidenced by the language of "basis of obligation."

It is therefore plausible to consider the will of states as a foundation for the validity of international legal norms. Before proceeding, there is one clarification necessary to make, which pertains to the differing roles of state practice and state belief in the international legal system: how can something be part of the identification process of what a norm is *and* give validity to

[82] Rosalyn Higgins, "Policy Considerations and the International Judicial Process" (1968) 17 ICLQ 58 at 58-59.
[83] Brownlie's, *supra* note 26 at 15.

that same norm? The answer to this paradox is twofold, and can be assisted by reference to the work of Kelsen. Kelsen acknowledged that "every legal norm is a source of that other norm, the creation of which it regulates. It is a characteristic element of the law in general, and hence also of international law, that it regulates its own creation."[84] The reason that this dual function is possible can be understood through the idea that "one must not confuse historical sequence with the logical relation between norms."[85] The logical function of state practice and state belief is its role as the rule of recognition: the historical sequence of state practice and state belief leads to the formation and interpretation of international law, as elements of custom formation and treaty interpretation. This dual function is possible.

There is one drawback necessary to overcome in order to proceed with analysis: this drawback concerns the need for a hierarchical system. In Hart's rule of recognition, what matters is the conduct and internal point of view of officials.[86] However, in an international legal system states cease to become officials, instead being the subject of the law. Some consider, therefore, that in international law the conduct and belief of states in relation to the rule of recognition can at most be *"*the custom of non-officials recognised by the law" and therefore cannot contribute to the recognition of primary norms.[87] However, such a criticism fails to note the difference of nature of legal systems between municipal and international law: international law applies horizontally, whereas municipal systems apply vertically. The horizontal application of international law means that, uniquely, states both create the law and are bound by it. Therefore, they fill the role of "official" in the sense that Hart intended it: those with *authority* to make the

[84] Kelsen, Principles, *supra* note 61 at 303.
[85] Kelsen, *supra* note 21 at 108.
[86] Hart, supra n 7 at 88-89.
[87] Grant Lamond, "Legal Sources, the Rule of Recognition and Customary Law" (2014) 59:1 AJ Jurisprudence 25, at 43.

law.[88] Therefore, states' practice and belief as to rules of international law can act as a rule of recognition in the manner which Hart intended.

This thesis will focus predominantly on state practice as an *element* of the rule of recognition. This is because state practice is the area of international law which is currently evolving to potentially include non-state actors, through rules of attribution.[89] It therefore is the part of the rule of recognition which is threatened most by the rule of attribution contained in Article VI of the OST. This does not undermine nor diminish the role of the internal belief of states in validating international law, especially if states show that they believe their private actors are forming and influencing international space law: detailed consideration of this internal component of the will of states merely lies outside the scope of this thesis.

1.2.2 How is international law identified

Having established the theoretical foundations of international law and the critical role of secondary rules in providing a framework for international norm recognition, this section turns to the sources of international law as articulated in Article 38 of the International Court of Justice (ICJ) Statute. Understanding these sources is essential for comprehending how international norms are created, interpreted, and applied in practice to create primary rules, which the will of states then grants normative value to.

1.2.2.1 Sources

[88] Hart, *supra* n 7 at 95.
[89] Binder and Wittich, *supra* n 4 at 243; Christina Ochao, "The Individual and Customary Law Formation", (2007) 48 VA Journal of International Law 119, at 122 *[Ochao]*.

Article 38 of the Statute of the ICJ contains the formally recognised sources of international law:[90]

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b) international custom, as evidence of a general practice accepted as law;
>
> c) the general principles of law recognized by civilised nations;
>
> d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The language of Article 38 states that these are the sources of law to be applied by the ICJ in order to settle disputes: however, while the language of Article 38 is in relation to the function of the ICJ, it is widely accepted to be an authoritative statement of sources of international law.[91] While Article 38 does not mandate a hierarchy of priority, sources a) and b) are the most important.[92]

Contained within Article 38 are three sources and two subsidiary sources. Inclusion of judicial decisions as a subsidiary source means that the work of the ICJ can be considered when interpreting international law, even though their function is an adjudicatory one and their decisions are not binding on parties outside of the dispute.[93] A brief glance at Article 38 confirms the state-centric approach of international law. The three sources are made from and validated by states: the subsidiary sources are the work of non-state actors which provides clarity to the

[90] Statute of the ICJ, *supra* note 63 at Article 38.
[91] Alain Pellet & Daniel Muller, "Article 38" in Zimmermann et al, eds, *The Statute of the International Court of Justice: a commentary,* 3rd ed (Oxford: Oxford University Press, 2012) 819 at 848-849.
[92] Brownlie's, *supra* note 26 at 20.
[93] Statute of the ICJ, *supra* n 63 at Article 59.

will of states in identifying what is international law.[94] The doctrine of sources is state-centric: however, for the reasons discussed above, the nature of international law, as based on state consent and validated by state will, means that the state-centric approach can be justified. This will be further considered in Chapter 2, where the role of non-state actors in forming and interpreting international law will be considered.

1.2.3 Democracy in international law

1.2.3.1 Theory of democracy

The final preliminary background matter necessary to discuss before normatively considering the role of state practice in the formation and interpretation of international law is that of democracy. In the context of international law, the concepts of democracy and democratic principles serve distinct yet interconnected roles. Democracy refers to a structured political system within individual states, defined by specific laws, institutions, and procedures that ensure citizen participation, accountability, and representation. This form of governance operates at the domestic level, offering a clear framework for decision-making through established democratic mechanisms such as elections and legislative processes. There are mechanisms in international law to ensure this is achieved, such as Article 21 of the Universal Declaration of Human Rights of 1948 which states that 'the will of the people shall be the basis of the authority of the government"[95] and Article 25 of the International Covenant on Civil and Political Rights, which

[94] Roberts and Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law" (2012) 37:1 Yale J Intl L 107, at 109 *[Roberts and Sivakumaran, Lawmaking]*.
[95] *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III) at Article 21.

states that "every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives."[96]

Democratic principles, however, extend beyond the confines of national systems and provide a broader, value-driven foundation for the legitimacy of international law.[97] This distinction finds support in the work of Crawford, who acknowledges the procedural and substantive aspects of democracy.[98] Core principles like equality, participation, and representation shape how states and other actors contribute to the development of international norms, ensuring inclusivity and fairness in the absence of a global democratic government. These democratic principles are particularly relevant in the formation and interpretation of international law, which as it currently stands have some serious emerging issues in relation to democratic principles.[99] In the creation of international norms, principles of participation and equality advocate for processes that include diverse state perspectives, thereby reinforcing the legitimacy and acceptance of international law. Similarly, in interpreting treaties and customary norms, representation and fairness are essential to maintaining international law's relevance and authority. By distinguishing between democracy as a specific internal structure and democratic principles as overarching values, this analysis highlights how democratic principles enhance the legitimacy of international law by promoting equitable engagement and representation, ultimately supporting a more just and effective global legal system. Democratic principles will be considered throughout the analysis undertaken as to the role of state practice in forming, interpreting and validating binding international legal norms.

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[96] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, at Article 25.
[97] Stanford Encyclopedia of Philosophy, "Philosophy of International Law" (12th May 2022) at Section 4.5, (online) <https://plato.stanford.edu/entries/international-law/>
[98] James Crawford, "Democracy and International Law" (1993) 64:1 BYBIL 113, at 132.
[99] Thomas Christiano,"Democratic Legitimacy and International Institutions" in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 119, at 137.

1.2.4 Treaty Law and Interpretation

1.2.4.1 Theoretical basis of treaty obligations and interpretation

In Article 38 in the Statute of the International Court of Justice, the first source of law listed is that of "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states."[100] This makes reference to treaties, seen by many as the most important source of international law.[101]

However, what treaties actually are is contested. Some see treaties as a source not of law, but of obligation. For example, Fitzmaurice argues that treaties are no more a source of law than an ordinary contract, creating mere rights and obligations.[102] For others, what is international law is merely the International Court of Justice would apply in a given circumstance[103] - under this view, a treaty is clearly a source of *law*. The issue of what a treaty *is* is a definitional issue, going to the root of what one believes international law is. The latter definition is too narrow, failing to take into account the role that states play in identifying what international law is. The flaw in Fitzmaurice's argument is that he separates law and obligation, basing his argumentation on the assumption that if a treaty is one of the two, it cannot be the other.[104] This is not true. To return to the discussion at the beginning of this thesis, international law can be understood as norms which regulate interstate relations[105]: treaties perform this function, and therefore can be understood as 'international law.'

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[100] Statute of the ICJ, *supra* note 63 at Article 38.
[101] Duncan B Hollis, 'Introduction', in Duncan B Hollis ed, *The Oxford Guide to Treaties*, 2nd ed (Oxford: Oxford University Press, 2020) 1, at 7; Brownlie's, *supra* note 26 at 28.
[102] Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in Jill Barret and Jean-Pierre Gauci, eds, *British Contributions to International Law, 1915-2015: An Anthology Set* (Leiden: Brill Nijhoff, 2020) 475, at 479-482. This view finds support in Brownlie's, *supra* note 26 at 21.
[103] Thirlway, Sources, *supra* n 6 at 98-99.
[104] Higgins, *supra* note 27 at 33.
[105] Kelsen, *supra* note 21 at 107.

However, the conclusion that a treaty is international law is only skimming the surface of the matter. While a treaty, a primary rule of international law, lays out the obligation it bestows upon the parties to it in writing, the true content of that treaty obligation depends on its interpretation.[106] The interpretation of a treaty is a process which establishes its true meaning.[107] Sir Humphrey Waldock, Special Rapporteur for the International Law Commission during the formation of the Vienna Convention on the Law of Treaties, in his Third Report on the Law of the Treaties, observed that "interpretation involves *giving* a meaning to a text."[108]

Treaties are based on agreement between states: a conclusion is reached as to the black letter content of the obligations, evidencing an express agreement.[109] Interpretation involves giving effect to these "expressed intentions."[110] Therefore, interpretation defines and scopes exactly what is contained in the written treaty document. It would be impossible to apply a treaty without first interpreting it.[111] Without interpretation, the meaning and scope of the treaty would be uncertain.

Hart describes how the rule of recognition remedies the defect in the law of uncertainty. In Hart's mind, without a rule of recognition "there will often be doubts about the rules themselves: what exactly they are and how far they extend."[112] To abductively reason from this conclusion, the fact that international law would suffer uncertainty without interpretation as to what the rules contained in treaties are and how far they extend, it is logical to then conclude that the process of interpretation must then play *some role* recognising what the primary rules of

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[106] Brownlie's, *supra* note 26 at 20.
[107] Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties : A Commentary*, 2nd ed (Berlin, Germany: Springer, 2018) at 522 *[Dörr and Schmalenbach]*.
[108] *"Third Report on the Law of the Treaties"* (UN Doc A/CN.4/167 and Add.1-3) in *Yearbook of the International Law Commission 1964*, vol 2 (New York: UN, 1964) at 53 *[Third Report on the Law of the Treaties]*, citing Harvard Law School, "Draft Convention on the Law of the Treaties" (1935) 29 AJIL Supp 653, at 946 (original emphasis).
[109] Brownlie's, *supra* note 26 at 19.
[110] Arnold McNair, *The Law of Treaties*, (Oxford: Clarendon Press, 1961) at 365 *[McNair]*.
[111] Dörr and Schmalenbach, *supra* note 107 at 530.
[112] Hart, *supra* note 7 at 92.

international law are (and grant them their validity). Interpretation is a key process in solving the problem of uncertainty in international law: if there are questions as to what a primary treaty rule is or the scope of such a rule, this defect can be cured through interpretation. Therefore, one answer to how the primary rules in international law can be ascertained lies in the interpretation of such treaties.

This is not to say that *interpretation*, in and of itself, is the rule of recognition that international law has been searching for. Merely that the rule of recognition can be found in *some part of* the process of interpretation. The part of interpretation in which international law's rule of recognition can be found is that of subsequent practice. Subsequent practice is widely accepted in international jurisprudence as part of the rules of interpretation,[113] and is codified in Article 31 (3)(b) and Article 32 of the VCLT. Article 31 (3)(b) has two elements to it: the subsequent practice (the external element) and the agreement of State Parties to the treaty that that practice is the correct interpretation (internal element). As discussed, the will of the states grants validity to legal rules: therefore, the internal and external elements of Article 31 (3)(b) are important beyond mere interpretation: the manner in which states perceive obligations and act in relation to them gives normative character to those obligations.

Based on this analysis, this section will proceed to analyse why subsequent practice can, and should, be considered the most valuable of the rules of interpretation. Before doing so, a brief note first about the general rules of interpretation and their development in international law and why the favouring of subsequent practice is possible based on the framework of the VCLT.

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[113] See specifically, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation,* Advisory Opinion, [1960] ICJ Rep 150 at para 168 *[Maritime Safety Committee]*: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 66 at para 19 *[Nuclear Weapons in Armed Conflict]*; Kasikili/Sedudu Island, *supra* n 80 at para 50; Navigational Rights, *supra* n 67 at para 64; Pulp Mills, *supra* n 19 at para 204; *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment, [2020] ICJ Rep 499 at para 69 *[Immunities]*.

1.2.4.2 VCLT

There is vast literature across international law detailing how treaties should be interpreted: subsequent practice of parties is only one of the ways to interpret the meaning of treaty terms. The Vienna Convention on the Law of Treaties (VCLT) is the document most often referred to, seen to codify customary rules of interpretation.[114] Article 31 of the VCLT, the provision relating to general interpretation, reads as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given
> to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the
> text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.[115]

To fully understand the context of the VCLT, it is useful to consider how its rules of interpretation came about, as this sheds light on their intended application and the manner in

[114] See eg Kasikili/Sedudu Island, *supra* n 80 at para 55.
[115] VCLT, *supra* n 31 at Article 31.

which they are applied. The contents of Article 31 has a life of its own entirely apart from its existence in the treaty.[116]

The work of Fitzmaurice was heavily considered in the drafting process of the VCLT.[117] Fitzmaurice categorised interpretation in international law into six principles.[118] The principles were as follows: (1) *Principle of actuality or textuality*, meaning treaties are to interpreted on a basis of their actual text; (2) *Principle of natural and ordinary meaning;* (3) *Principle of integration*, meaning a treaty must always be read as a whole; (4) *Principle of effectiveness*, meaning treaties are to be interpreted in reference to their stated object and purpose; (5) *Principle of subsequent practice*, meaning a court looks at how the treaty has actually been applied or operated by its parties or by organs authorised to do so and (6) *Principle of contemporaneity*, meaning treaty terms must be interpreted accorded to the meaning which they possessed at the time of conclusion. These principles were widely supported, especially by the ILC. This can be evidenced through the proposals for the Vienna Convention on the Law of Treaties, whose rules of interpretation wear striking resemblance to those composed by Fitzmaurice.[119] Fitzmaurice's classification in 1951 was far ahead of his time: his classification of rules of interpretation remains mostly true to this day, with the exception of the principle of contemporaneity.[120] However, with the drafting of Article 31, one thing became apparent: interpretation is not a formulaic set of requirements, as could be assumed from Fitzmaurice's construction. Instead, Article 31 provides a number of potential considerations in a loose

[116] Jennings, *supra* n 74 at 62.
[117] See specifically Third Report on the Law of the Treaties, *supra* n 108 at 55-56, para 12, where Fitzmaurice was cited. See also Jennings, *supra* n 74 at 30.
[118] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 BYIL 1, 9–22; See also Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 BYIL 203, at 210–227.
[119] Cf Third Report on the Law of the Treaties, *supra* n 108 at 55-56, para 12.
[120] The ICJ takes an evolutionary approach when interpreting treaties: see, for eg Navigational Rights, *supra* n 67 at para 66.

structure - there is no hierarchy or mandatory consideration within the potential factors influencing interpretation.[121] A hierarchy is only introduced when Article 32 VCLT is brought into the picture, which reads:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[122]

If Article 31 produces an unreasonable or obscure result, other factors may be considered in interpretation, as detailed in the Article. The rules of interpretation contained in the VCLT are a "scaffolding for the reasoning on questions of treaty interpretation,"[123] with the metaphor of scaffolding used by Thirlway capturing the 'supporting and enabling role' of the VCLT.[124]

Now, the text of Articles 31 and 32 is widely accepted to reflect international custom. This can be seen from the manner in which the principles of interpretation were used in treaty interpretation far before the existence of the VCLT. The principles were widely used by the ICJ, who used good faith and the object and purpose of the treaty alongside the ordinary meaning of the text to discern the meaning of obligations.[125] The ICJ have also used subsequent agreement

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[121] Richard Gardiner, "The Vienna Convention Rules on Treaty Interpretation" in Duncan Hollis, ed, *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2020) 459, at 477 *[Gardiner]*.
[122] VCLT, *supra* n 31 at Article 32.
[123] Hugh Thirlway, "The Law and Procedure of the ICJ 1960-89, Supplement 2006: Part 3" (2006) 77:1 BYBIL 1, at 19.
[124] Gardiner, *supra* n 121 at 461.
[125] See specifically *Case Concerning the Territorial Dispute (Libya v Chad)*, Judgment, [1994] ICJ Rep 6 at para 41; Kasikili/Sedudu Island, *supra* n 80 at para 18; *LaGrand (Germany v United States)* [2001] ICJ Rep 466 at para 99; *Avena and Other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 12 at para 83; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para 94 *[Construction of a Wall]*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43 at para 160 *[Bosnian Genocide]*; Navigational Rights, *supra* n 67 at para 47; Pulp Mills, *supra* n 19 at para 65.

and practice[126] and existing rules of international law[127] as tools of interpretation. The ICJ have also often used the negotiating history to confirm the meaning of an interpretation reached, cementing the status of Article 32 as custom.[128] There also have been acceptance of these rules across other international courts, for example the International Tribunal on the Law of the Sea,[129] the European Court of Human Rights,[130] the European Union,[131] the World Trade Appellate[132] and other arbitral courts.[133] The customary nature of Articles 31 and 32 VCLT have even been recognised in treaties.[134] Therefore, it can be said that Article 31 and 32 of the VCLT codify the customary rules of treaty interpretation.

1.2.4.3 Articles 31(3)(b) and 32 VCLT: Subsequent practice

The value of subsequent practice

As discussed above, Waldron stated that "interpretation involves *giving* a meaning to a text."[135] This giving of meaning is what justifies interpretation, through subsequent practice and agreement, as being the action which gives the meaning and validity to the primary norm. As

[126] Kasikili/Sedudu Island, *supra* n 80 at para 48; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* [2002] ICJ Rep 625 at para 37.
[127] *Oil Platforms (Iran v United States)*, Merits, [2003] ICJ Rep 161 at para 41 *[Oil Platforms]*.
[128] Bosnian Genocide, *supra* n 125 at para 161.
[129] See for eg *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), (2011) International Tribunal on the Law of the Seas (Seabed Disputes Chamber), (2011) ITLOS Rep 10 at para 57.
[130] See for eg *Al-Saadoon and Mufdhi v United Kingdom,* No 61498/08, [2010] IV ECHR 128 at para 126.
[131]See for eg *Brita GmbH v Hauptzollamt Hamburg-Hafen*, C-386/08, [2010], ECR I‑1289 at paras 41–42.
[132] See for eg *Japan – Taxes on Alcoholic Beverages II* (1997), WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 10-12 (Appellate Body Report) *[Taxes on Alcoholic Beverages]*; *China –Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Complaint by US) (2009)*, WT/DS363/AB/R, at para 348 (Appellate Body Report).
[133] See for eg *United States Federal Reserve Bank of New York v Iran, Bank Markazi Case A 28*, (2000) Iran US Claims Tribunal, 36 Iran-US Claims Tribunal Rep 5 at para 53.
[134] See for eg *Free Trade Agreement*, EU and the Republic of Korea, 16 October 2010, OJ L 127, 14.5 6 at Art 14.16.
[135] Third Report on the Law of the Treaties, *supra* n 108 at 53.

stated by Gardiner, "words are given meaning by action."[136] This is particularly true when considering treaty interpretation: the manner in which states act in relation to their treaty obligations give meaning to the treaty obligations they are bound to. On any occasion, a state applying or implementing obligations in a treaty presupposes an interpretation, whether conscious or subconscious.[137] This demonstrates why the interpretative tool of subsequent practice, contained in Article 31 (3) (b) and Article 32 of the VCLT, is of utmost importance in ascertaining the intention of the parties and the true meaning of the obligations contained in a treaty.

The importance of subsequent practice to interpretation has been recognised in both literature and jurisprudence. In *Kasikili/Sedudu Island* the ICJ, citing the ILC, affirmed that

> As regards the 'subsequent practice'...the Commission…indicated its particular importance in the following terms: "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious: for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals[138]

Such notions have been affirmed in various commentaries to the VCLT.[139] This confirms that subsequent practice as a tool of interpretation *can* be heavily relied on, and *can* be considered the most meaningful. The reason that subsequent practice *should* be afforded so much weight is that there is no better evidence to the meaning of obligations than how states carry out those

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[136] Richard Gardiner, *Treaty Interpretation*, 2nd ed (Oxford: Oxford University Press) at 253 *[Gardiner, Treaty Interpretation]*.
[137] Georg Schwarzenberger "Myths and Realities of Treaty Interpretation" (1968) 9 VaJIL 1, at 8; Dörr and Schmalenbach, *supra* note 107 at 530.
[138] Kasikili/Sedudu Island, *supra* n 80 at para 49 citing *"Report of the International Law Commision to the General Assembly on the work of its eighteenth session*" (UN Doc A/6309/Rev.1) in *Yearbook of the ILC 1966*, vol 2 (New York: UN, 1966) at 221, para 15 *[ILC Draft VCLT with Commentary]*.
[139]Dörr and Schmalenbach, *supra* note 107 at 554: "the subsequent practice of the parties in implementing the treaty constitutes objective evidence of their understanding as to the meaning of the latter and is, therefore, of utmost importance for its interpretation"

obligations.[140] This is because, as discussed above, treaties are based on express agreement by the intention of parties, and interpretation seeks to give effect to this intention.[141]

The 'supporting and enabling' role of the VCLT means that there is no formula necessary to follow when interpreting the provisions of a treaty.[142] Article 31 is merely a general rule with examples of factors to be taken into account when interpreting, with Article 32 supplementing this.[143] As the practice of states evidences their intention in relation to the obligation, it also helps to ascertain the object and purpose of the agreement which those states entered into. State practice is therefore not an isolated consideration in interpreting, as it influences all of the other considerations in Article 31 (*inter alia* ordinary meaning, object and purpose, context of the agreement).

As stated in the International Arbitral Awards; "the fulfilment of engagements between States, as between individuals, is the surest commentary on the meaning of these engagements."[144] The practice of states evidences what was intended by those states when they entered into the agreement of the treaty, and therefore should be afforded the utmost importance when considering what that treaty means. This is why the will of states, evidenced by their practice, *should* be considered the rule of recognition in international law. Crawford observes that "it is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty…international law says that the parties to a treaty own the treaty and can interpret it"[145]

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[140] *Cf* Thirlway, *supra* n 38 at 58-59.
[141] McNair, *supra* n 110 at 365.
[142] Gardiner, *supra* n 121 at 461.
[143] Gardiner, *supra* n 121 at 465.
[144] "l'exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements" : Russian Indemnity, *supra* n 80 at 433, translated by JB Scott, *The Hague Court Reports* 2nd ed (New York: Oxford University Press, 1916) at 302.
[145] James Crawford, "Subsequent Agreements and Practice from a Consensualist Perspective" in George Nolte, ed, *Treaties and Subsequent Practice* (Oxford: OUP, 2013) at 31.

This observation goes to the root of the role of the will of states in international law: to determine the validity of norms. States orchestrate international law, and therefore their will, evidenced by their practice and agreement, can and should play a key role in interpreting, and therefore determining, what international law *is*.

What is 'subsequent practice in the application of a treaty which establishes the agreement of the parties'?

The section above examines the value of subsequent practice, explaining why it can, and should, act as the rule of recognition in the context of the interpretation of international law. Following this normative analysis, it is now necessary to consider what therefore can be considered to be subsequent practice under Article 31(3)(b) of the VCLT and Article 32. Article 31 (3) (b) VCLT states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account for the purposes of interpretation. The ILC, in Conclusion 2 of the conclusions reached in 2018 regarding subsequent agreement and subsequent practice in the interpretation of treaties, have stated that "recourse may be had to subsequent practice in the application of the treaty as a supplementary means of interpretation under Article 32 [VCLT]."[146] There are three further questions to be had in regard to the construction and meaning of Article 31 3(b): 1. what constitutes subsequent practice, 2. who constitutes subsequent practice and 3. when can subsequent practice be used to interpret a treaty.

[146] "Chapter IV of the *Report of the Commission to the General Assembly on the work of its seventieth session"* (UN Doc A/73/10) in *Yearbook of the International Law Commission 2018,* vol 2, part 2 (New York: UN, 2018) at pg 17, Conclusion 2 *[Conclusions on the Interpretation of Treaties]*.

1. What constitutes state practice?

Firstly, the question of what 'subsequent practice' actually includes is necessary to address. Ultimately, what practice can be taken into account depends upon the subject matter of the treaty being interpreted.[147] The value of consistency of the practice in determining whether an action can be considered subsequent practice is contested: there are conflicting sources as to whether a duration, or even chain, of practice is necessary. Some analysis of subsequent practice opts for the language of the more "concordant, common and consistent" a practice is, the more value it holds in interpretation as it establishes a " a discernible pattern of behaviour."[148]

Such an approach to subsequent practice was adopted by the World Trade Organisation (WTO) Appellate Body in, *inter alia*, the case of *Japan - Taxes on Alcoholic Beverages*.[149] In this case, the appellate body stated that

> Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognised as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.*[150]*

The ILC, when drafting the VCLT, declined to use the wording of "concordant, common and consistent", instead opting to use "clarity and specificity" to demarcate when subsequent practice has value.[151] This choice suggests that a repeated action is not necessary, instead what is important is that the application of the treaty is clear and the manner of interpretation specific in the practice. In the context of interpretation, the approach taken by the ILC is more favourable, as interpretation seeks to ascertain meaning of terms and not establish the customary application

[147] Dörr and Schmalenbach, *supra* note 107 at 555; Gardiner, Treaty Interpretation, *supra* n 136 at 254.
[148] Dörr and Schmalenbach, *supra* note 107 at 555.
[149] Taxes on Alcoholic Beverages, *supra* n 132 at 13.
[150] *ibid*, at 13, citing Ian Sinclair, *The Vienna Convention on the Law of Treaties* 2nd ed (Manchester: Manchester University Press, 1984) at 137, for the wording of 'concordant, common and consistent.'
[151] *"Report of the Commission to the General Assembly on the work of its sixty eighth session"* (UN Doc A/71/10) in *Yearbook of the International Law Commission 2016*, vol 2, part 2 (New York: UN, 2016) at 85, draft conclusion 9 *[ILC Report on the Sixty-Eighth Session]*.

of terms. A state's intent will not change based on the number of times it carries out an action. A pattern of behaviour may be useful as evidence agreement as to the interpretation: however, consistency does not need to be a requirement in and of itself for practice to be considered under Article 31(3)(c) or Article 32.

Dörr and Schmalenbach define 'practice' as "[comprising] any external behaviour of a subject of international law, here insofar as it is potentially revealing of what the party accepts as the meaning of a particular treaty provision."[152] The second half of this definition is unhelpful, as it merely reiterates the text of Article 31(3)(c): the circular reasoning to provide for what 'practice' is does not bring one any closer to a definition. However, the first half, stating that practice "comprises any external behaviour of a subject of international law" justifies further consideration. This definition is somehow both narrow and wide: narrow in the sense that one must be a subject of international law to constitute state practice and wide in the sense that *any* behaviour which can be related to what the state believes the treaty obligation means can be considered. It does not take the path of other definitions and arguably extends beyond even the definition found in Article 31(3)(c), where subsequent practice *in the application of the treaty* is to be considered. The wide definition poses no normative issues, but appears inconsistent with existing literature and decisions of the ICJ, which have restricted state practice to that involving the application and operation of the treaty.[153] It also appears to contrast their own further analysis of subsequent practice, when they state that "the parties whose practice is under consideration must regard their conduct to fall within the scope of the application of the treaty…they must act the way they do for the purpose of fulfilling their treaty obligations."[154] The initial widening of

[152] Dörr and Schmalenbach, *supra* note 107 at 555.
[153] See for eg *International Status of South-West Africa,* Advisory Opinion, [1950] ICJ Rep 128 at 135–136; *Rights of US Nationals in Morocco,* Advisory Opinion, [1952] ICJ Rep 176 at 210–211.
[154] Dörr and Schmalenbach, *supra* note 107 at 555.

the definition therefore seems to be in error, given their own acknowledgement of the necessity of the practice being within the remit of carrying out that obligation.

The narrowing of subsequent practice to only include 'subjects of international law' also doesn't make sense in the context of Dörr and Schmalenbach's further analysis that: "'practice' in this respect is not limited to the central government authorities of States, rather any public body acting in an official capacity can contribute to demonstrating the state's position towards its treaty commitments."

2. Who constitutes state practice?

The aforementioned conception of practice, by Dörr and Schmalenbach, is in keeping with the approach taken by the ICJ and the literature on the topic, which leads one to the second question, in relation to the meaning of 'in the application of the treaty' and whose behaviour this encompasses. While this topic will be more fully addressed in Chapter 2, briefly, subsequent practice envelopes the conduct which has been attributed to it under principles of international law. This is the approach taken by the ILC in drafting the VCLT[155], the ICJ in applying rules of interpretation[156] and academic literature on the topic.[157] This does not merely apply to states: it is relatively uncontroversial that the conduct of international organisations can be considered to be subsequent practice.[158] Discussion of this matter will be further elaborated in Chapter 2.

3. When can subsequent practice be used to interpret a treaty?

[155] ILC Report on the Sixty-Eighth Session, *supra* n 151 at 149.
[156] See for eg *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, [1950] ICJ Rep 4 at 9; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Rep 151 at 160 and 165.
[157] See for eg Gardiner, Treaty Interpretation, *supra* n 136 at 266; Dörr and Schmalenbach, *supra* note 107 at 556.
[158] Threat or Use of Nuclear Weapons, *supra* n 29 at para 19; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] ICJ Rep 16 at para 22; Construction of a Wall, *supra* n 125 at para 27-28; Maritime Safety Committee, *supra* n 113 at para 168-170; Nuclear Weapons in Armed Conflict, *supra* n 113 at para 27.

The final question relates to when subsequent practice can be used to interpret a treaty: the requirement of a subjective element (that of 'agreement') provides the answer to this. Article 31(3)(b) uses the language of *'any'* subsequent practice, not *'all'* subsequent practice. When Article 31(3)(b) was drafted, this was a conscious decision made by the ILC.[159] In the Commentaries to the Draft VCLT, it is stated that "[the ILC] omitted 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[160]

This was intended to ensure Article 31(3)(b) would not be interpreted to mean that practice from all state parties to the treaty would be necessary to use state practice to interpret; instead, the practice can be by a limited number of states party to the treaty.[161] However, this is qualified by the requirement that even if the *practice* has only been carried out by a singular state, all parties must have *accepted* the interpretation evidenced in their practice. This necessary 'agreement' makes up the subjective element of Article 31(3)(b).[162] This 'agreement' means that for state practice to form interpretation, it is sufficient that inactive parties in relation to the subject matter of the obligation accept the practice set by active parties.[163] In Article 31 (3)(b) there is no requirement for a "sense of collective action involving all parties" in the same way that is necessary in Article 31 (2).[164]

The standard of 'agreement' for the purposes of Article 31(3)(b) has generally been interpreted to mean an extremely low threshold. In *Dispute Regarding Navigational and Related Rights,* between Costa Rica and Nicaragua, the ICJ held that "tacit" agreement satisfied this requirement, even if the subsequent practice meant that there was a departure from the original

[159] ILC Draft VCLT with Commentaries, *supra* n 138 at page 222, para 15.
[160] *ibid* at page 222, para 15.
[161]Dörr and Schmalenbach, *supra* n 107 at 556.
[162] Dörr and Schmalenbach, *supra* n 107 at 555.
[163]Dörr and Schmalenbach, *supra* n 107 at 556.
[164]Gardiner, *supra* n 121 at 468.

intent.[165] The approach of 'tacit' was also reflected in the work of the ILC in drafting the provision.[166] 'Tacit' would suggest that, at a minimum, an absence of disagreement from the other parties to the treaty is sufficient to satisfy the 'agreement' requirement.[167] Indeed, in *Kasikili/Sedudu Island*, the ICJ held that this means awareness of the practice by other state parties is necessary, implicitly suggesting that if there was an awareness, then the 'agreement' may be satisfied.[168]

This principle is particularly relevant in fields such as space law, where the OST has 115 ratifications, but a vast majority of these states do not have extensive space activities.[169] If subsequent practice from all state parties was necessary to interpret the terms, no interpretation would ever be done, as so many of the state parties are not sufficiently engaging in space activities. However, while in theory agreement is necessary, the extremely low threshold of 'tacit' agreement being sufficient to allow one state's practice to influence the terms of the treaty raises some concerns in relation to the democratic legitimacy of the interpretation. The low threshold of agreement means that this presents an opportunity for wealthy and technologically advanced states to monopolise the use of space, interpreting the OST in a manner that may bar new developing states from entering the sector. This is particularly true in light of the potential inclusion of private actors as state practice, whose interests diverge from the purpose of the outer space treaty, to ensure sustainable and responsible use of outer space (as will be discussed in Chapter 2).

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[165] Navigational Rights, *supra* n 67 at paras 63-64.
[166] *"Sixth Report on the Law of Treaties"* (Document A/CN.4/186 andAdd.1-7) in Yearbook of the International Law Commission 1966, vol 2, part 2 (New York: UN, 1966) at 99, para 18.
[167]Immunities, *supra* n 113 at para 69. *Cf* Mark Villiger, *Commentary on 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009) at 431, para 22; Dörr and Schmalenbach, *supra* n 107 at 560.
[168]Kasikili/Sedudu Island, *supra* n 80 at para 55
[169] See generally, "Satellites by Country or Organisation", (last updated 14 November 2024), online (website): <https://www.n2yo.com/satellites/?c=&t=country>.

What is interesting is that with respect to Article 32 VCLT, there is no requirement for there to be agreement for the subsequent practice to be used as a tool of interpretation. In the ILC's commentaries to their 2018 conclusions, they state that subsequent practice for the purposes of Article 32 "does not require the agreement of all parties" and "any practice in the application of the treaty that may provide indications as to how the treaty is to be interpreted may be a relevant supplementary means of interpretation.[170]

This shows that the way that subsequent practice applies can be distinguished between Article 31 and 32: the requirement of agreement is necessary for subsequent practice to be used as an authentic method of interpretation, whereas subsequent practice can only be used to supplement the authentic means if there is no agreement.[171] However, the very fact that subsequent practice can be used without agreement *at all* has the potential to create a serious democratic deficit, exacerbating the issues mentioned above which the requirement of agreement seeks to mitigate. Given the OST's "general and broad terms,"[172] this allows a select few wealthy, technologically advanced states to shape how its obligations are applied and enforced, sidelining the interests of the broader international community, therefore creating a democratic deficit. .

1.2.4 Customary international law (CIL)

The second source of law under Article 38 of the Statute of the ICJ is customary international law, which is defined in the Statute of the ICJ as "as evidence of a general practice accepted as

[170] Conclusions on the Interpretations of Treaties, *supra* n 146, at 33, para 23-24.
[171] *Cf* John Goehring, "Can We Address Orbital Debris with the International Law We Already Have? An Examination of Treaty Interpretation and the Due Regard Principle" (2020) 85:2 J Air L& Comm 309 at 321, citation 60.
[172] Manfred Lachs, *The Law of Outer Space: An Experience in Contemporary Law-Making* 2nd ed by Tanja L Masson-Zwan and Stephan Hobe (Leiden: Martinus Nijhoff Publishers, 2010) at 108 *[Lachs*].

law."[173] Customary international law represents a fundamental source of international legal norms, embodying the practices and beliefs of states that have gained widespread acceptance as binding legal obligations. Unlike treaties, which are explicitly negotiated and ratified, customary law evolves organically from the consistent and general practices of states, accompanied by the belief that such practices are legally binding (*opinio juris*).[174] This section will consider the formation and identification of customary international law, particularly focusing on the function of state practice in forming and identifying customary international law and the relationship between state practice in this sense and the will of states as the rule of recognition. The specific application of customary international law in outer space will be addressed in Chapter 2.

While the preceding analysis of international custom will primarily focus on state practice, this approach does not seek to diminish the significance of *opinio juris*, as some scholars have begun to do.[175] Both elements - state practice and *opinio juris* - are critically important. State practice forms the essence of customary law and evidences a state's intent, while *opinio juris* allows for a crucial distinction between binding international rules and "rules of international morality and conventional international rules."[176] The focus on state practice is because this element of custom is the one which has the potential to be impacted by Article VI of the OST, and the rule of attribution it contains.

[173] Statute of the ICJ, *supra* n 63 at Article 38.
[174] Nicaragua, *supra* n 32 at para 207.
[175] See for eg Lazare Kopelmanas "Custom as a Means of Creation of International Law" (1937) 18 BYIL 127.
[176] GJH van Hoof, *Rethinking the Sources of International Law*, (Netherlands: Kluwer Law and Taxation Publishers, 1983) at 86.

1.2.4.1 State practice

What is the role of state practice in customary international law?

Customary international law is fundamentally grounded in state practice, as the creation of binding obligations in this domain is practice-based.[177] However, state practice cannot solely amount to customary international law: if it did, then everything which states do would become binding law. This is where *opinio juris* comes in: if a state acts, believing that it is bound, it becomes binding international law. Belief of states alone is also not sufficient to generate binding obligations. *Opinio juris* cannot solely serve as the basis of a customary obligation because it creates an untenable scenario: if a practice cannot become law until states follow it with the *correct* belief that it is required by law, then no practice can ever achieve legal status, as this condition is inherently impossible.[178]

Despite this, Cheng argues that *opinio juris* is all that is necessary to establish in relation to the formation of a customary rule. He states that what is important is the attitude of the states in believing that an obligation is binding and that state practice performs a merely "evidentiary" function.[179] He argues that *opinio juris* is therefore the only constituent element[180], citing consent theory as his justification.[181] However, such an approach strips custom of its character as being based on state practice, "[rendering] unworkable the normal process by which the existence of a

[177] *ibid* at 86.
[178] Roberts and Sivakumaran, "The Theory and Reality of the Sources of International Law", in Evans, ed, *International Law*, 5th ed (Oxford: Oxford University Press, 2018) at 96 *[Roberts and Sivakumaran, Theory and Reality]*; Thirlway, *supra* n 38 at 47.
[179] Bin Cheng "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?"(1965) 5 IJIL 23 at 36 *[Cheng, Instant Custom]*.
[180] *ibid* at 36.
[181] *ibid* at 37.

customary rule is deduced and pieced together from widely varying types of acts which can be classified as the practice of states."[182]

Instead, both elements are essential to the formation of customary rule. The two elements are deeply connected: *opinio juris* is only discernible through the existence of state practice,[183] which remains the best evidence of *opinio juris*.[184] This analysis mirrors the role of state practice in treaty interpretation, where the consistent fulfilment of engagements by states provides the clearest indication of their meaning and the intent of states.[185] This also mirrors the rule of recognition in international law (the will of states): there is an internal component, which pertains to the perception of states as a binding obligation and an external component, which is a materialisation of this perception and can be used as evidence of a state's will. This demonstrates how the theoretical basis of international law is interlinked throughout different areas, and the importance of how states act and perceive norms in the functioning of international law. This also demonstrates how far reaching the Article VI of the OST rule of attribution has the potential to be: if private actors can be considered state practice, this impacts the formation, interpretation and validity of international law. This possibility will be further elaborated in Chapter 3.

What is considered state practice ?

Having considered the role of state practice in customary international law, it is necessary to now consider what state practice is, through the jurisprudence of the ICJ and academic scholarship on

[182] Thirlway, *supra* n 38 at 57.
[183] Gennady Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993) at 81 *[Danilenko]*.
[184] Thirlway, *supra* n 38 at 58-59.
[185] Russian Indemnity, *supra* n 80 at 433.

the matter. What can be considered as state practice depends upon the nature of the obligation.[186] However, the ICJ regularly considers national legislation,[187] alongside concrete acts.[188]

The ICJ have been reluctant to draw bright lines in relation to the duration of practice necessary, usually referring to 'long',[189] 'sufficiently long'[190] or a 'settled practice.'[191] The duration requirement has received some criticism in legal scholarship: Cheng, for example, argues that instant customary law is possible.[192] However, Cheng's conclusion of instantaneous customary law is based on his thesis that state practice is not necessary, and "where there is opinio juris, there is a rule of international customary law."[193] For the reasons discussed above, this thesis is simply unmaintainable. Similarly, D'Amato argues that the requirement of duration should be discarded, on account of the "fact that no-one can specify a time is a strong argument in support of the proposition that there is no such dividing time."[194] Thirlway's challenge to this proposition aptly dismisses such a notion:

> so expressed, the problem recalls the old riddle of how many straws make a heap, and the answer is surely the same: the fact that we cannot say precisely how many straws make a heap does not lead us to deny the possible existence of a heap of straw; nor does it oblige us to say that the heap is constituted by the placing of the first straw, - or, for that matter, the last.[195]

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[186] *"Fifth Report on the Identification of Customary International Law"* (A/CN.4/717) in *Yearbook of the International Law Commission 2018,* vol 2, part 2 (New York: UN, 2018) at para 33.
[187] *Arrest Warrant of 11 April 2000 (Congo v Belgium)*, Judgment, [2002] ICJ Rep 3 at para 58 *[Arrest Warrant]*; Jurisdictional Immunities, *supra* n 72 at para 70.
[188] Thirlway, *supra* n 38 at 58.
[189] *Barcelona Traction, Light and Power Company, Limited (New Application) (Belgium v Spain)*, Judgment, [1970] ICJ Rep 3 at para 70 *[Barcelona Traction]*.
[190] *Fisheries (UK/Norway)* Judgment, [1951] ICJ Rep 116 at para 139 *[Fisheries]*.
[191] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at para 77 *[NSCS]*.
[192] Cheng, Instant Custom, *supra* n 179 at 36.
[193] Cheng, Instant Custom, *supra* n 179 at 36.
[194] Anthony D'Amato, *The Concept of Custom in International Law*, (New York: Cornell University Press, 1971) at 163-164.
[195] Thirlway, *supra* n 38 at 83.

So while the time requirement is uncertain, what is certain is that there must be some passage of time - enough to establish a "settled practice."[196]

When considering who is necessary to establish a rule of international custom, the ICJ held in the *North Sea Continental Shelf* case that the state practice of "specially affected states" is sufficient to ascertain a rule.[197] Such a rule is logical: in *North Sea Continental Shelf*, in relation to Article 6 of the Geneva Convention on the Continental Shelf, the ICJ recognised that a "specially affected state" was one with a continental shelf adjacent to the territories of two or more states. The Court was willing to waive the conduct of states to whom the Convention was not open, as well as landlocked states, in determining customary obligations. Landlocked states, or states who could not join the Convention, could not form practice on the matter even if they wanted to. In this case, the narrowing of generality is reasonable. Other cases refer to "widespread"[198] practice to establish custom, with the practice not having to be "the practice of every state in the world… as long as it is…representative."[199]

However, the narrowing of who can be considered does pose issues: this issues are observed by Danilenko, who stated that:

> the [traditional approach's] emphasis on actual practice made custom a source of law which tended to reflect preferences of those powerful states that were able to assert a particular rule of conduct in inter-state relations.From a technical point of view, it resulted in a body of rules that created high expectations about their observance[200]

These considerations about who constitutes state practice and who is necessary to establish a rule of custom are particularly relevant to the development of customary law in outer space.

[196] NSCS, *supra* n 191 at para 77.
[197] NSCS, *supra* n 191 at para 73.
[198] Fisheries, *supra* n 190 at para 58.
[199] Roberts and Sivakumaran, Theory and Reality, *supra* n 178 at 93.
[200] Danilenko, *supra* n 183 at 87.

Currently, there are a small number of space actors. The potential of these small numbers of actors, because they have the capability to have space activities, being sufficient to form new norms of custom, especially given the growing role of private actors in outer space, is a growing concern. This is particularly true in light of ensuring sustainable development of outer space and democratic governance, allowing for new states to enter the sector without being subject to extensive regulation and barriers to entry. While growing acceptance of conferences, organisations and verbal acts as being state practice, as opposed to mere legislation or concrete acts, has advanced efforts to ensure that developing countries can play a role in influencing the development of legal norms,[201] the recognition of private actors as state practice in outer space risks undermining this progress and creating a democratic deficit. This risk is heightened by the potential for custom to crystallise alongside treaties, making treaty provisions binding on all states, not just signatories. Consequently, the actions of a few states and their private actors, if deemed "specially affected," could bind the entire international community. This particular possibility of coexisting rules of custom and treaty obligation will be considered further in Section 2.2.6.6, with the democratic deficit caused by private actor influence and the widening of the 'who' constitutes state practice being considered fully in Chapter 2.

1.3 Conclusions from Chapter 1

Chapter 1 aimed to provide theoretical context for the preceding discussion in Chapters 2 and 3 on attribution, Article VI of the OST and the role of private actors, and provide a framework against which to analyse the normative discussion. In conclusion, international legal norms derive their validity from the will of states. The will of states has a dual function in international

[201] Danilenko, *supra* n 183 at 87.

law: first, as part of the rule of recognition which confers normative force on legal rules. Second, in the interpretation and formation of international law, through their respective internal and external aspects. In the formation of customary rules of international law, the internal aspect is the *opinio juris* element and the external aspect is the state practice. In the interpretation of treaty law, the external aspect is the subsequent practice used to interpret a rule and the internal aspect is the need for agreement that that practice is the correct interpretation of that rule. The prevalence of state practice across international law demonstrates the centrality of states in the international legal system. The prevalence also indicates just how far-reaching the impact of Article VI of the OST could be, if its rule of attribution is applied to state practice across international law. The inclusion of the conduct of private actors in state practice in the formation, interpretation and validity granting roles of state practice has the potential to generate an extensive democratic deficit. This deficit will be formed as a result of private actors seeking to forward their own interests, which cut across the interests of the international community and the OST as a whole, thus not being representative. This potential will now be fully analysed in Chapters 2 and 3.

Chapter 2: Non-State Actors and Attribution

2.1 Subjects of International Law

Before considering rules of attribution in international law, it is necessary to consider what can be considered a subject of international law, and how the doctrine of subjects addresses non-state actors. Attribution operates to attach the act of a singular human being to an entity with legal personality,[202] therefore understanding what legal personality is is important. It should be established from the outset that this thesis does not seek to disagree with the traditional conception of legal personality in international law, nor does the final conclusion reached have any negative bearing on the traditional conception - Article VI attaches the conduct of private actors to the state, and thus does not raise an issue of legal personality.

In Chapter 1, this thesis argued that the will of states is what gives rules of international law normative character. The will of states has both external and internal components: the external component is the conduct and actions of states and the internal component is a state's perception of a rule. The derivation of normativity in international law being the will of states has significant bearing on the theoretical cohesiveness of international law in the event of an expansion of the doctrine of subjects: if non-state actors were to be recognised as entities with legal personality, and thus be bestowed rights and bound by obligations, their actions would be dictated by a system which was not designed for them, nor appropriate to accommodate for them.[203] The democratic deficit created by non-state actors influencing the interpretation and formation of international law, which is the focus of this thesis, is one thing, but the democratic

[202] Luigi Condorelli and Claus Kress "The Rules of Attribution: General Considerations" in James Crawford et al, eds, *The Law of International Responsibility* (Oxford: Oxford University Publishers, 2010) 221, at 221 *[Condorelli and Kress]*.
[203] Bianchi, *supra* n 9 at 41.

deficit which would exist if non-state actors were bound by obligations which they could have no part in forming or interpreting would be an entirely different issue. This issue is inherently different from private actors being bound by domestic law because domestic law is a vertical system, whereas international law is a horizontal system: states make the law and are bound by it and to have states making the law but have states and actors bound by it could cut across international law's horizontal, non-hierarchical character.

There is therefore a direct link between sources of international and subjects of international law: the link is that "the actual rights and obligations emanating from treaties, custom or other sources … are distributed through notions concerning participation in the international legal system."[204] This statement by Klabbers encompasses the broad overarching issue addressed by this thesis: the link between where sources gain their normative character, through formation and interpretation, and the bearing that Article VI's alternation of the notion of state in outer space has upon this allocation of normative value. What can be considered a subject of international law has direct bearing on how international rules gain their validity - "the subject actor debate touches on the very foundations of international law…[it] lies at the interface of law and politics."[205]

Non-state actors are rapidly becoming the most prevalent actors in commercial outer space. To promote the sustainable use of space, enable new entrants (such as developing countries), and prevent exploitation, it is desirable to hold private actors accountable to the provisions of the OST. However, while it is politically desirable for private actors to be held to international obligations under the OST, legally, they are not subjects of international law and therefore this is not directly possible. The rule of attribution contained in Article VI of the OST

[204] Klabbers, Recognition, *supra* n 5 at 351.
[205] Bianchi, *supra* n 9 at 40.

provides a middle ground: as will be argued below, Article VI has the effect of holding non-governmental entities to the provisions of the OST while attaching the international legal obligation to a state, hence ensuring consistency in the foundations of international law.[206] However, before considering the rule of attribution, understanding why private actors cannot be held directly to international legal obligations is necessary.

2.1.1 Traditional Doctrine of Subjects

A legal subject is an entity with legal personality: this means an entity "capable of possessing rights and duties and of bringing and being subjected to international claims."[207] One way in which legal personality has been theorised is as the entities which "the legal system has cast to appear on the stage of the law."[208] Predominantly, states can appear on the stage (and occasionally international organisations[209]): others are firmly reserved to playing a production role, influencing what does appear on the stage but from behind the scenes.[210] Non-state actors fall into this category in a traditional conception, as the concept of legal personality was "tailored to the very concept of statehood."[211] Even the term 'non-state actor' indicates this, reinforcing that all other entities in international law "revolve" around the state, who is the "central actor."[212]

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[206] *Cf* Brownlie's, *supra* note 26 at 111, where the attribution of conduct in international humanitarian law is analysed in a similar manner.
[207] Brownlie's, *supra* note 26 at 105. See specifically Reparation for Injuries, *supra* n 12 at 179.
[208] Bin Cheng, "Introduction to Subjects of International Law" in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Dordrecht: UNESCO and Martinus Nijhoff, 1991) 23, at 24 *[Cheng, Subjects*].
[209] Reparation for Injuries, *supra* n 12 at 179.
[210] Cheng, Subjects, *supra* n 208 at at 24.
[211] Bianchi, *supra* n 9 at 41.
[212] Philip Alston, 'The "Not-a-cat" Syndrome: Can the international Human Rights Regime Accommodate Non-State Actors?" in Philip Alston, ed, *Non-state Actors and Human Rights* (Oxford: Oxford University Press, 2005) 1 at 3 *[Alston]*.

The issue with the traditional model of subjects is that there is a disconnect between the theory, which is entirely state based, and the reality, in which non-state actors play a larger role. In the genesis of international law, it was law by states for states, based entirely on their sovereignty.[213] However, as the international legal system has developed, the role of non-state actors has changed: actors in the new international legal system have 'values, identities and roles distinct from the geographic limitations of states.'[214] While this is true, the theoretical basis for international law has not changed: consent still is a key factor in international law and if the will of states is to be considered the source of normative validity, international law being state-centric cannot be reconsidered. The traditional doctrine of subjects is necessary if the "whole edifice of the international legal system is not to be called into question."[215] This has led to what has been described as "a disjunction between theory and practice."[216] This disjunction has been the reason for alternative doctrines of subjects to arise, to reconcile the growing role of non-state actors in global governance with the theoretical basis for international law.

2.1.2 The Evolution of the Doctrine of Subjects

The shift toward considering non-state actors to be participants and shape international legal norms has taken many forms across the academic literature. One approach is a rebuttable presumption of normative responsibility for de facto powerful actors.[217] Under this approach,

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[213] Bianchi, *supra* n 9 at 42.
[214] Robert McCorquodale, "Beyond State Sovereignty: The International Legal System and Non-State Participants" (2006) 8 Revista Colombiana de Derecho Internacional 103, at 149.
[215] Pierre-Marie Dupuy, "Comments on Chapters 4 and 5" in Michael Byers and Georg Nolte eds, *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003) 176, at 179.
[216] A. Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy" (2001) 27 Rev Intl Studies 133, at 147.
[217] Karsten Nowrot, "Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities", in Fleur Johns, ed, *International Legal Personality* (Oxford: Routledge, 2010) 371, at 391.

once it can be established through empirical analysis that an entity is powerful, and participates in and impacts international legal processes, these entities would be presumed to have a duty to comply with international law bearing on "the promotion of community interests such as the protection of human rights, the environment, and core labour and social standards."[218] This applies to rules in international law of general application, and seeks to forward broad, community orientated interests. However, what this argument doesn't address is the fact that if there is a duty, there must also be a corresponding right: would these 'powerful' actors have a right to bring an international claim? Additionally, how can one define what a 'powerful entity' is - where can the line be drawn?

Another view is to take a constitutional approach and abandon a formalistic conception of international law: "the new actors in our globalising world might be more easily moulded into a system of international law if we try to conceive of them as factors and forces of a broader constitutional order."[219] Under this view, "states would be no more than mediators or 'bridges' between the local, regional and global plane and would no longer have the monopoly of international legal processes."[220] However, to abandon formalistic conceptions of international law is to remove its theoretical cohesiveness: to adopt this approach would be to set aside everything that makes international law a legal system, as discussed in Chapter I. Particularly, normative validity would be difficult to derive.

Focusing directly on the scope and application of legal norms is a similar but slightly different approach than the constitutional one: this approach involves moving away from predetermined categories of legal personality, instead identifying subjects based on who the

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[218] *ibid* at 13.
[219] Daniel Thürer, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State" in Rainer Hofmann, ed, *Non-State Actors as New Subjects of International Law* (Berlin: Duncker & Humbolt, 1999) 37, at 54.
[220] Bianchi, *supra* n 9 at 43.

international rule addresses, rather than the formal status of a particular individual.[221] Clapham suggests that this is the approach already taken in human rights law.[222] Practically such an approach is not feasible: this is because it sounds like a large-scale municipal legal system, but with no enforcer. Given the vast number of non-state actors whom legal rules could be directed at, the lack of enforcement would likely lead to a lack of compliance.

Nijman suggests a complete reprival of the concept of legal personality, basing it on natural law. She argues for a new theory of international legal personality where individuals are the primary persons in legal systems and possess "a natural right to political participation…the right to have rights, [which] includes the right to live in a world governed by just institutions."[223] The corollary to this natural right is that an individual has "the duty to take moral and political responsibility."[224] Nijman's linking of legal personality to justice, focusing on the role of the human being in law, is an extremely unrealistic and optimistic conception of international law. It fails to understand the nature of international law as being based on governing the relations between states: even though individuals may play a role in this, it does not change the character of international law as being an ordeal primarily between states. Linking international law to a natural law basis can be seen as "utopian idealism",[225] which focuses too much on the political aspects of legal personality as opposed to the theoretical considerations.

Some take the widening of legal personality further, extending the role of non-state actors to also include law making roles. For example, McCorquodale argues that there is an "inclusive

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[221] See for example Robert McCorquodale, "An Inclusive International Legal System" (2004), 17 Leiden J Intl Law 477, at 492-97.
[222] See for example Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations" (2006) 863 Intl Rev of the Red Cross 491 *[Clapham]*.
[223] Janne Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law,* (The Hague: TMC Asser Press, 2004) at 472.
[224] *ibid* at 473.
[225] Joseph Masciulli, "The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law. Review of Janne E. Nijman" (2006) 16 L & Politics Book Rev 242, at 242.

international legal system" based on participation rather than subjecthood, in which a variety of non-state actors participate in law creation. What is interesting is that he argues this is lex lata, as opposed to lex ferenda: he says that "the participation of non-state actors in the international legal system may not be the traditional method of international law-making,but it is now an accepted method."[226] Arguing that it *is* accepted that this is the case seems an overstep: there is certainly an argument to be made that non-state actors should be considered in law making processes if they are bound by those rules, to ensure legitimacy,[227] but it is certainly not the case that the international community has accepted the role of non-state actors as being one of forming law.

Taking these alternative doctrines of subjects into account, it seems that they all fall short of what they intend to do: broadly, each alternative conception fails to account for the nature of international law and its theoretical basis and focus too thoroughly on the political and practical considerations of non-state actors being subjects of international law. This does not mean that an alternative conception of legal personality would *not* be desirable: merely that there is yet to be a sufficient one. An alternative conception of legal personality would be desirable as the international legal system based entirely on state action does raise questions of legitimacy: returning to the issue of democracy, it becomes relevant here when considering whether states truly represent those who hold rights and obligations and can reliably be presumed to reflect their interests, thereby justifying their role as the sole entities involved in law-making.[228]

Luckily, international law is not black and white when it comes to legal personality: a choice does not have to be made between exclusively states being considered and non-state

[226] Robert McCorquodale, "An Inclusive International Legal System" (2004) 17:3 Leiden J Intl Law 477, at 496.
[227] Klabbers, Recognition, *supra* n 5 at 354-55.
[228] Roberts and Sivakumaran, Lawmaking, *supra* n 94 at 123.

actors directly making international law. There is a middle ground, which international law has crafted to mediate the relationship between subjects and sources: rules of attribution.

2.1.3 Rules of attribution

Attribution is a "set of tests and principles"[229] used to identify if conduct can be attributed to a state in international law.[230] Any act of state "must involve some action or omission by a human being or group"[231]: as the PCIJ famously stated, "states can only act by and through their agents and representatives."[232] Therefore there must exist some rules to determine when these non-state actions become actions of the state: this process is attribution.[233]

Attribution establishes when conduct can be equated, for legal purposes, as acts of state.[234] However, there are different circumstances in which conduct can be attributed, and for different reasons.[235] Sometimes attribution is used to determine when conduct can be attributed to a state to engage their international responsibility and raise legal consequences: attribution is also used to determine what conduct of the state makes up its consent to be bound (in the form of entering into obligations on behalf of the state).[236] Attribution is therefore relevant to customary

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[229] Carlo de Stefano, *Attribution in International Law and Arbitration*, (Oxford: Oxford University Publishing 2020) at 1 *[de Stefano]*.
[230] *Cf* Marko Milanovic, "Special Rules of Attribution of Conduct in International Law", (2020) 69 Intl L Stud 295, at 296 *[Milanovic]*; Binder and Wittich, *supra* n 4 at 242; Condorelli and Kress, *supra* n 202 at 221.
[231] *"Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries"* (UN Doc A/56/10) in Yearbook of the International Law Commission 2001, vol 2, Part Two (New York: UN, 2001) at 35, para 4 *[ARSIWA Commentary]*.
[232] *German Settlers in Poland*, Advisory Opinion, (1923) PCIJ (ser B) No 6 at 22.
[233] James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014) at 113: attribution is "the process by which international law establishes whether the conduct of a natural person… can be considered an 'act of state' and thus give rise to international responsibility."
[234] Bosnian Genocide, *supra* n 125 at para 391 and Nicaragua, *supra* n 32 at para 101-102.
[235] Andre Nollkaemper, "Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility" in Niels M Blokker and Nico Schrijver, eds, *The Security Council and the Use of Force: Theory and Reality - A Need for Change* (Netherlands: Martinus Nijhoff, 2005) 133, at 140.
[236] Condorelli and Kress, *supra* n 202 at 223.

norm formation and interpretation, as it determines what state practice is. This is what will be considered in this chapter, in light of the changing actors in the international sphere. An examination of rules of attribution demonstrates that they are changing and evolving to include a wider class of individuals than what is traditionally considered a subject of international law.[237] This evolution reflects the changing international landscape,[238] but also raises theoretical issues. These issues are pertinent in outer space, given the wide rules of attribution contained in Article VI of the OST.

Attribution is "not a single concept… Quite the contrary, different attribution tests are tied to their specific purpose, and hence they can only be applied appropriately in that specific subsystem of international law."[239] How attribution ties into the argumentation proposed by this thesis is through the idea of state practice. As established in Chapter 1, state practice is foundational to international law through the role it plays as the external component of the rule of recognition. Attribution helps determine what state practice is, which is especially relevant given the growing role of non-state actors and the potential expansion of the doctrine of subjects.[240] Attribution does not exist in a vacuum though: attribution cannot itself produce a legal consequence, instead acting as a vessel to do so.[241] Attribution is an element of state practice relevant to the development of customary international law and the interpretation of treaty norms. However, any discussion of attribution in these contexts must begin with an examination of state responsibility, which serves as a foundational framework for attribution

[237] Binder and Wittich, *supra* n 4 at 243.
[238] Binder and Wittich, *supra* n 4 at 243.
[239] Gábor Kajtár, "Fragmentation of Attribution in International Law", in Gábor Kajtár, Başak Cali, and Marko Milanovic, eds, *Secondary Rules of Primary Importance in International Law : Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals* (Oxford: Oxford University Press, 2022) 283, at 299 *[Kajtár]*.
[240] Binder and Wittich, *supra* n 4 at 260.
[241] Condorelli and Kress, *supra* n 202 at 223.

across international law.[242] Therefore, this chapter will consider the rules of attribution contained in ARSIWA, before considering how these rules apply in the context of treaty interpretation and customary international law formation. It will then consider Article VI of the OST as a *lex specialis* rule of attribution, and whether this rule impacts the actors that can be considered for norm formation and interpretation in outer space.

Before discussing attribution and its various contexts in international law, a brief note on its theoretical basis is necessary. There is often a misconception that attribution contradicts the theoretical foundation of international law. If we accept that the state is the primary subject of international law and exists prior to the international legal order, this acceptance stems from the fact that the international legal system is built upon state consent, thereby presupposing the state's existence. Consequently, the internal structure of the state should not be determined by international law rules, as attribution attempts to do.[243] There are two reasons that this is a misconception: firstly, the distinction between consent as a descriptive characteristic of international law versus the derivation of the normative character of international rules (see Section 1.2.1.1 for this discussion in full detail). If one considers the will of states to be the source of validity of international law, as is argued in Chapter 1, this critique bears less weight. Secondly, and more importantly, attribution does not define the state or its structure; it only specifies which aspects of the state's actions are attributable to it under international law. It is a "logical necessity" that "international law identifies what is the state, not in order to define or structure it, but so as to allow the rules of international law to effectively regulate the relations

[242] Binder and Wittich, *supra* n 4 at 250.
[243] See Gaetano Arangio-Ruiz, "State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance", in Michel Virally, ed, *Le Droit International Au Service de La Paix, de La Justice et Du déVeloppement* (Paris: A. Pedone, 1991) 25 at 25.

between states."[244] Therefore, the argument above cannot be levied as a criticism: it is a misconception of the application of attribution.

2.2 Attribution in State Responsibility

In international law, the responsibility of a state is engaged when they commit an internationally wrongful act.[245] In order for an internationally wrongful act to be committed, there are two elements which are necessarily to satisfy: breach of an international obligation and attribution of this conduct to the state in question.[246] These elements are widely understood to reflect customary international law,[247] and were codified by the ILC in their work on the Articles on the Responsibility of States for Internationally Wrongful Acts in the turn of the century. Therefore, attribution in and of itself is not sufficient to produce a legal effect in the context of state responsibility (nor in matters concerning the consent of a state to enter into an obligation, as will be discussed below): it must be paired with the action that breaches international law. However, this action of breach is not what is at concern here: rather, the focus is on the process by which a breach can be attributed to the state and the implications this has for the doctrine of subjects and the capacity of non-state actors to influence and interpret international law.

What is interesting is that the rules of attribution contained in ARSIWA were never intended by the ILC to fulfil the role of general rules of attribution applicable across international

[244] Condorelli and Kress, *supra* n 202 at 226.
[245] *Responsibility of States for Internationally Wrongful Acts*, UNGA, 6th Sess, UN Doc A/56/589 and Corr.1 (2002) Annex agenda item 162 at Article 12 *[ARSIWA]*; Nicaragua, *supra* n 32 at 186; *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, [1980] ICJ Rep 3 at para 56 *[US Consular Staff]*.
[246] ARSIWA, *ibid* at Article 2.
[247] *S*ee for eg*, inter alia*, US Consular Staff, *supra* n 245 at para 29 and Nicaragua, *supra* n 32 at 190.

law. They were intended to apply exclusively to the regime of state responsibility. In their commentary to ARSIWA, the ILC stated that:

> The question of attribution of conduct to the state for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the state…the rules concerning attribution set out in [Chapter II of Part I] are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government.[248]

Not only does this statement succinctly define the different ways in which rules of attribution can be used in international law, it acknowledges that different rules of attribution can be applied in such cases: attribution is not a rule of general application across all international law. The key difference is that responsibility has a "distinct content", which the attribution means can be applied, whereas attribution in interpretation and formation determines what the content of those rules are.[249] Kajtár categorises the different types of responsibility as narrow and broad. Narrow attribution is the rules contained in ARSIWA, and are applied to establish state responsibility.[250] Broad attribution is attribution for any other purpose, which serves "a variety of other legal purposes."[251] Article VI of the OST is therefore a narrow rule, as it pertains specifically to the responsibility of states.

However, despite this differentiation, the rules of attribution contained in ARSIWA have become somewhat of a "blueprint" for attribution across international law, regardless of the category which the purpose attribution is used for falls into.[252] The possibility and desirability of the process of imputing ARSIWA's attribution across international law generally will be considered below, in Chapter 3, but generally the transferral contributes to the growing

[248] ARSIWA Commentary, *supra* n 231 at 39, para 5.
[249]Milanovic, *supra* n 230 at 303.
[250] Kajtár, *supra* n 239 at 283.
[251] Kajtár, *supra* n 239 at 283.
[252] Binder and Wittich, *supra* n 4 at 250.

democratic deficit in international law as it allows for private actors to influence the formation and interpretation of international law, despite not being subjects of international law nor having the same motivations as states. Before exploring this possibility, it is essential to first understand what the ARSIWA rules of attribution actually entail. Article VI of the OST is only permissible as a rule of attribution for the purposes of state responsibility by virtue of the ARSIWA rules on attribution[253]: therefore, consideration of ARSIWA and the broader context of international responsibility is necessary before considering how Article VI of the OST diverges from these general rules.

Generally, in the law of state responsibility "the only conduct attributed to the State at the international level is that of its organs or government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State."[254] This broadly summarises the approach taken in Chapter 2 of ARSIWA. In order to enact this general position, there are four categories of instances when conduct can be attributed to the state for purposes of international responsibility. While an in-depth analysis of each of these rules is beyond the scope of this thesis, a brief examination will be useful against the backdrop of non-state actors in international law.

2.2.1 *De jure* organs

The first, and most obvious, category is that of *de jure* organs. These rules of attribution are contained in Articles 4 and 5 of ARSIWA. Article 4 encompasses acts which originate from the organs of states: these acts include "entities that are, very broadly, part of a state's structure."[255] The language of Article 4 reads as such:

[253] ARSIWA, *supra* n 245 at Article 55.
[254] ARSIWA Commentary, *supra* n 231 at 38, para 2. *Cf* Bosnian Genocide, *supra* n 125 at para 401 for a similar statement.
[255] Binder and Wittich, *supra* n 4 at 249.

> Article 4 (1): 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 organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.[256]

Binder and Wittich accurately describe Article 4 as "broad" - even the ILC acknowledged that "virtually any state organ", where a state organ is an entity acting in an official capacity, can be the author of an internationally wrongful act.[257] The term "state organ" is not limited by "seniority or hierarchy and includes the range of levels of administration that may arise within the state."[258] This is determined in relation to the internal law of the state.[259] In *Bosnian Genocide*, the ICJ confimed that Article 4 reflects customary international law and indeed is "one of the cornerstones of State responsibility."[260]

Article 5 of ARSIWA relates to entities empowered to exercise the authority of the state.[261] This is a narrow category, as the act must be authorised by internal law and be within the capacity of the authorisation.[262] The text of Article 5 reads as such:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[263]

ICJ jurisprudence likens this "empowerment" to a relationship of "complete dependance", where the entity is the mere "instrument" or "agent" of the state,[264] and therefore acting on behalf of

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[256] ARSIWA Article 4
[257] ARSIWA Commentary, *supra* n 231 at 40, para 5.
[258] Thomas Weatherall, *Duality of Responsibility in International Law: the individual, the state and international crimes* (Leiden, The Netherlands: Brill, Nijhoff, 2022) at 180 *[Weatherall]*.
[259] ARSIWA Commentary, *supra* n 231 at 42, para 11.
[260] Bosnian Genocide, *supra* n 125 at para 385.
[261] Weatherall, *supra* n 258 at 183. See also ARSIWA Commentary, *supra* n 231 at 43, para 3 and paras 4-7.
[262] ARSIWA Commentary, *supra* n 231 at 43, para 7.
[263] ARSIWA, *supra* n 245 at Article 5.
[264] Bosnian Genocide, *supra* n 125 at para 392.

them.[265] It is based on the 'factual status' of an entity, rather than their formal legal status.[266] However, to engage this provision, the circumstances ought to be exceptional.[267] The reason for this rule is that any other "solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious."[268] Indeed, Article 5 was introduced with the aim of ensuring that states could not avoid international responsibility through a process of subcontracting.[269] Article 5 means that states cannot use the doctrine of subjects to abscond themselves of their international responsibility. However, based on the fact that this authority to act as an agent of the government must be bestowed by virtue of internal law, this rule of attribution only applies to a narrow class of scenarios.[270]

Thus, in relation to *de jure* organs of the state which can be attributed, "attribution is accordingly based on a dual criterion: internal law must authorise an entity to exercise some sort of governmental authority (formal criterion) and the relevant conduct must relate to governmental activity (not just some private or commercial activity)."[271] The attribution of *de jure* organs of the state is based predominantly in the internal law of the state, as evidenced by Article 4(2) and 5. In this process of attribution, international law plays a "passive" role.[272]

2.2.2 *De facto* organs

The second category of instances in which conduct can be attributed to a state relate to the *de facto* organs of the state. Articles 8 and 9 of ARSIWA encompass this, addressing the conduct of

[265] Nicaragua, *supra* n 32 at 109.
[266] Binder and Wittich, *supra* n 4 at 248.
[267] Bosnian Genocide, *supra* n 125 at para 393.
[268] Bosnian Genocide, *supra* n 125 at para 392.
[269] ARSIWA Commentary, *supra* n 231 at 43, para 5.
[270] ARSIWA Commentary, *supra* n 231 at 43, para 7.
[271] Binder and Wittich, *supra* n 4 at 249.
[272] Condorelli and Kress, *supra* n 202 at 229.

persons acting under the direction, control, or on the instructions of an organ of the state and those acting in the absence or default of official authorities. As opposed to *de jure* organs of the states, the determination of *de facto* organs of the states involve a much more direct role of international law, which forms the scope of these categories.[273] Article 8 of ARSIWA states that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[274]

The ICJ has indicated that this rule of attribution constitutes international custom.[275] The ICJ has also extensively discussed the substantive content of this rule of attribution. Notably, Article 8 of ARSIWA gave rise to the well-known - but often misunderstood - "effective control" test, first established in *Nicaragua* and later reaffirmed in the *Bosnian Genocide* case.[276] The 'effective control' test is often mistakenly applied as a general rule of attribution[277], when in fact it is limited to the specific factual circumstances outlined in Article 8 of ARSIWA, concerning *de facto* attribution.

The "effective control" test was originally established to ascertain Article 8 attribution in the case of *Nicaragua*:

> for [the conduct of the contras which the US had involvement with] to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had the effective control of the military or paramilitary operations in the course of which the alleged violations were committed[278]

In *Bosnian Genocide*, Article 8 of ARSIWA was further interpreted in the following manner :

> A State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs or to be equated with such organs – only if,

[273] Condorelli and Kress, *supra* n 202 at 229.
[274] ARSIWA, *supra* n 245 at Article 8.
[275] Bosnian Genocide, *supra* n 125 at 398 and 407.
[276] See Nicaragua, *supra* n 32 at 115 and Bosnian Genocide, *supra* n 125 at 406.
[277] Kajtár, *supra* n 239 at 286.
[278] Nicaragua, *supra* n 32 at 115.

> assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 ARSIWA. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed.[279]

This clearly establishes that Article 8 applies in cases of instructions, directions *and* effective control. On its face, Article 8 seems like a complicity doctrine.[280] However, this is not the case, for one key reason. A complicity doctrine would engage the wrongful act in the giving of instruction: the rule of attribution contained in Article 8 pertains to the wrongful conduct that a non-state actor commits *as a result of* that instruction or control. There is therefore the possibility of two separate wrongful acts if the factual circumstances arise that relates to Article 8: one by application of Article 8 and one by application of Article 4 ARSIWA. Article 9 of ARSIWA also addresses de facto attribution, stating that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[281]

This article allows for attribution of conduct to the state when private individuals or entities assume governmental functions under "exceptional" circumstances where state authority is absent, such as during crises or government collapse.[282] In these cases, the actions can be attributed to the state if they are undertaken with the intent to maintain or restore order, thus temporarily filling a governmental role.

[279] Bosnian Genocide, *supra* n 125 at para 406 and para 413.
[280] See generally, Milanovic, *supra* n 230 at 333-334 for discussion of complicity versus attribution.
[281] ARSIWA, *supra* n 245 at Article 9.
[282] ARSIWA Commentary, *supra* n 231 at 48, para 1.

2.2.3 Insurrectional movements

Article 10 of ARSIWA addresses insurrectional movements, attributing their conduct to the state if and when they succeed in establishing themselves as the new government or create a new state. Article 10 applies to ensure that international responsibility can be attributed to a new government / state in the case of a breach of international law. Detailed consideration of Article 10 lies beyond the scope of discussion of this thesis.

2.2.4 Adoption and recognition

The final category of attribution under the ARSIWA is arguably the most radical. Article 11 allows for the attribution of conduct to a state when the state explicitly recognises and adopts that conduct as its own, even if the actors involved fall outside its formal governmental structure. The text of Article 11 reads:

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.[283]

Attribution of this kind has no requirement that the conduct have any connection to the state, other than the mere declaration of acceptance by the state.[284] This therefore is an extremely wide category, allowing for the attribution of private actors and entities to engage the international responsibility of a state.[285] This is especially true given that acknowledgment and adoption of the conduct can be either express or implied.[286]

[283] ARSIWA, *supra* n 245 at Article 11.
[284] Condorelli and Kress, *supra* n 202 at 231.
[285] ARSIWA Commentary, *supra* n 231 at 52, at para 2.
[286] ARSIWA Commentary, *supra* n 231 at 54, at para 9.

An example of the application of this rule of attribution can be found in the ICJ case *US Consular Staff in Tehran*.[287] In this case, Ayatollah Khomeini (the Supreme Leader of Iran at that time) announced a policy which approved the situation concerning the occupation of the US Embassy and the detention of hostages and sought to perpetuate it. This had the effect of "[translating] continuing occupation of the Embassy and detention of the hostages into acts of State … the militants, authors of the invasion and jailers of the hostages had now become agents of the Iranian State for whose acts the State itself was internationally responsible."[288]

Some consider the Article 11 rule on attribution to be a way to combat the changing scope of the doctrine of subjects to include non-state actors. Article 11 allows for the consideration of the conduct of private actors and for this conduct to generate state responsibility.[289]

2.2.5 *Lex specialis* rules of attribution

ARSIWA therefore contains four explicit categories of circumstances in which conduct of an actor can be attributed to a state. If these categories were the basis for attribution in outer space, the conduct of private actors could not be attributed to the state (unless the conditions contained in Article 11 were satisfied). Such an approach is unsatisfactory as it would provide no accountability, allowing private actors to use outer space in whatever manner they desire as they are not directly bound to the OST. However, ARSIWA permits the potential displacement of these rules in the case of a *lex specialis.*[290] In international law, the maxim of '*lex specialis derogat legi generali*' is one which is widely accepted as a general principle of law[291], a source

[287] US Consular Staff, *supra* n 245 at 3.
[288] US Consular Staff, *supra* n 245 at 74.
[289] Binder and Wittich, *supra* n 4 at 251.
[290] ARSIWA, *supra* n 245 at Article 55.
[291] ILC Fragmentation Report, *supra* n 8 at 9. See also Threat or Use of Nuclear Weapons, *supra* n 29 at para 25 and Construction of a Wall, *supra* n 125 at 178, para 106.

of law under Article 38(1)(c) of the Statute of the ICJ. The maxim *'lex specialis derogat legi generali'* governs the systematic relationship between legal norms, acting as a conflict resolution between contradictory norms of international law.[292] The maxim means that when two (or more) norms deal with the same subject matter, the one which is more specific in nature will prevail over the general ones. This allows for norms relating to specific subject matter in international law to displace general rules of international law. In the event of a norm relating to a specific subject matter, the *lex specialis* rule will apply, and any lacunae in the *lex specialis* can be supplemented by rules of general international law.[293]Article 55 of ARSIWA gives this principle footing in the law of state responsibility:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[294]

Article 55 resides in Part Four, containing general provisions. This means that a special rule can displace any of the articles in ARSIWA from Parts One, Two or Three[295]: a special rule of attribution is therefore possible. A *lex specialis* rule of attribution does not impact the other elements of an internationally wrongful act.[296] The ILC, in their draft ARSIWA commentaries specifically acknowledge the possibility of a *lex specialis* rule of attribution derived from a treaty regime, and how this would not affect the applicability of other aspects of the general law of state responsibility.[297] In order for a specialised rule of attribution to displace the rules of

[292]ILC Fragmentation Report, *supra* n 8 at 9.
[293] Threat or Use of Nuclear Weapons, *supra* n 29 at para 25. See also ILC Fragmentation Report, *supra* n 8 at 44.
[294] ARSIWA, *supra* n 245 at Article 55.
[295] James Crawford "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" (2002) 96:4 AJIL 874 at 879 *[Crawford, ARSIWA]*.
[296] Milanovic, *supra* n 230 at 304.
[297] ARSIWA Commentary, *supra* n 231 at 43, para 3.

attribution contained in ARSIWA, it would have to specifically relate conduct to the state for the purpose of responsibility and be dependent on the application of a primary rule.[298]

The ICJ have set out further criteria necessary to meet in order to be recognised a *lex specialis* rule of attribution. They have acknowledged the possibility of a *lex specialis* rule of attribution in *Bosnian Genocide,* where the Court stated that: "the rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis."[299] While the ICJ acknowledge the possibility here of a *lex specialis* rule of attribution, they also set the threshold of achieving such a rule extremely high. The rule must be *'clearly expressed'*, meaning it must be explicit and unambiguous in its role of displacing the general rule of attribution - the combination of the requirement that the rule of attribution be directly linked to state responsibility and dependent on the application of a primary rule, along with the necessity for it to be "clearly expressed," creates an exceptionally high threshold. Consequently, *lex specialis* rules of attribution are rare in international law.[300] However, Article VI of the OST is a rare example: this will be analysed in the following section.

As a result of their rarity, it is challenging to clearly identify what constitutes a *lex specialis* rule of attribution. This is not helped by the example given by the ILC, that of the Convention Against Torture and Other Cruel or Inhumane or Degrading Treatment or Punishment, which only applies to to torture committed by "or at the instigation of or with the consent or acquiesence of of a public official or other person acting in an official capacity."[301] The ILC states that this is "probably narrower than the bases of attribution contained in Part

[298]Milanovic, *supra* n 230 at 304.
[299] Bosnian Genocide, *supra* n 125 at para 401.
[300] Binder and Wittich, *supra* n 4 at 243.
[301] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* (10 December 1984), 1465 UNTS 85 at Article 1.

1."[302] The wording of 'probably' does not inspire confidence in the example given: indeed, some consider the Convention Against Torture to not contain a special rule of attribution at all, instead merely defining torture under the Convention.[303]

Milanovic argues that Article 1 of the Convention Against Torture could be considered a rule of attribution if it were worded in one of the following ways: "State parties shall not be responsible for torture carried out in the absence or default of the official authorities" or "[States] shall be responsible for torture which their public officials acquiesced in."[304] However, what Milanovic mandates to make up a rule of attribution would have the exact same effect as what Article 1 of the Convention currently contains: indeed, Milanovic even recognises that a special rule of attribution can be one that attributes conduct "implicitly,"[305] which seems to be what the Torture Convention is doing. Whether Milanovis is correct in his analysis of Article 1 of the Torture Convention or not, it highlights the challenges in identifying what constitutes a *lex specialis* rule of attribution, as there remains significant ambiguity (and disagreement!) regarding its precise form and application.

2.2.6 Article VI of the OST contains a *lex specialis* rule of attribution

Nonetheless, it may be argued that, despite the uncertainty surrounding the identification of *lex specialis* rules of attribution, Article VI of the OST serves as a clear example.[306] Article VI unequivocally addresses the responsibility of states in relation to their space activities, attributing responsibility to states for all national activities, whether carried out by governmental or non-governmental entities. This attribution is dependent upon the application of the primary

[302]ARSIWA Commentary, *supra* n 231 at 140, para 3, citation 820.
[303]Milanovic, *supra* n 230 at 312.
[304]Milanovic, *supra* n 230 at 312.
[305]Milanovic, *supra* n 230 at 314.
[306] *See e.g.* Condorelli and Kress, *supra* n 202 at 227.

rules contained in the OST, as states are responsible for ensuring their national activities comply with the treaty's provisions. The requirements for a *lex specialis* rule of attribution are therefore met, and "*clearly expressed*" in Article VI. This conclusion can be supported by an in-depth interpretation of Article VI, making specific reference to the ordinary meaning of the term, the wider context of the OST and the drafting history of the provision.[307]

2.2.6.1 Ordinary meaning of Article VI

Article VI of the OST is a complex provision, encompassing four distinct obligations within its text. Each of these obligations relates to the rule of attribution and thus warrants individual consideration. The first sentence of the Article VI of the OST begins:

> 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…[308]

This is a clearly expressed indication that the OST attributes conduct to state parties in a wider context than the general rules on attribution contained in ARSIWA: indeed, this widening of ARSIWA attribution has been recognised in the academic literature.[309] There are two terms which warrant further consideration in this obligation: *'national activities'* and *'in outer space.'* These terms are contested and the determination of their meaning lies beyond the scope of this thesis: however, a brief overview is necessary to contextualise the meaning of the rule of attribution in Article VI.

Firstly, '*outer space'* means that Article VI applies to all space activities - both in-orbit and deep space. This is uncontroversial. However, there is slightly more controversy surrounding

[307] VCLT, *supra* n 31 at Article 31.
[308] OST, *supra* n 3 at Article VI.
[309] Condorelli and Kress, *supra* n 202 at 227.

what *'in'* outer space means. A wide interpretation of 'in outer space' is that it includes activities that take place in space or activities predominantly and intentionally *directed* at outer space.[310] This would allow for the inclusion of terrestrial activities, such as radio astronomy, which are directed at space: there are no "a priori temporal, cosmographical or material limits" to Article VI.[311] However, given that Article VI was intended to combat the ultra-hazardous nature of space activities, it seems unlikely that it was intended to extend to activities which occur on the surface of the Earth. The narrow view of 'in outer space' includes activities that take place in space or make it accessible, explorable or usable.[312] While the specific meaning of 'in outer space' is beyond the scope of discussion of this thesis, it is worth noting that if the wide interpretation of 'in outer space' is adopted, this significantly widens the scope of activities that a state can have attributed to it (and therefore be responsible for). Additionally, if, as this thesis seeks to establish, Article VI means that conduct can be attributed to the state for the purposes of interpretation and formation, this also means that a wider class of actions can be attributed to the state, which are further removed from space activities as defined by states.[313] Therefore, one is inclined to adopt the narrow view of 'in outer space.'

The greatest controversy, however, arises in relation to the term *'national activities.'* The OST does not clarify jurisdiction in the way in which other international treaties concerning areas beyond national jurisdiction do. For example, the United Nations Convention on the Law of the Sea Article 139 specifies it applies with personal jurisdiction and the Treaty of Antarctica

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[310] Bin Cheng "Article VI of the 1967 Space Treaty Revisited: "International responsibility", "national activities", and "the appropriate state" (1998), 26:1, J Space L 7, at 19 *[Cheng, National Activities]*.
[311] *ibid* at 19.
[312] Michael Gerhard, "Article VI" in Stephan Hobe et al, eds, *Cologne Commentary on Space Law* (Berlin: BWV Berliner Wissenschafts-Verlag, 2017) 373, at 386, para 20 *[Article VI Cologne Commentary]*.
[313] See for eg South Africa, *Space Affairs Act 84 of 1993*, s 1; Belgium, *Space Activities Act of 17 September 2005*, s 1, art 1, para 1; Netherlands, *Space Activities Act of 24 January 2007*, s 1 and France, *Space Operations Act No 2008-518 of 3 June 2008,* ar 1, where 'space activity' is defined as 'operation and control of space objects.'

Article VIII(1) specifies it applies with personal and territorial jurisdiction.[314] This leaves a lacuna in international space law where it is not clear what a state party must regulate: "is it those activities over which they have jurisdiction under international law, those activities over which they have effective control or any activity in which one of the state's nationals, person or juridical is involved?"[315] This lacuna has given way to differing interpretations of the scope of *'national activities'* which states regulate - the reason that so much ink is split on the matter is that whatever state has jurisdiction is the state which will be held to be internationally responsible.[316]

Generally, in international law, when determining the nationality of a private entity, the standard applied by the ICJ in the case of *Barcelona Traction* is applied: wherever that entity is incorporated, as per the state's internal law, and where the entity has its registered office is what constitutes a national activity.[317] However, this is not the approach which has been taken in relation to 'national activities' under Article VI OST. Some advocate a territorial approach to jurisdiction.[318] Others prefer a personal and territorial jurisdiction, in order to ensure that no national activity could fall outside the scope of the legislation.[319] Some even allocate 'national activities' to the state of registry,[320] based on Article VIII of the OST and the clause that

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[314] *United Nations Convention on the Law of the Sea,* 10 December 1982, 1833 UNTS 397 at Article 139; *The Antarctic Treaty,* 1 December 1959, 5778 UNTS 402 at Article VIII(1).
[315] Annette Froehlich and Vincent Seffinga, eds, *National Space Legislation : A Comparative and Evaluative Analysis* (Switzerland: Cham, 2018) at 138.
[316] Article VI Cologne Commentary, *supra* n 312 at 398, para 40.
[317] Barcelona Traction, *supra* n 189 at para 70.
[318] JF Mayence, "Granting Access to Outer Space: Rights and Responsibilities for States and their Citizens", in Frans Von der Dunk, ed, *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in Light of Developments in European Space Cooperation,* (Leiden: Martinus Nijhoff Publishers, 2011) 73 at 88. See for eg Netherlands, *Space Activities Act of 24 January 2007*, s 2(2) and Belgium, *Act on Space Activities of 17 September 2005*, s 2(2).
[319] Tedd Schmidt, "Authorisation of Space Activities after the EU Reform Treaty", in Frans Von der Dunk, ed, *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in Light of Developments in European Space Cooperation*, (Leiden: Martinus Nijhoff Publishers, 2011) 297, at 313. See for eg *Sweden, Act on Space Activities* (1982:963), s 2 and France, *Space Operations Act No 2008-518 of 3 June 2008,* s 2(1), (2).
[320] Henri A. Wassenbergh, "The Law Governing International Private Commercial Activities of Space Transportation" (1993) 21:2 J Space L 97, at 109.

jurisdiction and control of a space object is retained by the state of registry.[321] However, this approach conflates a space object and a space activity, and given that the state of registry is the launching state, it would be illogical to attribute responsibility based on a conception which is fixed and cannot fully accommodate for transfers of ownership.[322] However, as stated, such considerations lie beyond the scope of this thesis; regardless of the approach taken by a state as to the scope of what their internal space law applies to, they are accepting responsibility for some group of private actors, either those operating from their territory or their nationals. How states define 'national activity' matters less than the fact that they are authorising, regulating and accepting the attribution of that conduct in the first place.

The second obligation which arises in Article VI is that of "assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty."[323] The 'and' between the attribution clause and the assuring compliance clause indicates that these are separate obligations, and that the latter can be considered a "second responsibility."[324] This clause is important for two reasons: first, it establishes the scope of responsibility in the case of non-governmental entities. A state will be internationally responsible if the conduct of the non-governmental entity is not compliant with the provisions of the OST. There is debate as to whether this obligation to assure compliance is a result or conduct obligation. Some believe that ensuring compliance is a result obligation, because a state will be internationally responsible if the result of a private actor breaching the OST occurs.[325] Others see the assurance of compliance as a conduct obligation, which means that states must take all reasonable steps to ensure

[321] OST, *supra* n 3 at Article VIII.
[322] Article VI Cologne Commentary, *supra* n 312 at 400, para 43.
[323] OST, *supra* n 3 at Article VI.
[324]Article VI Cologne Commentary, *supra* n 312 at 412, para 53.
[325] *See* Bosnian Genocide, *supra* n 125 at 430 for discussion of the distinction between result and conduct obligations.

compliance in order to adhere with their obligations until Article VI.[326] However, the principle of impossibility is a general principle of international law,[327] which means that a state can only ever really be held to be internationally responsible for what was possible for them to do to ensure compliance[328] - regardless of the nature of the obligation, a state cannot be held internationally responsible for the actions of a private actor which would have been impossible for them to prevent. For instance, when the US company Swarm Technologies launched four satellites from Indian territory using an Indian rocket, it did so after the Federal Communications Commission (FCC) denied permission for a US-based launch.[329] The FCC's concerns centred on the satellites' small size, which made them difficult to track in their end-of-life phases, posing potential risks to other space objects.[330] In this case, the United States could not be held internationally responsible under the OST if Swarm Technologies were to breach its provisions, as the US had taken all possible measures to prevent the launch. Whether the obligation to assure compliance is result or conduct, the US did everything possible to ensure compliance and therefore complied with their own obligations.

Second, the 'assuring compliance' clause is important because it ensures cohesiveness in terms of the underlying theory of international law and where this law derives its validity. This is because the provision ensures that private actors will comply with the provisions of the OST, but only through the intermediary of the state. The Government is bound to ensure that their activities, governmental and non-governmental, comply with the OST. The effect of Article VI is

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[326] *Ibid* at 430.
[327] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1st ed (Cambridge: Cambridge University Press, 2006) at 226.
[328] *Corfu Channel Case (United Kingdom v Albania)*, Merits, [1949] ICJ Rep 4 at 23.
[329] Elizabeth Howell, "Four Cubesats Snuck into Orbit Without Regulatory Approval, FCC Says" (March 16th 2018) online (website): <https://www.space.com/40001-four-cubesats-unauthorized-launch-fcc.html>.
[330] Federal Communication Commission, "Letter to Swarm Technologies" (December 12, 2017) online (pdf): <https://apps.fcc.gov/els/GetAtt.html?id=203152&x=. >.

therefore *as if* private actors were bound by the provisions. However, the authority remains with the state:

> If such an activity is undertaken by the State that ratified the Treaty, the government is directly bound to ensure its compliance with the terms of the ratified Treaty. If such an activity is undertaken by an entity that is not directly bound to the Treaty, the State has to ensure its compliance by implementing an authorisation procedure. Only an institution that exercises State authority, namely the supreme State authority, is bound to the international treaties ratified by the State.[331]

Therefore, this ensures that the international obligations continue to be based on state consent, a key characteristic of international law (see section 1.2.1). It also ensures that the actions of states are what matters, in keeping with what gives international law its normative force (see section 1.2.1.2). Therefore, while '*ensuring conformity with the provisions set forth in the present Treaty'* has the effect of all space actors, public or private, adhering to the OST and thus ensuring a sustainable and accessible outer space, the mechanisms by which this is achieved are consistent with the underlying theory of international law. This therefore is the part of the obligation which is related to the primary rules contained in the OST, evidencing Article VI as a *lex specialis* rule of attribution.

The third and fourth obligations contained in Article VI relate directly to this assurance of compliance and can be considered together. These obligations require that "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."[332]

'Appropriate state' is ordinarily presumed to be the 'national' state (in line with the definition of national adopted)[333]: thus, while this is rebuttable in the case of multiple 'appropriate states' the obligation to authorise and supervise relates to the 'national activities' of

[331]Article VI Cologne Commentary, *supra* n 312 at 392, para 33.
[332] OST, *supra* n 3 at Article VI.
[333] Cheng, National Activities, *supra* n 310 at 28.

the state. The obligation to authorise and supervise relates directly to the second obligation in Article VI: the authorisation and supervision is to ensure that a state's national activities are in compliance with the applicable provisions,[334] and therefore that the state's international responsibility cannot be engaged as there is no element of breach. While a detailed examination of supervision and authorization requirements falls outside the scope of this thesis, it is sufficient for the purposes of the argumentation to understand that states must oversee, initially and continually, their national activities to ensure compliance with the OST.[335] All four obligations contained are therefore linked to the responsibility which states bear for non-governmental activities and can be used to consider the nature of the rule of attribution contained in Article VI. It is indeed a *'clearly expressed'* rule of attribution, which is related to the primary rules contained in the OST and of general application.

2.2.6.2 Context of OST

Article VI's status as a *lex specialis* rule of attribution can also be affirmed in light of the OST as a whole, and its wider intent and purpose. The object and purpose of the OST can be deduced from Article I,[336] which states 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.

[334] Irmgard Marboe, "National Space Legislation", in Frans von der Dunk & Fabio Tronchetti, eds, *Handbook of Space Law* (Cheltenham: Edward Elgar Publishing 2015)127 at 185; Major Tyler J. Sena, ''Providing Clarity for Fault-Based Liability in International Space Law: A Practical Approach Through Principles of General International Law" (2022) 46:1 J Space L 1 at 21.
[335] See *Report of the Working Group on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space on the work conducted under its multi-year work plan*, Committee on the Peaceful Uses of Outer Space – Legal Subcommittee, UN DOC A/AC.105/C.2/101 (2012).
[336] Article 1 of a treaty is regularly used for this purpose: See for eg Oil Platforms, *supra* n 127 at para 27 and 31; Navigational Rights, *supra* n 67 at 54; Whaling in the Antarctic (Australia v Japan: New Zealand Intervening), Judgment, [2014] ICJ Rep 226 at para 56.

> 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.[337]

Article 1 of the OST both grants rights and imposes obligations. The right to be able to freely use and explore outer space is bestowed by Article 1, but is qualified by the obligation to carry out this use and exploration for the benefit and in the interest of all countries. The rights bestowed by Article 1 are further limited by Article IX of the OST, which requires states to act with "due regard towards the corresponding interests" of other states when carrying out space activities.[338] Due regard can be understood to mean "acting in accordance with other states' right to use and explore outer space."[339] Therefore, while Article 1 grants a wide right to use and explore outer space, Article IX qualifies this right by obligating states to take into account the rights which other states possess in the same manner. The qualification of Article I has sustainable goals in mind, seeking to ensure that the outer space environment is protected and preserved for uses of future generations.

A second limitation placed upon the right to freely use and explore outer space is that such use and exploration should be done in the "interests of all countries, irrespective of their degree of economic or scientific development." This provision indicates an intent to not exclude developing countries from the space sector, taking their interests into account when conducting space activities.[340] The provision evidences the important role of wide democratic principles in outer space, ensuring that representative interests are taken into account. This increases the legitimacy of international space law.

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[337] OST, *supra* n 3 at Article I.
[338] OST, *supra* n 3 at Article IX.
[339] Lachs, *supra* n 172 at 43; Cheng, National Activities, *supra* n 310 at 117.
[340] Stephan Hobe, "Article I" in Stephan Hobe et al, eds, *Cologne Commentary on Space Law* (Berlin: BWV Berliner Wissenschafts-Verlag, 2017) 167 at 205, para 50.

What can be deduced from this discussion of Article I is that Article VI was drafted with these goals in mind. This can be seen from the negotiating history, as will be discussed below. Private actors are, generally, motivated by goals of economic and technological advancement: this cuts against the purpose of the OST, which instead focuses on sustainability, seeking to ensure the long-term responsible use of outer space. Given this focus of Article 1, there is then an obligation upon states to ensure that their private actors comply and act in this manner: the purpose of attribution rules align with the objectives of the area of law to which they belong.[341] However, states, in their authorisation and supervision, are encouraged to ensure that their private actors comply with Article 1, ensuring that space can be used in a long-term and sustainable manner.[342] If states are responsible for the breaches carried out by their private actors, then they are more likely to ensure that private actors comply. This therefore further evidences Article VI's role as a rule of attribution.

2.2.6.3 Drafting history

The drafting history and circumstances which led to the drafting of a treaty may be used to "confirm the meaning resulting from the application of Article 31 [VCLT]"[343], as was reached above. Article VI as a rule of attribution can also be supported by reference to the drafting history of the OST. The wording of Article VI arose as a result of a compromise between the USSR and the US, who had conflicting views on what outer space activities should be permitted. The USSR originally proposed as part of Article VI that "all activities… shall be carried out

[341] Binder and Wittich, *supra* n 4 at 245.
[342] *Guidelines for the Long-Term Sustainability of Outer Space Activities,* UNCOPUOS, 62nd sess, A/74/20 (2019) at A.1.
[343] VCLT, *supra* n 31, at Article 32.

solely and exclusively by States."[344] The UK, an intermediate state in the disagreement between the USSR and US, sought a compromise and proposed that "all states shall, for themselves and for their nationals, have equal rights in the exploration and use of outer space. These rights shall be exercised in accordance with international law and with the principles affirmed in this declaration."[345] This proposal is interesting in light of the fact that this is not a rule of attribution, instead seemingly bestowing rights to states but imposing obligations upon both states *and* those carrying out space activities. The US then suggested a counter proposal to the USSR, proposing that "a state from whose territory or with whose assistance or permission space vehicle is launched bears international responsibility for the launching."[346] This would include private actors within its remit.

In response to this, the USSR initially resisted changing their stance and, in 1963, continued to propose that the text of Article VI read "all activities of any kind…shall be carried out solely by states. If states undertake activities in outer space collectively…each state participating in such activity has the responsibility to comply with the principles set forth in this declaration."[347]

Eventually, in 1966, a compromise was reached, in which the USSR proposed the following text for Article VI:

> [States] bear international responsibility for national activities in outer space…, whether such activities are carried on by governmental agencies or non governmental bodies corporate by the State concerned. The activities of

[344] *USSR Draft Declaration of the basic principles governing the activities of States pertaining to the exploration and use of outer space,* UN Doc A/AC.105/C.2/L.1 (1962) at 2, Article 7.
[345] *Letter dated 4 December 1962 from the Permanent Representative of the UK to the UN addressed to the Chairman of the First Committee*, A/C.1/879 (1962) at 10, Article 4.
[346] *US Draft Declaration of the basic principles governing the activities of States pertaining to the exploration and use of outer space,* UN Doc AC/C.1/881 (1962).
[347] USSR, *Revised Version of Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,* UN Doc A/AC.105/C.2/L.6 (1963).

> non-governmental bodies corporate shall require authorisation and continuing supervision by the State concerned.[348]

The conclusive form of Article VI was based on this proposal, and suggested by Working Group L6, who focused on Article VI.[349] The fact that this wording was chosen over the wording of the UK proposal marks intent to relate the conduct of private actors to the international responsibility of a state, to ensure accountability for all actors in outer space.

2.2.6.4 Article VI contains a rule of attribution for responsibility

Based on the above analysis of Article VI, it is possible to conclude that it is a rule of attribution in the context of state responsibility. While Article VI indicates that "states bear international responsibility" for their national space activities, state responsibility still has to be determined by general aspects of international law.[350] Therefore, the elements of an internationally wrongful act still have to be established. Article VI merely imposes a positive rule of attribution which expands what can be classed as state conduct for the purpose of satisfying the attribution element.[351]

2.2.6.5 Article VI contains a lex specialis rule of attribution

It is also clear that Article VI of the OST is a *lex specialis* rule of attribution. The rules of attribution in general international law are contradictory towards the rules of attribution in article VI OST in relation to what can be attributed to a state. This can be seen by contrasting the

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[348] USSR, *Final Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,* UN Doc A/AC.105/C.2/L.13 (1966).
[349] Working Group (WG) L6, *Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,* UN Doc A/AC.105/25 Annex II (1966).
[350] Article VI Cologne Commentary, *supra* n 312 at 398, para 41.
[351] Milanovic, *supra* n 230 at 305.

approach in ARSIWA, which is primarily hostile to the conduct of private actors unless specific conditions are met[352], to Article VI of the OST, where private actors are attributed to the state automatically. This is therefore a case of a conflict between a general norm and a special norm that constitutes an exception to the general norm.[353]

The test for whether a rule is *lex specialis* in the context of international responsibility is whether there is "some actual inconsistency…or else a discernible intention that one provision is to exclude the other."[354] Establishing if this is the case is a matter of interpretation.[355] As seen from the interpretation above, both in relation to ARSIWA and Article VI, there is clearly an inconsistency as to how attribution is approached. The ILC also give four reasons which might indicate that a *lex specialis* does not apply: if prevalence of general law may be inferred from the form or nature of the general law or intent of the parties; if the application of special law may frustrate the purpose of the general law; if third party beneficiaries may be negatively affected by the special law and if the balance of rights and obligations, established in general law, would be negatively affected by the special law.[356] In the case of Article VI, none of these circumstances are met. There is no presumption that general law excludes special rules in ARSIWA.[357] A *lex specialis* rule of attribution also does not frustrate the purpose of general attribution in ARSIWA, as it merely expands the category of conduct for which a state can be internationally responsible. There is no effect upon third party beneficiaries nor an upsetting of the balances of rights and obligations. The states are the ones who will be held internationally responsible, which has no bearing upon the international obligations of the private actor.

[352] See ARSIWA, *supra* n 245 at Article 11.
[353] ILC Fragmentation Report, *supra* n 8 at 53-54.
[354] ARSIWA Commentary, *supra* n 231 at 140, para 4.
[355] Crawford, ARSIWA, *supra* n 295 at 880.
[356] ILC Fragmentation Report, *supra* n 8 at 10.
[357] Crawford, ARSIWA, *supra* n 295 at 880.

In relation to l*ex specialis* rules of attribution, there are two possibilities: it is possible that in a treaty states may adopt special rules of attribution regulating their relations with each other, which is a *ratione personae*. The other possibility is that there is a special rule of attribution in relation to a collection of primary rules, which is a *ratione materiae.*[358] Article VI is a clear example of the latter, as the attribution of private actors is in relation to compliance with the OST.[359] Therefore, it is possible to conclude that Article VI OST contains a *lex specialis* rule of attribution.

2.2.6.6 Article VI as a rule of international custom

In international law, there is potential for a treaty obligation to crystallise into a rule of customary international law.[360] In doing so, the obligations retain their individual character as sources of law under Article 38 (1)(a) of the Statute of the ICJ, while gaining the character of a customary rule of law under Article 38(1)(b) of the Statute of the ICJ.[361] However, crystallisation into a rule of customary international law means that the treaty obligation binds all subjects of international law, rather than just those party to the original treaty.[362] Article VI of the OST is such a norm: while it retains its character under Article VI OST, the obligation that states will bear international responsibility for their private actors and ensure compliance with applicable international law, through authorisation and supervision, while carrying out activities in outer space is a norm which has crystallised into international customary law.[363] This is not, however,

[358]Condorelli and Kress, *supra* n 202 at 227.
[359] *ibid*, which states that "the law relating to outer space has been identified as providing a particularly clear example, given the existence of the principle that renders the state responsible for all national activities in space in all circumstances, whether carried out by a private or governmental entity", at 227.
[360] NSCS, *supra* n 191 at para 71; *Continental Shelf (Libya v. Malta),* Judgment, [1985] ICJ Rep 13 at para 27 *[Continental Shelf]*; Jurisdictional Immunities, *supra* n 72 at para 55.
[361] Nicaragua, *supra* n 32 at 175.
[362]NSCS, *supra* n 191 at para 71.
[363] Frank Lyall and Paul Larsen, S*pace Law: A Treatise,* 3rd ed (Oxon: Routledge, 2024) at 64 *[Lyall and Larsen*].

an example of a treaty codifying custom, as the first commercial space activities occurred close to the entering into force of the OST[364] and far after when the drafting process of the OST began.[365] The claim made here is that Article VI OST has crystallised into a rule of customary international law and therefore extends to all subjects of international law, not just those who are party to the OST.

In order for a treaty rule to pass into a rule of customary international law, it is necessary that that rule is one of a " fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[366] This means that the norm must go beyond a mere agreement between the parties (i.e. not be of a contractual nature)[367] and be capable of general applicability. The rule in Article VI, that states are internationally responsible for their national space activities and thus must authorise and supervise these activities to ensure compliance with applicable law is of a general character. It creates universal norms, and therefore satisfies this requirement set out by the ICJ in the *North Sea Continental Shelf* cases.

To substantiate the claim that Article VI has crystallised into international custom it is necessary to prove state practice and *opinio juris*, the elements necessary to identify a rule of international custom.[368] It is appropriate to refer to states who conduct space activities and have national space legislation in order to establish custom, as these are the states who are "specially

[364] The first commercial satellite was launched in 1962. See for eg National Air and Space Law Museum, "Model, Communications Satellite, Intelsat" (last visited 13 November 2024), online: <https://airandspace.si.edu/collection-objects/model-communications-satellite-intelsat-i/nasm_A19750767000>.
[365] Talks on the OST began in 1957. The UNGA Resolution which became the basis of the OST (*Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, UNGA, 18th Sess, UN Doc A/5616 (1963) GA Res 1962 (XVIII)) was adopted in 1963.
[366] NSCS, *supra* n 191 at para 72.
[367] Bing Bing Jia, "The Relations between Treaties and Custom", (2010) 9:1 Chinese JIL 81, at 93.
[368] NSCS, *supra* n 191 at para 77. Continental Shelf, *supra* n 360 at para 27; Nicaragua, *supra* n 32 at para 183 and 207.

affected"[369] and those "taking [the relevant] action … [and] in a position to react to it."[370] State's national legislation can be used to evidence both state practice and *opinio juris*.[371]

By enacting national legislation to authorise and supervise their national space activities, and recognising national space activities to be territorial or personal in scope, therefore including private actors, this demonstrates both state practice and *opinio juris* that states consider these activities to be attributed to them.[372] States have implicitly taken on the role of being the 'appropriate state' and thus accepted the attribution and potential allocation of responsibility. Therefore, the vast number of states that have national space legislation which regulates their 'national space activities'[373] acts as evidence of both state practice and *opinio juris* that the rules in Article VI (all four obligations[374]) have crystallised into international custom.[375] See, for example, the Swedish Act on Space Activities 1982 Section 2; The UK Outer Space Act 1986 Sections 1 and 2; Australian Space (Launches and Returns) Act 2018 Part I Article 4; Chinese Order on Interim Measures on Launch Permits Section 2; Netherlands Space Activities Act 2006 Section 2; French Space Operations Act 2008, Article 1; Austrian Outer Space Act 2011, Section 1(1); Indonesian Space Act 2013, Section 5; Danish Outer Space Act 2016, Section 2; New Zealand's The Outer Space and High-altitude Activities Act 2017, Part 2, Article 7 and the Liechtenstein Act from 5th October 2023 on the Authorization of Space Activities and the

[369]NSCS, *supra* n 191 at para 74.
[370] Nicaragua, *supra* n 32 at para 109 and "Chapter V of the *Report of the Commission to the General Assembly on the work of its seventieth session"* (UN Doc A/73/10) in *Yearbook of the International Law Commission 2018,* vol 2, part 2 (New York: UN, 2018) at pg 129 at para 7 *[Draft Conclusions on the Identification of CIL]*.
[371] Arrest Warrant, *supra* n 187 at para 58; Jurisdictional Immunities, *supra* n 72 at para 70.
[372] Draft Conclusions on the Identification of CIL, *supra* n 370 at 134, para 6, citation 706 as evidence of the claim that one act can amount to both state practice and *opinio juris*.
[373] See, for eg Netherlands, *Space Activities Act of 24 January 2007*, s 2(2); Belgium, *Act on Space Activities of 17 September 2005*, s 2(2); *Sweden, Act on Space Activities* (1982:963), s 2 and France, *Space Operations Act No 2008-518 of 3 June 2008,* s 2(1), (2) for examples of states which regulate their private actors.
[374] See section 2.2.6.1, *above* for discussion of the separate obligations contained in Article VI OST.
[375] Frans von der Dunk, "The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law" (2011) 69:1 Space, Cyber, and Telecommunications Law Program Faculty Publications 1, at 8.

Registration of Space Objects Article 1. The consistent and representative practice across space-faring states that their national space activities include that of private actors satisfies the state practice element. In relation to *opinio juris,* the implementation into national law of the attribution rule demonstrates that states believe they are bound. The consistency of approach across states further indicates that states believe they are bound by this rule,[376] meaning that the element of *opinio juris* is satisfied.

There has also been no contradictory action in outer space, with all states taking responsibility for their private actors and thoroughly authorising and regulating their activities.[377] The absence of any practice contradicting this principle by states not party to the OST further supports the argument for the formation of a customary rule.[378] Instead, states who are not party to the OST have adopted national legislation to regulate their private actors in outer space, further evidencing that Article VI has crystallised into international custom. For example, Lichtenstein has neither signed nor ratified the OST,[379] but in January 2024 the Lichtenstein Space Act came into force, which regulates Lichtenstein's national space activities, including private actors.[380] As states other than those party to the OST are implementing Article VI into national legislation, this demonstrates that it has, in fact, risen to the level of binding international custom.

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[376] Thirlway, *supra* n 38 at 58-59: "the best evidence of opinio juris is actual practice consistently and generally followed."
[377] See for example: Federal Communications Commission, "Space Exploration Holding, LLC: Request for Orbital Deployment and Operating Authority for the SpaceX Gen2 NGSO Satellite System", online: <docs.fcc.gov/public/attachments/FCC-22-91A1.pdf> *[Starlink Licence]*, and the extensive requirements imposed upon Starlink.
[378] *Asylum Case (Colombia v Peru),* Judgment, [1950] ICJ Rep 266 at 277, where the ICJ found that inconsistency and fluctuation act as a bar to finding a rule of international custom.
[379] UNCOPUOS, "Status of International Agreements relating to activities in outer space as at 1st January 2024" (15 April 2024), online (PDF): <https://www.unoosa.org/res/oosadoc/data/documents/2024/aac_105c_22024crp/aac_105c_22024crp_3_0_html/AC105_C2_2024_CRP03E.pdf >
[380] UNCOPUOS, "Lichtenstein National Space Law", online (PDF): <https://www.unoosa.org/documents/pdf/spacelaw/sd/LIECHTENSTEIN_1601204.pdf>

Article VI's crystallisation into customary international law also means that it is capable of potentially influencing other rules of customary international law, based on its general application: specifically, the customary international law related to the formation of international custom and the interpretation of treaty provisions. It constitutes a *lex specialis* rule of attribution with general application. This potential will now be considered.

2.3 Attribution in Customary International Law

In Chapter 1, it was established that in order to form international custom, state practice is required. Chapter 1 focused primarily on *what* state practice looks like and the consequences that arise as a result of this in relation to the validity of international legal norms. However, a question which also arises is *who* can contribute to state practice. The question of *who* is answered by the legal procedure of attribution[381]: the state practice required for the formation of customary international law can only consist of "acts and conduct which is attributable to the state."[382] It should be noted from the outset that attribution in state responsibility and attribution in state practice are fundamentally different: the first relates to establishing an internationally wrongful act and the consequences which flow from such a finding, whereas the latter relates to entering into a legal obligation and therefore the substantive content of the obligation.

The natural meaning of state practice would focus on states: customary international law requires *state* practice, and not practice generally. The ICJ exclusively use the language of "state practice" as an element of custom[383], rather than "general practice," which is the language used

[381]Binder and Wittich, *supra* n 4 at 243.
[382] Condorelli and Kress, *supra* n 202 at 222.
[383] *Cf* Immunities, *supra* n 113 at para 69; NSCS, *supra* n 191 at para 74; Fisheries, *supra* n 190 at para 58; Nicaragua, *supra* n 32 at 186; Arrest Warrant, *supra* n 187 at para 58.

in Article 38 in the Statute of the ICJ.[384] In a recent restatement of the elements of customary international law, the Court stated that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States"[385]

It is a logical assumption that practice of the states only includes organs of the state: indeed, this is the approach taken by the ILC, who in 2018, held that "to qualify as state practice, the conduct in question must be "'of the State' meaning the conduct of 'any state organ.'"[386] In their draft conclusions on the identification of customary international law, Conclusion 4 states that 'the requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of states that contributes to the formation, or expression, of rules of customary international law… Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice [of states]."[387] Conclusion 5 states that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions."[388] This indicates a clear picture of what can be attributed to states: conduct of organs of the state. However, it is interesting to note that in Conclusion 4, the ILC use the language of "primarily", rather than "exclusively" : this means that non-state actors are not necessarily barred from contributing to customary international law.

This trend continues, with the ILC seemingly imputing the ARSIWA rules of attribution to assess what conduct can be considered to be state practice. This can be seen in the Second Report on Identification of Customary International Law, where Sir Michael Wood, the Special Rapporteur, stated that "as in other cases, such as state responsibility and subsequent practice in

[384]Statute of the ICJ, *supra* n 63 at Article 38.
[385] Jurisdictional Immunities, *supra* n 72 at para 55, citing Continental Shelf, *supra* n 360 at 29-30.
[386] Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 2.
[387] Draft Conclusions on the Identification of CIL, *supra* n 370 at 119.
[388] Draft Conclusions on the Identification of CIL, *supra* n 370 at 120.

relation to the interpretation of treaties, for practice to be relevant for the formation of customary international law it must be attributable to the state. For this purpose, the actions of all branches of Government (whether exercising executive, legislative, judicial or other functions) may be relevant."[389] While he makes explicit reference to the actions of branches of Government, he says that they "may" be relevant, not that they are the exclusive source of conduct. Sir Michael Wood also does not draw a distinction between the attribution used in state responsibility, subsequent practice for interpretation and state practice in customary international law. This implicitly indicates that the same standards of attribution apply across these areas.

Similarly, the ILC, in drafting the conclusions on the identification of customary international law explicitly refer to ARSIWA and the rules of attribution throughout, therefore approving a transferral of concepts from ARSIWA to customary international law. For example, in the 2018 commentaries to the draft conclusions, in the commentary to Article 5 (which uses the language of "of the state"), the ILC state that to qualify as state practice "the conduct of a person or entity otherwise empowered by the law of the state to exercise elements of governmental authority is also conduct 'of the State', provided the person or entity is acting in that capacity in the particular instance."[390]

This is a direct transfer of Article 5 ARSIWA, which allows for entities which are *not* state organs to be attributed as conduct of the state if they are exercising state authority. In a similar vein, in the same 2018 draft conclusions, in citation 699 to Conclusion 5 the ILC refers to Article 4 and 5 ARSIWA.[391] They use ARSIWA to supplement their own explanation of attribution, using it in a manner that suggests they see it as an authoritative source for reference.

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[389] *"Second Report on Identification of Customary International Law"* ILC, 66th Sess, UN Doc A/CN.4/672 (2014) at 17, para 34.
[390] Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 2.
[391] Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 2, citation 699.

It is not merely cited as an example; it is treated as a binding principle. This further evidences acceptance of a transferral of concepts from ARSIWA to attribution rules outside of state responsibility. This supports the argument that the ARSIWA rules of attribution acted as a "blueprint" for attribution across international law.[392] If the rules of attribution from ARSIWA are a blueprint, then it logically follows that all principles in relation to attribution are transferred: this includes Article 55, which permits for a *lex specialis* principle of attribution.

A wide acceptance of all ARSIWA rules of attribution in relation to the identification and formation of customary international law is further evidenced by ILC's acknowledgement of international organisations and the fact that they can contribute to the formation of international custom.[393] In the commentary to conclusion 4, the ILC states that the practice of international organisations assumes the most attributive value when it is "carried out on behalf of its member states or endorsed by them."[394] Similarly, in the preceding paragraph, the ILC stated that "the acts of private individuals may sometimes be relevant to the formation or expression of rules of customary international law, but only to the extent that states have endorsed or reacted to them."[395] Such wording is an implicit restatement of Article 11 ARSIWA, which allows that conduct, including that of private actors, can be attributed to a state "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[396] These commentaries also evidence the willingness of the ILC to accept that non-state actors have at least *some* influence in the formation of customary international law. The commentary could, therefore, be interpreted to mean that ILC accepted Article 11 ARSIWA as a rule of attribution in relation to state practice in the formation of international custom.[397]

[392] Binder and Wittich, *supra* n 4 at 250.
[393] Draft Conclusions on the Identification of CIL, *supra* n 370 at 119, Conclusion 4(2).
[394] Draft Conclusions on the Identification of CIL, *supra* n 370 at 131, para 7.
[395] Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 8.
[396] ARSIWA, *supra* n 245 at Article 11.
[397] Binder and Wittich, *supra* n 4 at 253.

Based on the transferral of concepts between the ARSIWA rules of attribution and what constitutes 'state practice' for the purposes of customary international law formation, it can therefore be reasonably assumed that this transferral extends to *lex specialis* rules of attribution, laid out in Article 55 ARSIWA. This means that in outer space, by virtue of Article VI, the conduct of private actors can be considered state practice for the purposes of customary international law. The application of ARSIWA rules of attribution in this context is troubling, as these principles were never designed to extend beyond state responsibility.[398] It challenges the theoretical foundation of international law (based on the will of states, as established in Chapter 1) when a broad range of actions and actors can be attributed to a state for the purpose of assuming obligations, particularly in the context of recognising state practice for the formation of customary international law.

2.4 Attribution in Interpretation

When discussing attribution in interpretation, it is predominantly in reference to 31(3)(b) and Article 32 of the VCLT, and interpreting treaty provisions in line with the "subsequent practice" of states party to the treaties. Chapter 1 considered *what* this subsequent practice could be: this section will now consider the role attribution plays in determining *who* can conduct subsequent practice.

In the case of interpretation, the role of attribution is slightly more straightforward than in the case of customary international law. This is because, on a purely linguistic analysis, the language of "subsequent practice" is used, rather than "state practice." There is no need to rebut the presumption that arises in customary international law that states are the only entity which

[398] ARSIWA Commentary, *supra* n 231 at 39, para 5.

can be considered. Additionally, the reasoning used in determining that ARSIWA's attribution has been transferred to attribution of state practice for the purpose of customary international law is very similar to that which will be applied here. Sir Michael Wood even suggested that rules of attribution which apply to customary international law are the same as those used in subsequent practice in interpretation.[399]

The approach to subsequent practice for the purposes of interpretation is widely understood as conduct which can be attributed to the parties of the treaty.[400] The ILC, in its work on subsequent agreements and subsequent practice in relation to interpretation of treaties, proposed in draft conclusion 5 that subsequent practice 'may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.'[401] As was the case in the ILC's draft conclusions relating to the identification of customary international law, in their conclusions regarding subsequent agreements and subsequent practice in relation to interpretation of treaties, they borrow phraseology from ARSIWA's rules of attribution. In relation to subsequent practice, the ILC even states that "the term "any conduct" encompasses actions and omissions and is not limited to the conduct of organs of a state, but also covers conduct which is otherwise attributable, under international law, to a party to a treaty."[402] Thus, the same transferral of concepts as was established in relation to custom occurs in relation to interpretation and subsequent practice.

This approach has been reflected in international jurisprudence. In Case A16 in the Iran-US claims tribunal, the arbitral tribunal rejected the assertion that settlements between American and Iranian banks could be viewed as subsequent practice in interpretation of a treaty

[399] Second Report on CIL, *supra* n 376, at 17, para 34.
[400] Gardiner, Treaty Interpretation, *supra* n 136 at 266; Dörr and Schmalenbach, *supra* note 107 at 556, para 88.
[401] "Report of the International Law Commission on the work of its sixty-fifth session", (UN Doc A/68/10) *in Yearbook of the International Law Commission 2013,* vol 2, part 2 (New York: UN, 2013) at Chapter 4, page 42 para 2. This was then reaffirmed in ILC Report on the Sixty-Eighth Session, *supra* n 151 at 149.
[402] ILC Report on the Sixty-Eighth Session, *supra* n 151 at 149.

because, although the Iranian bank Markazi was an entity of the Iranian state, the US banks were not entities of the US and therefore could not be attributed to them.[403] This shows that the transfer of attribution rules is widely accepted, even across international jurisprudence. As a result, Article 55, which permits *lex specialis* rules of attribution, also applies. In the context of outer space, this means that the conduct of private actors can be attributed to states and thereby used to interpret provisions of the space treaties. As is the case with state practice in customary international law, the extension of ARSIWA rules of attribution raises significant concerns, as it permits a broader class of actors, including non-governmental entities, to determine the scope of obligations imposed on states. This dynamic risks exacerbating a democratic deficit by having states bound by obligations which they did not themselves enter into. This issue is further intensified under Article 32 VCLT, where no agreement from other states is required to use state practice for interpreting a provision.[404] This allows the actions of private actors to influence the interpretation of the OST, even without the consent of non-spacefaring states, creating a significant democratic deficit. The broad and general provisions of the OST amplify this problem, as they leave much open to be interpreted and thus creating uncertainty, which allows for Article 32 to be engaged.[405]

2.5 Conclusions from Chapter 2

Combining this conclusion reached in relation to interpretation with the conclusion reached in relation to Article VI's influence on state practice in the formation of customary international law, it is possible to see that private actors have the capability to significantly

[403] *Case A16 USA v Iran*, Iran-US Claims Tribunal, 5 Iran–US Claims Trib Rep 57, at 62–64 and 70–71.
[404] See section 1.2.4.3, *above*.
[405] Paul Dembling & Daniel Arons, "The Evolution of the Outer Space Treaty"(1967) 33:1, J Air L & Comm, 419 at 456.

influence the formation and interpretation of international law. The importation of ARSIWA's rules of attribution to state practice in international law generally is what has allowed this influence to take root: this importation is extremely undesirable. As Article VI OST can be considered a *lex specialis* rule of attribution, it can then be extended to interpretation and formation of international space law, by virtue of Article 55 of ARSIWA, which has been imported to other areas which involve the practice of states. The application of Article VI beyond international responsibility creates a democratic deficit as these actors do not represent the international community, nor do they represent the interests of the nationals of the state which they can be attributed to. This influence has the potential to exclude new actors from the sector, particularly developing states, as the rules surrounding international space law become more lax and allow private actors to use outer space irresponsibility, under the influence of private actors. This potential will be fully analysed in the following chapter.

Chapter 3: Application to International Space Law: conclusions, normative issues and recommendations

This thesis has considered the basis for validity in international legal rules, the exponential value of state practice in international law, the changing subjects doctrine, the role of democracy in international law and rules of attribution in state responsibility, interpretation of treaty law and the formation of customary international law. At a first glance, these areas of international law seem to have little in common. However, all of these considerations have a meeting point - Article VI of the OST. Each of the areas examined in this thesis rest against the backdrop of international space law. International space law provides a unique perspective on international law, calling into question many of the well-established theoretical and practical principles which exist in international law.

The reason for this calling into question is Article VI of the OST, which attributes the conduct of private actors, when carrying out space activities, to the state.[406] This rule of attribution marks a significant deviation from the general rules of attribution contained in international law.[407] Traditionally, rules of attribution mirrored the traditional doctrine of subjects, which exclusively encompassed states. The reason for this narrow approach was where international law derived its normative character: the will of states. States are the entity which international law revolves around, and therefore the international legal system is one which is catered to their specific needs and actions.[408] In 1967, when the OST came into force, the rule attributing the conduct of private actors to states was radical and significantly different to anything which existed in international law. This deviation can be explained in reference to the

[406] See section 2.2.6, *above*.
[407] See section 2.2.6.5, *above*.
[408] See, for eg Alston, *supra* n 212 at 3; Higgins, *supra* note 27 at 39.

circumstances of the conclusion of the OST, the ultrahazardous nature of space activities (because of orbital velocity and debris cascade, among other things)[409] and the desire for sustainable and responsible uses of outer space.[410]

However, the rule of attribution contained in Article VI also has bearing upon other areas of international law beyond a state's international responsibility.[411] This is where the discrepancies begin, and the issues which this thesis seeks to highlight. The dividing line between rules of attribution has dissolved over time, meaning that the rules of attribution contained in ARSIWA, which were originally designed to apply exclusively to state responsibility, have been adopted as rules of general application. In particular, recent years have shown the willingness to import ARSIWA's attribution rules to determine what constitutes 'state practice', for the purpose of customary international law formation and subsequent practice in treaty interpretation.[412] ARSIWA's approach to attribution is wide, including the possible attribution of private actors conduct. The importation of these rules has resulted in what can be considered 'state practice' for norm formation and interpretation being significantly widened. When Article VI is applied as a *lex specialis* rule of attribution, 'state practice' is widened even further, with all private space activities carried out being capable of establishing norms and altering existing ones.[413]

Private actors' conduct being considered as state practice is also problematic as it contributes to a growing democratic deficit in international space law. This is because private actors have different motivations from states and different interests, therefore meaning that their conduct is not representative of the international community as a whole. States are those who

[409] See section 3.1.2.1, *below* for full discussion on why space activities are ultrahazardous in nature.
[410] See section 2.2.6.1, *above*.
[411] See sections 2.3 and 2.4, *above*.
[412] See specifically Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 2, citation 699 and ILC Report on the Sixty-Eighth Session, *supra* n 151 at 149.
[413] See sections 2.3 and 2.4, *above*.

will be bound by the norms which private actors have the potential to establish and determine the scope of: it is therefore not fair that private actors can form such significant influence. This is particularly true in light of the concentrated number of states who have private actors in space currently, who do not reflect the interests of developing states who may potentially be barred as new entrants to the sector on account of these norms formed by private actors[414]: a democratic deficit is thus created. Taking into account the sustainable development of outer space and ensuring the freedom of use and exploration of outer space, the process discussed above, in relation to the private actors, seriously undermines the purpose of outer space and the theory of international law as a whole.

The conclusions explained above are those which can be reached through analysis of the *lex lata*, drawn from the discussions throughout Chapter 1 and 2. However, normative considerations also are significant: thus, this section will now consider the issues which arise in relation to the current approach, *lex ferenda* and future considerations in international space law.

3.1 Non-state actors and legal personality

The questions raised in relation to private actors and their status in the international legal system by Article VI fall into predominantly two categories: questions about the legitimacy of private actors having a law-making role, and the difference between direct and indirect lawmaking (and where state practice falls).

[414] Lyall and Larsen, *supra* n 363 at 60.

3.1.1 Law-making as a concept

There is no doubt that the doctrine of sources is traditionally statist.[415] This is because states are, traditionally, the sole entity with rights, obligations and the capacity to enforce international law. The classic positivist conceptions of international law based on state consent derive the validity of international law from the consent of who it governs,[416] and given this is states, sources of international law tend to focus on this. As states, traditionally, are the only subjects of international law, they thus should be the only entities capable of creating the laws by which they are bound.[417]

As described above, some argue that the doctrine of subjects is changing. With this change, where non-state actors are held to obligations under international law, there are questions as to whether they should also then be considered in making international law.[418] However, this thesis does not seek to disagree with the traditional positions that states create international law or that nonstate actors are not subjects of international law: such considerations of the changing scope of the subjects doctrine lay beyond the scope of this thesis.

This thesis merely asserts that by virtue of the Article VI rule of attribution, private actors can form state practice, for the purpose of interpretation and custom. Article VI does not raise issues in terms of the traditional position of the doctrine of sources because the OST does not bestow obligations on non-state actors. It bestows obligations upon a state, who has to ensure compliance with the provisions of the OST by its private actor. The source of the obligation that a private actor is bound by comes from the internal law of the state, not international law. As

[415]Roberts and Sivakumaran, Lawmaking, *supra* n 94 at 109.
[416] See Dworkin, *supra* n 30 at 5, for discussion of the role of consent in positivist legal thought. See for eg David Lefkowitz, "The Sources of International Law: Some Philosophical Reflections" in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford, University Press, 2010) 187 at 193.
[417] Roberts and Sivakumaran, Lawmaking *supra* n 94 at 109.
[418] Ochao, *supra* n 89 at 122. See also *ibid*, at 150

stated by Kelsen,"international law imposes obligations on, and grants rights to, individual human beings indirectly, mediated by the state legal system."[419]

Therefore, this does not challenge the traditional position in relation to non-state actors' legal status. However, if private actors are not bound by the provisions of the OST, then this throws their influence over the formation and interpretation of the OST into further question. If they were bound by the OST, it would be legitimate to consider their voices in the determination of the content of those rules.[420] However, states are the only entity bound by the OST, meaning that private actors' ability to influence the formation and interpretation of international space law draws the legitimacy of the law into question.

3.1.2 Direct versus indirect interpretation and formation

In order to reach a conclusion as to the legitimacy of the involvement of private actors in the interpretation and formation of international law, let us consider if they can actually be considered as a law maker. Some "recognise the importance of nonstate actors and their influence without suggesting that they have achieved the role of lawmaker."[421]

The influence of private actors can be considered through an examination of the difference between direct and indirect influence upon interpretation and formation. The practice can be considered indirect if it influences the national legislation, which then counts as state practice. It is well established that the enactment of national rules is how states comply with their duty to ensure conformity on the part of their private actors with the provisions of the OST.[422]

[419] Kelsen, *supra* n 21 at 110.
[420] Klabbers, Recognition, *supra* n 5 at 354-55.
[421] Clapham, *supra* n 222 at 28-29.
[422] Article VI Cologne Commentary, *supra* n 312 at 430, para 84.

This is a widely accepted to be permissible,[423] for the reasons discussed above regarding the nature of the doctrine of subjects.

However, when discussing the importation of ARSIWA rules of attribution to state practice in customary international law formation and treaty interpretation, the influence exerted by private actors in international space law is not of the indirect type. It is a direct influence, where their practice is considered, regardless of the fact that they themselves are not bound by the obligations which arise from the OST. This creates a democratic deficit, because the private actors are not representative of those who are bound by the obligations, given their difference in motivations from that of a state.

3.1.2.1 Private actors' direct influence

As there has been no concrete application of the OST as of yet, the exact manner in which Article VI applies, as a *lex specialis* rule of attribution, is uncertain. However, the application of Article VI to the interpretation and formation of international space law generally has two possible interpretations.

The first interpretation allows for Article VI to be exported as a *lex specialis* rule of attribution across international law. This adopts the approach discussed above in relation to the transferral of ARSIWA's rules of attribution to determining state practice for the purposes of customary international law formation and treaty interpretation. This approach allows for private actors to be considered state practice, for the purposes of interpretation and formation of international space law. It involves collapsing the "broad" and "narrow" notions of attribution.[424] Attribution can be considered in the same manner across international law, regardless whether

[423] See for eg Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016) at 121.
[424] Kajtár, *supra* n 239 at 283.

the conduct being attributed is to be used to determine the scope of an obligation or to engage international responsibility: attribution can be subsumed into a general set of "tests and principles."[425] In both the Draft Conclusions on the Identification of Customary International Law and the Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, the ILC continually refer to ARSIWA and cite them in a manner which suggests they are authoritative.[426] In this sense, ARSIWA acted as the "blueprint" for attribution across international law.[427] Based on this, you could reasonably assume the rule of *lex specialis*, contained in Article 55 of ARSIWA, can also be imputed. Therefore, applying Article VI, in the formation and interpretation of international space law, private actors' conduct can be considered as part of the state practice of the state to which it is attributed.

The issue with this approach is that it fails to acknowledge the differing contexts in which attribution applies: attributing conduct for the purpose of entering into an obligation or determining the scope of it is very different to attributing conduct to bring about the legal consequences which arise with state responsibility. Thus, while this approach avoids the fragmentation of rules of attribution, it requires collapsing the doctrine of subjects and legal personality: private actors can form and interpret obligations of international space law, but without being bound by such obligations. This does not therefore provide a cohesive approach to international legal theory. It also risks creating a significant democratic deficit, particularly given the broad provisions of the OST and their need for interpretation. Under Article 32 VCLT, which does not require agreement from all state parties, the actions of private actors used as state practice, for the purposes of interpretation, could shape the OST's obligations to serve interests

[425] De Stefano, *supra* n 229 at 1.
[426] See specifically Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 2, citation 699 and ILC Report on the Sixty-Eighth Session, *supra* n 151 at 149.
[427] Binder and Wittich, *supra* n 4 at 250.

that conflict with those of the broader international community in outer space. In this sense, the transferral of ARSIWA rules of attribution across general international law is undesirable.

The second argument refines Article VI to its specific context, as a rule of attribution for the purposes of international responsibility. Article VI is a *lex specialis* rule of attribution. However, it is a *lex specialis* rule of attribution in relation to the *responsibility* of states, given the specific wording of Article VI. To use Kajtár's distinction, it is a narrow rule of attribution and therefore has no application outside of international responsibility.[428] It therefore cannot be used to attribute conduct in cases of entering into obligations or interpreting provisions, and private actors cannot form or interpret norms of international space law. This approach properly acknowledges the different reasons why conduct can be attributed,[429] remaining true to the traditional doctrine of sources and the source of validity of international law being state practice. However, even if the conduct attributed to states for the purposes of responsibility under Article VI cannot be considered to form and interpret norms of international space law, this does not mean that the actions of private actors cannot be considered in form normation and interpretation. Article VI, accepted as a rule of international custom, arguably evidences that a state has "acknowledged and adopted" the conduct as its own, therefore meaning the conduct can be attributed to it by virtue of Article 11 ARSIWA. Article 11 ARSIWA has explicitly been endorsed by the ILC as applying to both custom formation and subsequent practice for the purpose of treaty interpretation.[430]

Authorisation and supervision, along with the Article VI attribution in the case of international responsibility, demonstrate an acceptance and endorsement of the conduct of

[428] Kajtár, *supra* n 239 at 283.
[429] Condorelli and Kress, *supra* n 202 at 223.
[430] See Draft Conclusions on the Identification of CIL, *supra* n 370 at 132, para 8; Binder and Wittich, *supra* n 4 at 253.

private actors by a state. This is because the manner in which the private actor acts is directed by the national legislation or regulation mechanism of the state. The state, by directing the action of private actors through its regulation, endorses that action. Therefore, the conduct of private actors can be attributed to the state through Article 11 ARSIWA and have an ability to form and interpret international space law, even if Article VI's application is restricted to its specific context.

However, the acknowledgement that there are different rules of attribution for different purposes raises issues in and of itself, in terms of the fragmentation of international law. Kajtár illustrates this possibility by reference to *jus ad bellum* standards of attribution as compared to ARSIWA. He explains that there may be some situations in which state responsibility is engaged, but no armed attack has occurred.[431] However, while this does lead to a fragmentation of approach, it is not necessarily problematic. *Jus ad bellum* is a specific subset of international law, and a different rule of attribution is permissible in order to achieve the purpose for which the law exists. The second approach explained above is more cohesive in terms of international law and a truer reading of the intentions of the parties when drafting the OST, and so a preferable approach, if one has to be taken between the two. Often discussions which revolve around fragmentation fail to properly consider the *need* for *lex specialis* alongside the effect of fragmentation which it creates. When a simple system of law, or a subset of a body of law, is the subject of discussion fragmentation is an issue. However, international law requires a certain nuanced approach, because it deals with such a variety of subject matters. The fact that international law exists as a system in order to govern the relations between states means that when these relations occur in a specific context, international law has to take account of that.

[431] Kajtár, *supra* n 239 at 300.

The issue is that both of these perspectives allow for private actors to influence formation and interpretation, which is not cohesive with international theory nor desirable democratically. State practice in the context of customary international law concerns the "development of a new norm of international law" - this development may impose a new obligation upon other states, modify an existing one, or grant a state a right.[432] Similarly, the interpretation of a treaty involves determining its true meaning.[433] These undertakings all directly involve the consent of the states and limit their freedom to act: therefore, the stakes of whether non-state actors can be considered as part of this state practice pertains to the validity of international law as a whole. As discussed in Chapter 1, international law gains its validity from the will of states, both through their internal perception and their external action. Therefore, rules created by non-state actors have the potential to not have normative force, until states themselves engage in the practice being established. This is an illogical process: the 'law' created by non-state actors would essentially have no real effect, until the elements of state practice and *opinio juris* can be found in relation to states as well.

The widening of state practice in formation and interpretation to include non-state actors, as can be discerned from the ILC's recent conclusions, is therefore not a desirable development of international law. The involvement of non-state actors creates a democratic deficit, in terms of broad democratic principles, as it fails to represent the interests of the international community. It also creates a democratic deficit in terms of procedural democracy: states should, in theory, represent their nationals (as determined by the internal mechanisms). However, a private actor does no such thing: they therefore create a democratic deficit in the narrow conception as well.

[432] Binder and Wittich, *supra* n 4 at 246.
[433]Dörr and Schmalenbach, *supra* note 107 at 522.

Additionally, as the space industry continues to expand, the sheer volume of state practice is also going to increase. It is likely that the pattern of behaviour will begin to diverge between actors. Considering private actors as part of this means that an even wider range of actions will need to be considered, as the practice of private actors is unlikely to align with that of states. Jennings, in relation to the law of sea, remarked "how could one conceivably extract adequate rules concerning passage, or the powers of coastal States, from the great body of practice that the daily passage of ships in their millions represents?"[434] Thinking practically, this is a valid point to consider in relation to including private actors as state practice for the purpose of norm formation and interpretation. Especially when one considers how different the interests of private actors are to the interests of states, the divergence of action is likely to be great.

The issues which arise in relation to Article VI beg the question - should Article VI be reinterpreted to exclude private actors' behaviour from being attributed to the state? Some have indicated this perspective, arguing that in a changing global landscape it is not appropriate for states to continue to have private actors attributed to them.[435]

However, if private actors were to be discharged from a state's international responsibility, there would be no incentive for a state to ensure that entity to comply with the OST and no incentive for a private actor to comply with the provisions of international law. Outer space would become inundated by private actors, who have no regulation as outer space is an area beyond national jurisdiction, but also have no obligation to follow international law, therefore undermining the sustainable and responsible use of outer space and cutting acrossing the purpose of the OST.

[434] Jennings, *supra* n 74 at 37.
[435] Christian Robison, "Changing Responsibility for a Changing Environment" (2020), 5:1 U Bologna Rev 1, at 2-5.

If Elon Musk can launch 12,000 satellites into LEO *with* the US having international responsibility for this, one cannot imagine what he would do without the accountability imposed by state involvement. Already, it is possible to see a weakening of what was intended by Article 1 through the interpretation by the US. The US have authorised SpaceX to launch more than 12,000 satellites into low-earth orbit.[436] Currently, there are just over 10,000 satellites in orbit: Starlink makes up roughly 6500 of these.[437] Given that 600 satellites are sufficient to provide global internet,[438] the authorisation of this vast number of satellites into low-earth orbit cuts against the purpose of Article I of the OST. As the number of satellites, particularly in low earth orbit (LEO), increases, the orbit will become congested and potentially unusable for future generations. The increased number of satellites in LEO also increases the likelihood of collisions occurring, which could lead to the Kessler Effect. Therefore, the US, while on the face of its actions seem to be complying with their obligation to properly authorise and supervise, are acting against the interest of other states, and not using space in a sustainable manner. The US is a powerful space actor, and therefore their interpretation has the potential to shape the scope of the OST (if there is no explicit disagreement voiced by other states).[439] If the actions of private actors were to be considered, alongside states, this trend of weakening what was intended by Article I would surely continue. The interests of private actors cut against the OST, as the reconciliation of economic gain and sustainable use of space is difficult. SpaceX is just one

[436] Starlink Licence, *supra* n 377 at para 19.
[437] Jonathan McDowell, "Satellite and Debris Population: Last Decade" (Last updated 27th October 2024), online (website): < https://planet4589.org/space/stats/acdec.html>
[438] JASON, "The Impacts of Large Constellations of Satellites" (Last updated January 21st 2021), online (PDF): <https://www.nsf.gov/news/special_reports/jasonreportconstellations/JSR-20-2H_The_Impacts_of_Large_Constellations_of_Satellites_508.pdf>.
[439] See Chapter 1 section 1.2.4.3, on the requirement of 'agreement.'

private actor, and yet requested permission to launch more than 40,000 satellites into LEO.[440] This shows a blatant disregard for the provisions of the OST, particularly Article I and IX.

Article VI was intended to prevent private actors monopolising outer space and acting in an irresponsible manner which would make outer space dangerous or even unusable. The democratic deficit created by the role of private actors in state practice by virtue of Article VI is a lesser evil than what would be the case if private actors were excluded from international space law altogether. This marks the difference between theory and reality: while Article VI creates theoretical issues in terms of international law, its attribution of private actors to states is the best possible outcome to ensure that outer space can be used in a sustainable and responsible manner.

3.2 Conclusion

In conclusion, the question *'is the growing influence of private actors in outer space on the formation and interpretation of international law creating a democratic deficit?*' can be answered in the affirmative. This conclusion has been reached through examination of each of the sub-questions laid out. Initially, in Chapter 1, it was established that rules of international law gain their normative value through the will of states, which acts as a rule of recognition. The will of states acts as a rule of recognition because all international law derives from states, and their actions and internal attitudes towards these actions are used across the system of law to form and interpret rules of law. Chapter 2 concluded that state practice, in the context of international space law, can include private actors by virtue of Article VI OST, which is accepted as a rule of international custom and therefore binding on all states. The rules of attribution in ARSIWA

[440] Tereza Pultarova and Elizabeth Howell, "Starlink Satellites: Facts, tracking and impact on astronomy" (27th September 2024), online (website), <https://www.space.com/spacex-starlink-satellites.html>.

have been exported to establish state practice across international law, particularly when establishing state practice for the purpose of international custom and subsequent practice for the purpose of treaty interpretation. This export means that, by virtue of Article VI, private actors can form state practice in outer space, both contributing to the formation of custom and the interpretation of the OST.

Chapter 3 then established that this is an undesirable development as it has created a democratic deficit: the interests of private actors do not reflect the international community as a whole, private actors are not representative of the nationals of a state, and private actors are not bound by the obligations which they then help create. Not only does the importation of ARSIWA rules of attribution to the formation and interpretation of international law have undesirable practical effects, it also undermines the theoretical basis of international law. If the rule of recognition can be considered the will of states, as Chapter 1 argues, any law created or interpreted by private actors will not have normative value until the actors' corresponding state acts or reacts. This is an ineffective system of law and underscores the need for reconsidering how ARSIWA rules of attribution are applied.

However, this raises a critical question: how should these rules be adapted to address these issues without creating further problems? Reinterpreting Article VI of the Outer Space Treaty to exclude private actors being attributed to states would yield consequences far worse than the current democratic deficit it creates, making such a reconsideration both impractical and undesirable. Instead, the focus should shift to refining the application of the ARSIWA rules on attribution within international law. These rules should be confined to the realm of state responsibility and not extend to 'state practice' in forming and interpreting international legal norms. While this refinement may seem desirable in theory, achieving it in practice presents

significant challenges. The interpretation of Article VI, particularly through evolving state practice, will ultimately determine its broader implications for what can be included as state practice in international law. The future alone will reveal whether a balance can be struck between addressing the democratic deficit and maintaining the practical functioning of international space law.

Bibliography

Legislation

International

Constitution of the International Telecommunication Union (22nd December 1992) 1825 UNTS 143, UN Reg No I-31251

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (10 December 1984), 1465 UNTS 85

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

The Antarctic Treaty, 1 December 1959, 5778 UNTS 402

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205

Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993

United Nations Convention on the Law of the Sea , 10 December 1982, 1833 UNTS 397

Vienna Convention on the Law of Treaties, 23 May 1969, 1115 UNTS 331

Domestic

Act on Space Activities (1982:963), Sweden

Foreign Sovereign Immunities Act of 1976, 28 USC § 1602-1611(US)

Free Trade Agreement, EU and the Republic of Korea, 16 October 2010, OJ L 127, 14.5 6

Space Activities Act of 17 September 2005, Belgium

Space Activities Act of 24 January 2007, Netherlands

Space Affairs Act 84 of 1993, South Africa

Space Operations Act No 2008-518 of 3 June 2008, France

State Immunity Act 1978 (UK)

State Immunity Act, RSC 1985, c S-18 (Canada)

Jurisprudence

PCIJ

German Settlers in Poland, Advisory Opinion, (1923) PCIJ (ser B) No 6

The Case of the S.S. "Lotus" (France v Turkey) (1927) PCIJ (Ser A) No 10

ICJ

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, [2007] ICJ Rep 4

Arrest Warrant of 11 April 2000 (Congo v Belgium), Judgment, [2002] ICJ Rep 3

Asylum Case (Colombia v Peru), Judgment, [1950] ICJ Rep 266

Avena and Other Mexican Nationals (Mexico v United States) [2004] ICJ Rep 12

Barcelona Traction, Light and Power Company, Limited (New Application) (Belgium v Spain), Judgment, [1970] ICJ Rep 3

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, [1986] ICJ Rep 14

Case Concerning the Territorial Dispute (Libya v Chad), Judgment, [1994] ICJ Rep 6

Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, [1962] ICJ Rep 151

Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, [1950] ICJ Rep 4

Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, Advisory Opinion, [1960] ICJ Rep 150

Continental Shelf (Libya v. Malta), Judgment, [1985] ICJ Rep 13

Corfu Channel Case (United Kingdom v Albania), Merits, [1949] ICJ Rep 4

Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, [2009] ICJ Rep 213

Fisheries (UK/Norway) Judgment, [1951] ICJ Rep 116

Immunities and Criminal Proceedings (Equatorial Guinea v France), Judgment, [2020] ICJ Rep 499

International Status of South-West Africa, Advisory Opinion, [1950] ICJ Rep 128

Jurisdictional Immunities of the State (Germany v. Italy), Judgement, [2012] ICJ Rep 99

Kasikili/Sedudu Island (Botswana/Namibia), Judgment, [1999] ICJ Rep 1045

LaGrand (Germany v United States) [2001] ICJ Rep 466

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep 136

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, [1996] ICJ Rep 66

Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, [1996] ICJ Rep 226

North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), [1969] ICJ Rep 3

Oil Platforms (Iran v United States), Merits, [2003] ICJ Rep 161

Pulp Mills on the River Uruguay (Argentina/ Uruguay), Judgment, [2010] ICJ Rep 14

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, [1949] ICJ Rep 174

Rights of US Nationals in Morocco, Advisory Opinion, [1952] ICJ Rep 176

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) [2002] ICJ Rep 625

United States Diplomatic and Consular Staff in Tehran (US v. Iran), Judgment, [1980] ICJ Rep 3

Whaling in the Antarctic (Australia v Japan: New Zealand Intervening), Judgment, [2014] ICJ Rep 226

Miscellaneous

Al-Saadoon and Mufdhi v United Kingdom, No 61498/08, [2010] IV ECHR 128

Brita GmbH v Hauptzollamt Hamburg-Hafen, C-386/08, [2010], ECR I‑1289

Case A16 USA v Iran, Iran-US Claims Tribunal, 5 Iran–US Claims Trib Rep 57

China –Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Complaint by US) (2009), WT/DS363/AB/R

Japan – Taxes on Alcoholic Beverages II (1997), WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 10-12 (Appellate Body Report)

Parking Privileges for Diplomats (1971) 70 ILR 396

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion), (2011) International Tribunal on the Law of the Seas (Seabed Disputes Chamber), (2011) ITLOS Rep 10

Russian Indemnity (Russia v. Turkey) (1912) Arbitral Award, 11 RIAA 421

United States Federal Reserve Bank of New York v Iran, Bank Markazi Case A 28, (2000) Iran US Claims Tribunal, 36 Iran-US Claims Tribunal Rep 5

Secondary materials

Books

Alston, Philip ed, *Non-state Actors and Human Rights* (Oxford: Oxford University Press, 2005)

Austin, John *The Province of Jurisprudence Determined*, Wilfred Rumble ed (Cambridge: Cambridge University Press, 1995)

Barret, Jill and Jean-Pierre Gauci, eds, *British Contributions to International Law, 1915-2015: An Anthology Set* (Leiden: Brill Nijhoff, 2020)

Bedjaoui, Mohammed ed, *International Law: Achievements and Prospects* (Dordrecht: UNESCO and Martinus Nijhoff, 1991)

Besson, Samantha and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010)

Blokker, Niels M and Nico Schrijver, eds, *The Security Council and the Use of Force: Theory and Reality - A Need for Change* (Netherlands: Martinus Nijhoff, 2005)

Byers, Michael and Georg Nolte eds, *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003)

Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, 1st ed (Cambridge: Cambridge University Press, 2006)

Crawford, James *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019)

Crawford, James et al, eds, *The Law of International Responsibility* (Oxford: Oxford University Publishers, 2010)

Crawford, James, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014)

D'Amato, Anthony *The Concept of Custom in International Law*, (New York: Cornell University Press, 1971)

Danilenko,Gennady *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993)

de Stefano, Carlo *Attribution in International Law and Arbitration*, (Oxford: Oxford University Publishing 2020)

Dörr, Oliver and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties : A Commentary*, 2nd ed (Berlin, Germany: Springer, 2018)

Dumberry, Patrick *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016)

Evans, Malcolm ed, *International Law* 3rd ed (Oxford: Oxford University Press, 2010)

Evans, Malcolm ed, *International Law*, 5th ed (Oxford: Oxford University Press, 2018)

Fastenrath, Ulrich et al, eds, *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011)

Finnis, John M *Fundamentals of Ethics* (Washington DC: Georgetown University Press, 1983)

Finnis, John *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011)

Froehlich, Annette and Vincent Seffinga, eds, *National Space Legislation : A Comparative and Evaluative Analysis* (Switzerland: Cham, 2018)

Hart, Herbert L. A., *The Concept of Law,* 2nd ed (Oxford: Oxford University Press, 1994)

Higgins, Rosalyn *Problems and Process: International Law and How We Use It*, (Oxford: Oxford University Press, 1994)

Hobe, Stephan et al, eds, *Cologne Commentary on Space Law* (Berlin: BWV Berliner Wissenschafts-Verlag, 2017)

Hoffmann, Florian and Anne Orford (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016)

Hofmann,Rainer ed, *Non-State Actors as New Subjects of International Law* (Berlin: Duncker & Humbolt, 1999)

Hollis, Duncan B ed, *The Oxford Guide to Treaties*, 2nd ed (Oxford: Oxford University Press, 2020)

Honderich, Ted ed, *Morality and Objectivity : A Tribute to J. L. Mackie* (Boston: Routledge, 1974)

Gardiner, Richard *Treaty Interpretation*, 2nd ed (Oxford: Oxford University Press)

Johns, Fleur ed, *International Legal Personality* (Oxford: Routledge, 2010)

Kajtár, Gábor, Başak Çali and Marko Milanovic, eds, *Secondary Rules of Primary Importance in International Law: attribution, causality, evidence and standards of review in the practice of international courts and tribunals*, (Oxford: Oxford University Press, 2022)

Kelsen, Hans *Introduction to the Problems of Legal Theory,* translated by Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon, 1992)

Kelsen, Hans *Principles of International Law* 2nd ed by Robert Tucker (New York: Holt, Rinehart and Winston, 1966)

Lachs, Manfred *The Law of Outer Space: An Experience in Contemporary Law-Making* 2nd ed by Tanja L Masson-Zwan and Stephan Hobe (Leiden: Martinus Nijhoff Publishers, 2010)

Lyall, Frank and Paul Larsen, S*pace Law: A Treatise,* 3rd ed (Oxon: Routledge, 2024)

Markesinis, BS and JHM Willems Eds, *The Cambridge-Tilburg Law Lectures, Third Series 1980* (The Hague, The Netherlands: Kluwer, 1983)

Max Planck Encyclopedias of International Law (online), *Max Planck Encyclopedia of Public International Law,* "Consent" (Oxford, Oxford University Press, 2022)

McNair, Arnold *The Law of Treaties*, (Oxford: Clarendon Press, 1961)

Nijman, Janne *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law,* (The Hague: TMC Asser Press, 2004)

Nolte, George ed, *Treaties and Subsequent Practice* (Oxford: OUP, 2013)

Oppenheim, Lassa *International Law; a Treatise*, 8th ed by Hersch Lauterpacht (London, UK: Longmans, Green, 1955)

Petman, Jarna and Jan Klabbers, eds, *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (Leiden: Martinus Nijhoff, 2003)

Sinclair, Ian *The Vienna Convention on the Law of Treaties* 2nd ed (Manchester: Manchester University Press, 1984)

Shaw, Malcolm *International Law*, 8th ed (Cambridge: Cambridge University Press, 2017)

Thirlway, Hugh *International Customary Law and Codification : An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff,1972)

van Hoof, GJH *Rethinking the Sources of International Law*, (Netherlands: Kluwer Law and Taxation Publishers, 1983)

Villiger, Mark *Commentary on 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009)

Virally, Michel ed, *Le Droit International Au Service de La Paix, de La Justice et Du déVeloppement* (Paris: A. Pedone, 1991)

von der Dunk, Frans & Fabio Tronchetti, eds, *Handbook of Space Law* (Cheltenham: Edward Elgar Publishing 2015)

Von der Dunk, Frans ed, *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in Light of Developments in European Space Cooperation,* (Leiden: Martinus Nijhoff Publishers, 2011)

Weatherall, Thomas *Duality of Responsibility in International Law: the individual, the state and international crimes* (Leiden, The Netherlands: Brill, Nijhoff, 2022)

Zimmermann et al, eds, *The Statute of the International Court of Justice: a commentary,* 3rd ed (Oxford: Oxford University Press, 2012)

Articles

Arons, Daniel and Dembling, Paul, "The Evolution of the Outer Space Treaty"(1967) 33:1, J Air L & Comm, 419

Brownlie, Ian "The Reality and Efficacy of International Law" (1982) 52:1 BYBIL 1

Cheng, Bin “Article VI of the 1967 Space Treaty Revisited: “International responsibility”, “national activities”, and “the appropriate state” (1998), 26:1, J Space L 7

Cheng, Bin “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?”(1965) 5 IJIL 23

Chinkin, Christine “The Challenge of Soft Law : Development and Change in International Law” (1989) 38:4 Intl & Comp Q 850

Clapham, Andrew “Human Rights Obligations of Non-State Actors in Conflict Situations” (2006) 863 Intl Rev of the Red Cross 49

Crawford, James “Democracy and International Law” (1993) 64:1 BYBIL 113

Crawford, James “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect” (2002) 96:4 AJIL 874

Cutler, Claire “Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy” (2001) 27 Rev Intl Studies 133

De Man, Phillip "State practice, domestic legislation and the interpretation of fundamental principles of space law" (2017) 42 Space Pol’y 92

Dworkin, Ronald “A New Philosophy for International Law” (2013) 41:1 Philosophy & Pub Affairs 2

Fitzmaurice, Gerald "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points” (1951) 28 BYIL 1

Fitzmaurice, Gerald "The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 BYIL 203

Franck, Thomas “Legitimacy in the International System” (1988) 82 AJIL 705

Goehring, John “Can We Address Orbital Debris with the International Law We Already Have? An Examination of Treaty Interpretation and the Due Regard Principle” (2020) 85:2 J Air L & Comm 309

Harvard Law School, “Draft Convention on the Law of the Treaties” (1935) 29 AJIL Supp 653

Higgins, Rosalyn “Policy Considerations and the International Judicial Process” (1968) 17 ICLQ 58

Jia, Bing Bing“The Relations between Treaties and Custom”, (2010) 9:1 Chinese JIL 81

Kopelmanas, Lazare "Custom as a Means of Creation of International Law" (1937) 18 BYIL 127

Lamond, Grant "Legal Sources, the Rule of Recognition and Customary Law" (2014) 59:1 AJ Jurisprudence 25

Masciulli, Joseph "The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law. Review of Janne E. Nijman" (2006) 16 L & Politics Book Rev 242

McCorquodale, Robert "Beyond State Sovereignty: The International Legal System and Non-State Participants" (2006) 8 Revista Colombiana de Derecho Internacional 103

McCorquodale, Robert "An Inclusive International Legal System" (2004), 17 Leiden J Intl Law 477

Milanovic, Marko "Special Rules of Attribution of Conduct in International Law", (2020) 69 Intl L Stud 295

Ochao, Christina "The Individual and Customary Law Formation", (2007) 48 VA Journal of International Law 119

Roberts and Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law" (2012) 37:1 Yale J Intl L 107

Robison, Christian "Changing Responsibility for a Changing Environment" (2020), 5:1 U Bologna Rev 1

Schwarzenberger, Georg "Myths and Realities of Treaty Interpretation" (1968) 9 VaJIL 1

Sena, Major Tyler J."Providing Clarity for Fault-Based Liability in International Space Law: A Practical Approach Through Principles of General International Law'' (2022) 46:1 J Space L 1

Thirlway, Hugh "The Law and Procedure of the ICJ 1960-89, Supplement 2006: Part 3" (2006) 77:1 BYBIL 1

von der Dunk, Frans "The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law" (2011) 69:1 Space, Cyber, and Telecommunications Law Program Faculty Publications 1

Wassenbergh, Henri A. "The Law Governing International Private Commercial Activities of Space Transportation" (1993) 21:2 J Space L 97

Electronic sources

Elizabeth Howell, “Four Cubesats Snuck into Orbit Without Regulatory Approval, FCC Says” (March 16th 2018) online, (website): <https://www.space.com/40001-four-cubesats-unauthorized-launch-fcc.html>.

European Space Policy Institute, “The Rise of Private Actors in the Space Sector” (July 2017), online (PDF): <https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-report-The-rise-of-private-actors-Executive-Summary-1.pdf>

The Economist, “How Elon Musk’s satellites have saved Ukraine and changed warfare” (5 January 2023), online (website): <https://www.economist.com/briefing/2023/01/05/how-elon-musks-satellites-have-saved-ukraine-and-changed-warfare?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=18156330227&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gad_source=1&gclid=Cj0KCQiA_qG5BhDTARIsAA0UHSIHRrb7lOP4crxlFInpYqX0uof5LEnki0JSw3OPIi9hIWqZ_IyEiBUaAuBQEALw_wcB&gclsrc=aw.ds >

Federal Communication Commission, “Letter to Swarm Technologies” (December 12, 2017) online (PDF): <https://apps.fcc.gov/els/GetAtt.html?id=203152&x=. >.

Federal Communications Commission, “Space Exploration Holding, LLC: Request for Orbital Deployment and Operating Authority for the SpaceX Gen2 NGSO Satellite System”, online: <docs.fcc.gov/public/attachments/FCC-22-91A1.pdf>

International Telecommunication Union, *“About the International Telecommunication Union”*, online (website): <https://www.itu.int/en/about/Pages/default.aspx>.

JASON, “The Impacts of Large Constellations of Satellites” (Last updated January 21st 2021), online (PDF): <https://www.nsf.gov/news/special_reports/jasonreportconstellations/JSR-20-2H_The_Impacts_of_Large_Constellations_of_Satellites_508.pdf>

Jonathan McDowell, “Satellite and Debris Population: Last Decade” (Last updated 27th October 2024), online (website): < https://planet4589.org/space/stats/acdec.html>

National Air and Space Law Museum, “Model, Communications Satellite, Intelsat” (last visited 13 November 2024), online: <https://airandspace.si.edu/collection-objects/model-communications-satellite-intelsat-i/nasm_A19750767000>.

“Satellites by Country or Organisation”, (last updated 14 November 2024), online (website): <https://www.n2yo.com/satellites/?c=&t=country>.

Stanford Encyclopedia of Philosophy, “Philosophy of International Law” (12th May 2022) at Section 4.5, (online) <https://plato.stanford.edu/entries/international-law/>

Tereza Pultarova and Elizabeth Howell, “Starlink Satellites: Facts, tracking and impact on astronomy” (27th September 2024), online (website), <https://www.space.com/spacex-starlink-satellites.html>.

UNCOPUOS, “Lichtenstein National Space Law”, online (PDF): <https://www.unoosa.org/documents/pdf/spacelaw/sd/LIECHTENSTEIN_1601204.pdf>

UNCOPUOS, “Status of International Agreements relating to activities in outer space as at 1st January 2024” (15 April 2024), online (PDF): <https://www.unoosa.org/res/oosadoc/data/documents/2024/aac_105c_22024crp/aac_105c_22024crp_3_0_html/AC105_C2_2024_CRP03E.pdf >

UN Docs

Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA, 18th Sess, UN Doc A/5616 (1963) GA Res 1962 (XVIII)

Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (UN Doc A/56/10) in Yearbook of the International Law Commission 2001, vol 2, Part Two (New York: UN, 2001)

Fifth Report on the Identification of Customary International Law (A/CN.4/717) in *Yearbook of the International Law Commission 2018,* vol 2, part 2 (New York: UN, 2018)

Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ILC, 58th Sess, UN Doc A/CN.4/L.702, (2006), Report of the Study Group of the International Law Commission

Guidelines for the Long-Term Sustainability of Outer Space Activities, UNCOPUOS, 62nd sess, A/74/20 (2019)

Letter dated 4 December 1962 from the Permanent Representative of the UK to the UN addressed to the Chairman of the First Committee, A/C.1/879 (1962)

Report of the Commission to the General Assembly on the work of its sixty eighth session (UN Doc A/71/10) in *Yearbook of the International Law Commission 2016*, vol 2, part 2 (New York: UN, 2016)

Report of the International Law Commision to the General Assembly on the work of its eighteenth session (UN Doc A/6309/Rev.1) in *Yearbook of the ILC 1966*, vol 2 (New York: UN, 1966)

Report of the International Law Commission on the work of its sixty-fifth session (UN Doc A/68/10) *in Yearbook of the International Law Commission 2013,* vol 2, part 2 (New York: UN, 2013)

Report of the Committee on the Peaceful Uses of Outer Space on its Sixty-Second Session (*A/74/20*), 2019

Report of the Commission to the General Assembly on the work of its seventieth session (UN Doc A/73/10) in *Yearbook of the International Law Commission 2018*, vol 2, part 2 (New York: UN, 2018)

Report of the Working Group on National Legislation Relevant to the Peaceful Exploration and Use of Outer
Space on the work conducted under its multi-year work plan, Committee on the Peaceful Uses of Outer Space - Legal Subcommittee, UN DOC A/AC.105/C.2/101 (2012)

Responsibility of States for Internationally Wrongful Acts, UNGA, 6th Sess, UN Doc A/56/589 and Corr.1 (2002) Annex agenda item 162

Second Report on Identification of Customary International Law" ILC, 66th Sess, UN Doc A/CN.4/672 (2014)

Sixth Report on the Law of Treaties (Document A/CN.4/186 andAdd.1-7) in Yearbook of the International Law Commission 1966, vol 2, part 2 (New York: UN, 1966)

Third Report on the Law of the Treaties (UN Doc A/CN.4/167 and Add.1-3) in *Yearbook of the International Law Commission 1964*, vol 2 (New York: UN, 1964)

Universal Declaration of Human Rights, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

US Draft Declaration of the basic principles governing the activities of States pertaining to the exploration and use of outer space, UN Doc AC/C.1/881 (1962)

USSR Draft Declaration of the basic principles governing the activities of States pertaining to the exploration and use of outer space, UN Doc A/AC.105/C.2/L.1 (1962)

USSR, *Revised Version of Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,* UN Doc A/AC.105/C.2/L.6 (1963)

USSR, *Final Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,* UN Doc A/AC.105/C.2/L.13 (1966)

Working Group (WG) L6, *Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,* UN Doc A/AC.105/25 Annex II (1966).