

# EMERGING LEGAL ISSUES: A BIRD'S-EYE-VIEW

## *Cuestiones jurídicas emergentes: un análisis a vista de pájaro*

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### ***Abstract***

This is a reflection about some ideas explained in the last panel of the Spanish-Philippines Congress of Deusto (June 2019). It is a backdrop of different topics that may be categorized as “emerging legal issues”. These topics are relatively new –technology is an aspect to be considered– and their regulation is unclear. This is not a conclusive analysis, but, on the contrary, it is an overview about some heterogeneous issues where more questions than answers may be found. Art and culture are guidelines to be followed.

### ***Keywords***

Art and Culture; environment; human rights; Science; technology.

### ***Resumen***

Este trabajo intenta hacerse eco de algunas de las ideas vertidas (como conferencia previa) en el último panel que cerraba el Congreso Hispano-Filipino celebrado en la Universidad de Deusto en junio de 2019. Pretende simplemente ofrecer una especie de telón de fondo en el que se ilustran diversos temas que pueden ser considerados “cuestiones jurídicas emergentes”. Es un conjunto de temas relativamente nuevos, donde la tecnología juega un papel de excepción, o donde no existe una regulación

clara. No se trata de un trabajo conclusivo, sino de un estudio de ámbitos muy heterogéneos donde encontramos más interrogantes que respuestas. El arte, en sus diversas manifestaciones, actúa como idea guía de los distintos temas enunciados.

***Palabras clave***

Arte y cultura; Ciencia; derechos humanos; medioambiente; tecnología.

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**SUMMARY:** I. INTRODUCTION. II. EMERGING LEGAL ISSUES: AN APPROACH.  
 1. *Environmental Challenges*. 2. *Science, Law and Human Rights*.  
 3. *Legal Challenges and New Technologies*. 4. *The Relationship among  
 Culture and Law*. III. Sailing a terra incognita. *BASIC BIBLIOGRAPHY*.

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*Toda la naturaleza es arte, por ti desconocido;  
 Todo azar, dirección, que ver no logras;  
 Toda discordia, ignorada armonía;  
 Todo mal parcial, un bien universal*

(Alexander Pope)

## I. INTRODUCTION

This key note was a preliminary explanation of the last panel so-called “Emerging Legal Issues”, in the context of the Congress “V Centuries Sailing the Legal World”, the fifth edition of this event to enhance the mutual relations between Spain and the Philippines. I have decided to add the expression “a Bird’s-Eye-View” for two main reasons: firstly, because I will focus my attention on some “new” topics and scientific literature about them. It is true that the adjective “new” means that the issues raised are not covered by existing regulation or, on the other hand, the legal instruments are insufficient or inadequate. Secondly, a few examples of works of art (paintings, sculptures and literary works) are the red thread of the following reflections; this is the second element that will be included into this bird’s-eye-view.

What are the topics to be included on the category of “emerging legal issues”? This key-note is only “an approach” to this matter; a never ending reflection about some factors of evolution or (why not?) revolution of the legal system at this historical moment: finishing the second decade of the twenty-first century. It must be said, as a basic principle, that the field of human rights “pollutes” almost everything. This factor shall be taken into account.

Exploring “emerging legal issues” means opening the doors and the windows of international society, opening our mind and thinking about some challenges of our contemporary world. We must be sailors, in a world of uncertainty (in the same way as was Shanti Andía, the Basque seaman described by Pío Baroja<sup>1</sup> and reproduced by the painter Ramón de Zubiaurre<sup>2</sup>).

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<sup>1</sup> Pío Baroja, *Las inquietudes de Shanti Andía/ The Restlessness of Shanti Andía* (Madrid: Biblioteca Renacimiento, 1911).

<sup>2</sup> Ramón de Zubiaurre, *El Marino Vasco Shanti Andía, el Temerario/ The Basque Seaman Shanti Andía, the Bold* (catalogued in 1924, Museo Nacional Centro de Arte Reina Sofía).

A few number of topics fall within this category; some examples that will be analysed are the following: 1) environmental law, climate change and disasters; 2) Science, law and human rights; 3) legal challenges and new technologies; 4) the relationship among culture and law. All the aforementioned subjects have a common pattern: there are new aspects to be considered in order to solve surrounding questions on every case. And this is the main objective of this key note: an initial approach to the so-called emerging legal issues.

## II. EMERGING LEGAL ISSUES: AN APPROACH

This paragraph describes some topics where a radical evolution/revolution has transformed their essence and, as a result of this, their regulation. Next explanations will be focused on selected issues that, from our perspective, must be mentioned and carefully studied.

### 1. *Environmental Challenges*

The close relationship and interaction between environmental law, climate change and disasters is a key point to be mentioned. On this field, the Philippines play an important role<sup>3</sup>: this is a region where the risk of disasters and the field of prevention is crucial<sup>4</sup>. The typhoon Haiyan/Yolanda had a great impact in the development of the field of disasters, prevention, preparedness and response, in the Philippines (2013)<sup>5</sup>.

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<sup>3</sup> This key-note was given in the context of a Congress (V Centuries sailing the legal world), developed in Deusto School of Law (Bilbao), focused on the Spanish and the Philippines relations. I remember the starting point of the mutual relations between the University of Málaga and the Philippines, some years ago: the former Ambassador of this country in Spain (Mr. Salinas) visited the Law School of my University, (invited by José Manuel Torres Perea, prof. of Civil Law and our Dean, prof. Juan José Hinojosa Torralvo).

<sup>4</sup> See Andrés Bautista-Hernández, “A Comparative Study on International Disaster Law applicable to Spain and the Philippines”, *Estudios de Deusto*, vol. 66/1 (enero-junio 2018): 235-252. This article includes a list of natural disasters in the Philippines during the period 2010 to 2017 and the figures are truly shocking: 124 natural disasters, 13.835 deaths, 165.973 injured, and 74.940.063 affected people. See *ibid.*, 240.

<sup>5</sup> This topic was discussed in international fora, such as the ECOSOC (Economic and Social Council of the United Nations) in 2013; see additional information at <https://www.un.org/en/ecosoc/philippines/> (last accessed 2 September 2019). Raising awareness on emerging issues – such as emergencies and disasters- is one of the activities of this main organ of the United Nations system (see <https://www.un.org/ecosoc/en/content/ecosoc-special-meetings-emergency-situations>). Last accessed 2 September 2019. The risk of natural disasters in the Philippines has received attention by academics; see <https://www.statista.com/statistics/921036/philippines-risk-index-for-natural-disasters/> (last accessed 2 September 2019).

As a curiosity, a new Civil Protection Mechanism of the European Union<sup>6</sup> was adopted the same year 2013 (and entered into force in 2014). This tool promotes cooperation –inside and outside the EU- prevention, preparedness and response in case of disaster<sup>7</sup>. This Mechanism has been activated all over the world (for example in Chad, Bosnia-Herzegovina, Guatemala, United States, the Philippines, Fiji, Republic of Congo, Jordan...)<sup>8</sup>. All these surrounding facts, together with awareness raising on the effects of climate change<sup>9</sup> had contributed to the emergence of the so-called “International Disaster Law”, receiving the attention of international lawyers<sup>10</sup>. The labour of the International Law Commission of the United

<sup>6</sup> Decision n. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (*DOUE L 347*, 20 December 2013). See [https://ec.europa.eu/echo/what/civil-protection/mechanism\\_en](https://ec.europa.eu/echo/what/civil-protection/mechanism_en) (last accessed 12 September 2019). In the same way, see Enrique Vega Fernández, “La Unión Europea frente a las catástrofes: ¿es factible una unidad multinacional europea para emergencias?”, (Fundación Alternativas, 2011), in <http://www.falternativas.org/opex/documentos-opex/documento-de-trabajo>, last accessed 2 September 2012; and Markuz Kotzur, “European Union Law on Disaster Preparedness and Response”, *German Yearbook of International Law* 55 (2012): 253-278.

<sup>7</sup> See María Isabel Torres Cazorla, “¿Lecciones aprendidas? El papel de la Unión Europea en materia de prevención y coordinación en caso de catástrofe”, in *Bioderecho, Seguridad y Medioambiente/Biolaw, Security and Environment*, coord. by José Manuel Sánchez Patrón, María Isabel Torres Cazorla & Daniel Ignacio García San José (Valencia: Tirant lo Blanch, 2015), 151-171; in the same collective work, see Andrés Bautista-Hernández, “Recientes avances en la regulación de la Unión Europea en materia de catástrofes: el Mecanismo de Protección Civil de la Unión”, 173-194. This mechanism has been strengthened by the so called rescEU; see additional information at [https://ec.europa.eu/echo/news/resceu-strengthened-eu-civil-protection-mechanism-enters-force\\_en](https://ec.europa.eu/echo/news/resceu-strengthened-eu-civil-protection-mechanism-enters-force_en). Last accessed 2 September 2019.

<sup>8</sup> See, for example, concerning the Philippines, [https://ec.europa.eu/echo/where/asia-and-pacific/philippines\\_en](https://ec.europa.eu/echo/where/asia-and-pacific/philippines_en) (last accessed 2 September 2019).

<sup>9</sup> See Antoni Pigrau Solé, “Calentamiento global, elevación del nivel del mar y pequeños estados insulares y archipelágicos: un test de justicia climática”, in *El Derecho del Mar y las personas y grupos vulnerables*, Gabriela A. Oanta (coord.), (J.M. Bosch editor, 2018), 235-281.

<sup>10</sup> See Jean-Marc Thouvenin, “L’internationalisation des secours en cas de catastrophe naturelle”, *Revue Générale de Droit International Public* 102, n.2 (1998): 327-363; Jean-Marc Thouvenin, « La définition de la catastrophe par la CDI : vers une catastrophe juridique ? », in *Derecho Internacional y Desastres. Estudios sobre Prevención y Asistencia a Víctimas*, ed. by Rafael Prieto Sanjuán and Jean-Marc Thouvenin (Bogotá: CEDI, CEDIN, Grupo Editorial Ibáñez, 2011), 41-50; Carlos Ramón Fernández Liesa, “Desarrollos del Derecho Internacional frente a los desastres/catástrofes internacionales”, *Anuario de Derecho Internacional* 27 (2011): 209-240; María Isabel Torres Cazorla, “Las emergencias y catástrofes como riesgo para la seguridad: una visión desde la perspectiva del Derecho Internacional Público a la luz de la Estrategia de Seguridad

Nations may be enhanced<sup>11</sup>. Human rights, environmental law and security<sup>12</sup> close the circle<sup>13</sup>.

## 2. Science, Law and Human Rights

A key aspect to be analysed is the relationship between Science, Law and human rights and, strictly speaking, the development of some areas of law where the regulation need to be expanded. Some issues such as surrogacy<sup>14</sup>,

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Nacional de mayo de 2013”, *icade. Revista Cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales* 92 (mayo-agosto 2014): 77-106; Katja Samuel, Marie Aronsson-Storrier, and Kirsten Nakjavani Bookmiller, *The Cambridge Handbook of Disaster Risk Reduction and International Law* (Cambridge: Cambridge University Press, 2019).

<sup>11</sup> The International Law Commission adopted the draft articles on the protection of persons in the event of disasters (2016). See all the information about this on the ILC website: [http://legal.un.org/ilc/guide/6\\_3.shtml](http://legal.un.org/ilc/guide/6_3.shtml) (last accessed 2 September 2012). See Aldo Pérez, “In Defense of Concurrent Application: the ILC Draft Articles on the Protection of Persons in the Event of Disasters and International Humanitarian Law”, *Denver Journal of International Law and Policy* 46 (2018): 259-288.

<sup>12</sup> See María Isabel Torres Cazorla, “A New Paradigm for United Nations Security Council: the Relationship between Security and Health”, in *Bioderecho Internacional, Derechos Humanos, Salud Pública y Medioambiente*, coord. by María Isabel Torres Cazorla and José Manuel Sánchez Patrón (Valencia: Tirant lo Blanch, ESIL: 2018), 117-142.

<sup>13</sup> See Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari and Giulio Bartolini, *Routledge handbook of human rights and disasters* (London, New York: Routledge, 2018); Rosemary Lyster and Robert R.M. Verchick, *Research Handbook on climate disaster law: barriers and opportunities* (Cheltenham: Edward Elgar Publishing Limited: 2018); Stephania Negri (ed.), *Environmental Health in International and EU Law: Current Challenges and Legal Responses* (Abingdon-on-Thames, Turin: Routledge-Giappichelli Studies in Law: 2019).

<sup>14</sup> See Kathryn Webb Bradley, “Surrogacy and Sovereignty: Safeguarding the Interest of Both the Child and the State”, 43 *North Carolina Journal of International Law and Commercial Regulation* (2018, n.4): 1-37; Kimberley M. Mutcherson, “Things that Money Can Buy: Reproductive Justice and the International Market for Gestational Surrogacy”, 43 *North Carolina Journal of International Law and Commercial Regulation* (2018, n.4): 150-181; Richard F. Storrow, “International Surrogacy in the European Court of Human Rights”, 43 *North Carolina Journal of International Law and Commercial Regulation* (2018, n.4): 38-68; Kellen Trilha Schappo, “Surrogacy in the Context of Private International Law? Cross-border Effects of international reproductive agreements”, in *Global Private International Law: adjudication without frontiers* (Cheltenham: Edward Elgar Publishing (2019), 495-504; Dagmar Coester-Waltjen, “A case for harmonisation of Private International Law? Juggling between Surrogacy, interest of a child and parenthood”, in *Global Private International Law: adjudication without frontiers* (Cheltenham: Edward Elgar Publishing (2019), 504-509.

assisted reproductive techniques<sup>15</sup>, the end of life issues<sup>16</sup>, genetic engineering<sup>17</sup>, the use of vaccines<sup>18</sup>, organ trafficking<sup>19</sup>, pandemics<sup>20</sup>, new diseases, new medical treatments, may be mentioned and need to be regulated.

Bioethics, Health Law, and Biolaw<sup>21</sup>, together with the labour of States, medical associations and International Organizations (in the universal and regional fields) must be analysed. Mostly in Europe, the labour of the Council of Europe must be enhanced. Council of Europe's instruments<sup>22</sup>, together with judicial decisions of the European Court of Human Rights must be taken into account<sup>23</sup>. As a recent example, the Strasbourg Court's

<sup>15</sup> See Mary Am Mason and Tom Ekman, *Babies of Technology: assisted reproduction and the rights of the child* (New Haven, London: Yale University Press: 2017).

<sup>16</sup> See Stefania Negri, *Self-determination, dignity and end-of-life care: Regulating advance directives in international and comparative perspective* (Leiden: Nijhoff (2011).

<sup>17</sup> Nicole H. Kalupa, "Black Biology: Genetic Engineering, the Future of Bioterrorism and the Need for Greater International and Community Regulation of Synthetic Biology", *Wisconsin International Law Journal* 34, n. 4 (2017): 952-980.

<sup>18</sup> See Michel Bélanger, *Droit, éthique et vaccination: l'obligation vaccinale en question* (Bordeaux : Études hospitalières (2006).

<sup>19</sup> See Stefania Negri, "Transplant Ethics and International Crime of Organ Trafficking", *International Criminal Law Review* 16, n.2 (2016): 287-303.

<sup>20</sup> See Stefania Negri, "Emergenze sanitarie e diritto internazionale: il paradigma salute-diritti umani e la strategia global: di lotta alle pandemie ed al bioterrorismo", in *Studi in onore di Vincenzo Starace*, vol. 1 (Napoli: Editoriale Scientifica (2008): 571-605.

<sup>21</sup> In the field of the European Society of International Law there is an Interest Group on International Biolaw (see <https://esil-sedi.eu/interest-groups/bio-law/>), together with another one referred to International Health Law (<https://esil-sedi.eu/interest-groups/health-law/>). This is a good example of the interest of these issues for international lawyers, in particular.

<sup>22</sup> The labour of the Council of Europe on biolaw is not new; see, concerning the Biomedicine Convention and Protocols, María Isabel Torres Cazorla, "Las implicaciones de los avances científicos en el campo jurídico y la necesidad de proteger los Derechos Humanos: la entrada en vigor del Convenio relativo a los Derechos Humanos y la Biomedicina de 4 de abril de 1997", *Revista Electrónica Geriatrianet.com*, n.2 (2000) and "El "derecho a no ser informado" en el Convenio sobre biomedicina y sus protocolos adicionales: últimos avances de la mano del Protocolo relativo a los tests genéticos con fines médicos", in *La obra jurídica del Consejo de Europa (en conmemoración del 60 Aniversario del Consejo de Europa)*, ed. by Pablo Antonio Fernández Sánchez (Sevilla: Gándulfo Ediciones (2010), 529-545).

<sup>23</sup> An overview of the activity of the Council of Europe on this field (the Oviedo Convention and Protocols, the labour of the European Court of Human Rights and related sites) may be seen at <https://www.coe.int/en/web/bioethics/home>; in particular the document "Bioethics and the Case-Law of the Court" is an useful tool to study the labour of the Strasbourg Court on this field (last accessed 2 September 2019). In the same way, see Francesco Seatzu, "The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine", *Utrecht Journal of International and European Law*, vol. 31, n. 81 (2015): 5-16.

First Advisory Opinion under Protocol 16 may be mentioned<sup>24</sup>. This Opinion, delivered by the French Court of Cassation (*Cour de Cassation*), deals with a very specific family law matter, namely “the recognition in domestic law of a legal-parent child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother”<sup>25</sup>. There are more questions to be solved in the near future about this and surrounding subjects.

### 3. *Legal Challenges and New Technologies*

Another aspect to be considered deals with legal challenges and new technologies: for example, big data<sup>26</sup>, blockchain<sup>27</sup>, cryptocurrencies<sup>28</sup>, the use of

<sup>24</sup> See this Advisory Opinion, given the 10th of April 2019, at [https://hudoc.echr.coe.int/eng-press#{"itemid":\["003-6380685-8364782"\]}](https://hudoc.echr.coe.int/eng-press#{) (last accessed 2 September 2019).

<sup>25</sup> See Antonia Durán Ayago, “Protocolo nº 16 al Convenio Europeo de Derechos Humanos y Gestación por Sustitución: primera consulta planteada por la Corte de Casación francesa y primera respuesta para seguir sin desbrozar del todo el camino”, *Revista General de Derecho Europeo, Iustel*, 48 (2019), at [https://www.iustel.com/v2/revistas/detalle\\_revista.asp?id\\_noticia=421437&d=1](https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=421437&d=1) (last accessed 2 September 2019).

<sup>26</sup> See Ana Beduschi, “The Big Data of International Migration: Opportunities and Challenges for States under International Human Rights Law”, *Georgetown Journal of International Law*, 49, n.3 (2018): 981-1017; Glenn Cohen, Holly Fernández Lynch, Effy Vayena and Urs Gasser, *Big Data, Health Law and Bioethics* (Cambridge, New York: Cambridge University Press (2018); Viktor Mayer-Schönberger and Thomas Ramge, “A Big Choice for Big Tech: Share Data or Suffer the Consequences”, *Foreign Affairs* 97, n.5 (September-October 2018): 48-54; Scott Millwood, “Big Airlines with Big Data: the European Competition Law Issues Associated with Price-Setting in the Airline Industry Using Big Data Analytics and Machine-Learning and the Case for Competition-by Design”, *Air and Space Law* 43, n.3 (2018): 287-301; Katarzyna Poludniak-Gierz, “Personalization of Information Duties Challenges for Big Data Approach”, *European Review of Private Law* 26, n. 3 (2018): 297-309; María Isabel Torres Cazorla, “The Use of Big Data in Health-related questions: UNESCO and APEC perspectives” (Conference, Ateneo-Manila Law School, Manila, the Philippines, June 2018), a brief presentation at <https://riuma.uma.es/xmlui/handle/10630/15756> (last accessed 2 September 2019).

<sup>27</sup> See Primavera De Filippi and Aaron Wright, *Blockchain and the Law: the Rule of Code* (Cambridge: Harvard University Press (2018); Robert Herian, “Taking Blockchain Seriously”, *Law and Critique* 29, n.2 (2018): 163-171; Marcelo Corrales, Mark Fenwick and Helena Haapio, *Legal Tech, Smart Contracts and Blockchain* (Singapore: Springer (2019).

<sup>28</sup> See Anton N. Didenko and Ross P. Buckley, “The Evolution of Currency: Cash to Cryptos to Sovereign Digital Currencies”, *Fordham International Law Journal* 42, n.4 (2019): 1041-1094.

artificial intelligence in unexplored areas<sup>29</sup>, robotics<sup>30</sup>, cybercrime<sup>31</sup> and cybersecurity<sup>32</sup>, or new weapons<sup>33</sup> are some relevant issues to be taken into

<sup>29</sup> See Visa A.J. Kurki and Tomasz Pietrzykowski, *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Cham, Switzerland: Springer (2017); Antje von Ungern-Sternberg, “Artificial Agents and General Principles of Law”, *German Yearbook of International Law* 60 (2017): 239-266; Philipp Hacker, “Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law”, *Common Market Law Review* 55, n.4 (2018): 1143-1185; Jani Ihalainen, “Computer Creativity: Artificial Intelligence and Copyright”, *Journal of Intellectual Property Law and Practice* 13, n.9 (2018): 724-728; Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer, *Liability for Artificial Intelligence on the Internet of Things. Münster Colloquium on EU Law and the Digital Economy (IV)* (Universität Münster: Centrum für Europäisches Privatrecht (2018); Kenneth Payne, “Artificial Intelligence: A Revolution in Strategic Affairs?”, *Survival* 60, n.5 (October-November 2018): 7-32; James Kwan, James Ng and Brigitte Kiu, “The Use of Artificial Intelligence in International Arbitration: Where Are We Right Now?”, *International Arbitration Law Review* 22, n.1 (2019): 19-26.

<sup>30</sup> See Horst Eidenmüller, “The Rise of Robots and the Law of Humans”, *Zeitschrift für europäisches Privatrecht* 25, n.4 (2017): 765-777; Özlem Ülgen, “Kantian Ethics in the Age of Artificial Intelligence and Robotics”, *Questions of International Law* (October 2017): 59-83; Marcelo Corrales, Mark Fenwick and Nikolaus Forgó, *Robotics, AI and the Future of Law* (Singapore: Springer (2018).

<sup>31</sup> See Jan Kleijssen and Pierluigi Perri, “Cybercrime, Evidence and Territoriality: Issues and Options”, *Netherlands Yearbook of International Law* 47 (2016): 147-173; Ilias Bantekas, “Cybercrime and its Sovereign Spaces: an International Law Perspective”, in *Legal Responses to Transnational and International Crimes: Towards an Integrative Approach* (Cheltenham: Edward Elgar Publishing (2017): 128-145; William A. Barletta, “Toward a Universal Order of Cyberspace: Managing Threats from Cybercrime to Cyberwar”, *Global Review of Cyberlaw* 2 (2017): 129-224; Tim Owen, Wayne Noble and Faye Christabel Speed, *New Perspectives on Cybercrime* (Cham, Switzerland: Palgrave Macmillan (2017); Emilio Viano, *Cybercrime, Organized Crime and Social Responses: International Approaches* (Cham, Switzerland: Springer Nature (2017); Hamid Jahankhau, *Cyber Criminology* (Cham, Switzerland: Springer (2018); Gorazd Mesko, “On Some Aspects of Cybercrime and Cybervictimization”, *European Journal of Crime, Criminal Law and Criminal Justice* 26, n.3 (2018): 189-199.

<sup>32</sup> See Rhea Siers, “Cybersecurity”, in *Security Studies: An Introduction*, ed. by Paul D. Williams and Matt McDonald (London and New York: Routledge, 3<sup>rd</sup>. edition (2018): 556-568.

<sup>33</sup> See Armin Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons* (Farnham, Burlington: Ashgate (2009); Noel Sharkey, “The Evitability of Autonomous Robot Warfare”, *International Review of the Red Cross* 94, n. 886 (2012): 787-799; Paul J. Springer, *Military Robots and Drones: A Reference Handbook* (Santa Barbara, California: ABC-CLIO (2013); Elena del Mar García Rico, “Altas Tecnologías, conflictos armados y seguridad humana”, *Araucaria: Revista Iberoamericana de Filosofía, Política y Humanidades*, vol. 18, n. 36 (2016): 265-293; Alex Završnik, *Drones and Unmanned Aerial Systems: Legal and Social Implications for Security and Surveillance* (Cham:

account. New technologies<sup>34</sup> and artificial intelligence must be confronted with traditional law sectors such as human rights, privacy, liability, settlement of disputes mechanisms or trade law. A mixture between International regulations, civil law, criminal law and trade law raised its head. And the law need to provide solutions (at the universal, regional and municipal level) to the above- mentioned challenges.

#### 4. *The Relationship among Culture and Law*

The relationship among culture and law<sup>35</sup> was one of the topics included on the list of this panel concerning “Emerging legal Issues”, when the call for papers of this Conference was launched. Unfortunately, no documents have been submitted on the subject. I should try to fill this gap, introducing the debate about a recent issue.

A particular scope will be adopted: territorial changes have displayed the relevance of history, ancient treasures and their connection with a territory. The annexation of the Crimean Peninsula<sup>36</sup> by the Russian Federation in 2014 provides a good example: it deals with the destiny of ancient treasures on an exhibition in Amsterdam (the Netherlands) at the Allard Pierson Museum<sup>37</sup>.

The origin of this conflict between Ukraine, the Crimean Museums and the Netherlands is as follows: On February 2014, the Allard Pierson Museum

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Springer (2016); Alan L. Schuller, “At the Crossroads of Control: The Intersection of Artificial Intelligence in Autonomous Weapon Systems with International Law”, *Harvard National Security Journal* 2 (2017): 379-425; Francis Grimal and Jae Sundaram, “Combat Drones: Hives, Swarms and Autonomous Action?”, *Journal of Conflict and Security Law* 23, n.1 (2018): 105-135; Wolff Heintschel von Heinegg, Rubert Fran and Tassilo Singer, *Dehumanization of Warfare: Legal Implications of New Weapons Technologies* (Cham, Switzerland: Springer) (2018).

<sup>34</sup> See Molly K. Land and Jay D. Aronson, *New Technologies for Human Rights Law and Practice* (Cambridge, New York: Cambridge University Press (2018); William H. Boothby, *New Technologies and the Law in War and Peace* (Cambridge, New York: Cambridge University Press (2019); Leonie Reims, *Regulating New Technologies in Uncertain Times* (The Hague, Berlin: Asser Press, Springer) (2019).

<sup>35</sup> See Carlos R. Fernández Liesa, *Cultura y Derecho Internacional* (Alcalá de Henares: Universidad de Alcalá (2012). The author describes this sector as an example of the fortress of an expanding legal order (on p. 53).

<sup>36</sup> See a complete study of Crimea's annexation on the book edited by Wladyslaw Czaplinski, Sławomir Debski, Rafał Tarnogorski and Karolina Wierczynska, *The Case of Crimea's Annexation under International Law* (Warsaw: Scholar Publishing House (2017). In the Spanish doctrine, see Ricardo Martín de la Guardia, Rodrigo González Martín and César García Andrés, *Conflictos Postsoviéticos. De la secesión de Transnistria a la desmembración de Ucrania* (Madrid: Dykinson, S.L. (2017): 121-131.

<sup>37</sup> See <https://allardpierson.nl/en/> (last accessed 2 September 2019).

(a Museum of the University of Amsterdam) premiered an exhibition named “Crimea: Gold and Secrets of the Black Sea”<sup>38</sup>. This exhibition included 500 or so Scythian<sup>39</sup> Art objects from five Ukrainian Museums (four of them located in the Crimean Peninsula: Tavrida Central Museum, Kerch Historical and Cultural Preserve, Bakhchisaray History and Cultural State Preserve and National Preserve of Tauric Chersonesos). The museum number five –the National Museum of History- is in Kiev, the Ukrainian capital.

Before the beginning of the exhibition on February 2014, loan agreements between the representatives of the Allard Pierson Museum and their counterparts of the five Ukrainian museums were signed. The loan agreements stipulate that the Allard Pierson Museum would return the loaned materials to each of the five museums in a timely manner after the expiration of the term of the temporary storage for the purpose of demonstration. In March 2014, Russian sent troops to Crimea, and the Autonomous Republic of Crimea and Sevastopol became part of the Russian Federation. A question emerged at the end of the exhibition: Who is the owner of the Scythian art objects?<sup>40</sup>. The Allard Pierson museum was confronted with two competing claims to the objects: the Ukrainian State on the one hand and the Crimean Museums on the other. This is a dilemma. International Law, historical ties with a territory and the need to preserve these antiquities for future generations are intertwined on this case. The majority of the world’s States and International Organizations do not recognize Russia’s Annexation of Crimea (and it is the case of the Netherlands, as an example)<sup>41</sup>.

<sup>38</sup> The alternate title of the exhibition (that was firstly displayed in the Landesmuseum in Bonn) was “The Crimea: Greeks, Scythians and Goths at the Black Sea”. This is a testimony of different civilizations the Crimean Peninsula has known, as part of the Silk Road. See Evelien Campfens “Whose Cultural Heritage? Crimean Treasures at the Crossroads of Politics, Law and Ethics”, *Art Antiquity and Law* XXII, issue 3 (October 2017): 193-212.

<sup>39</sup> See <https://www.britannica.com/topic/Scythian> (last accessed 2 September 2019). The Scythians founded a powerful empire on what is now Crimea. They inhabited the central steppes from the 9<sup>th</sup> to the 1<sup>st</sup> century BC and in the 3<sup>rd</sup> century BC were forced to inhabit coastal areas of the Black Sea and Crimea. See Neil Kent, *Crimea: A History* (London: Hurst & Company: 2016).

<sup>40</sup> See Maria Nudelman, “Who Owns the Scythian Gold? The Legal and Moral Implications of Ukraine and Crimea’s Cultural Dispute”, *Fordham International Law Journal* 38 (2015): 1261-1297. She states that “this art disputes is right at the center of the two ethical frameworks. The Crimean museums have made the argument that it is essential to return the objects to Crimea for the objects’ and collections’ integrity and informational preservation. Ukraine, however, argues that this dispute is simply part of the larger question of Ukraine’s State sovereignty and cultural independence”, *ibid.*: 1284.

<sup>41</sup> See the Resolution adopted by the United Nations General Assembly by 100 votes in favour, 11 against and 58 abstentions (see GA/11493, 27 March 2014) as Doc. A/

Some difficulties derived from this situation may be found: the Ukrainian State is considered to be the lawful representative of Crimea but lacks effective control over the territory<sup>42</sup>; and any official act that could be understood as a *de facto* recognition of the illegal situation –such as the return of the cultural objects other than to the Ukrainian State– might cause political problems.

By July 2014 the Allard Pierson Museum suspended its obligations under the loan agreements; it adopted the position that it had no interest in the Crimean treasures and simply wanted to return the artefacts to the entitled party. In fact, the nineteen objects borrowed by the National Museum of History of Ukraine in Kiev were returned in August 2014. On November 2014, the four Crimean Museums filed a lawsuit before the District Court in Amsterdam against the Allard Pierson Museum. They claim that the art objects should be returned to the institutions with the strongest cultural heritage ties.

On December 2016, the Civil Chamber of the Amsterdam District Court held in favour of the Ukrainian State and ordered the return of the objects to Kiev on the basis of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>43</sup>. The Dutch Court held that the Crimean annexation was “a material

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RES/68/262 (1 April 2014) that states in the last paragraphs: “5. *Underscores* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol.

6. *Calls upon* all States, International Organizations and Specialized Agencies not to recognize any alteration of the status of the autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered Status”.

In the same way, the Parliamentary Assembly of the Council of Europe passed a resolution with a similar content the 9 of April 2014 and the European Union adopted restrictive measures or sanctions against the Russian Federation.

<sup>42</sup> On this regard, the Law passed by Ukraine the 15 April 2014 (with some changes set forth on May 2014) on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine) may be mentioned. Article 1, on the “Legal Status of the Temporarily Occupied Territory of Ukraine, states as follows: “The temporarily occupied territory of Ukraine (here and after- temporarily occupied territory) is an integral part of the territory of Ukraine. The application of the Constitution and the laws of Ukraine shall extend to such territory”. The need to preserve cultural heritage is mentioned on article 5, paragraph 7, with this content: “The responsibility for protection of cultural heritage in the temporarily occupied territory shall be placed on the Russian Federation as the occupying power in accordance with the norms and principles of international law”.

<sup>43</sup> Paris, 14 November 1970 (1970 UNESCO Convention) at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/> (last accessed 2 September 2019).

change in circumstances”<sup>44</sup>; and this fact justifies the termination of the Allard Pierson Museum’s contractual obligations<sup>44</sup>. As a consequence of this:

- a) The loan agreement between the Crimean Museums and the Allard Pierson Museum is dissolved.
- b) The Allard Pierson Museum shall transfer the loan objects to the National Historical Museums of Ukraine in Kiev in its capacity as custodian of the Crimean Objects designated by the Ukrainian State.
- c) Pending an appeal, the artefacts shall remain in storage at the Allard Pierson Museum.
- d) Ukraine shall pay storage and insurance costs to the Allard Pierson Museum<sup>45</sup>.

This table describes the arguments of the Crimean Museums, on the one hand, and Ukraine, on the other:

Crimean Museums	Ukraine
The objects loaned should be returned to them on the basis of the guarantees contained in the loan agreements.	The loan agreements considered the objects as part of the “museum fund of Ukraine”.
The objects can be traced back a thousand years to civilizations that lived in the Crimean Peninsula, the true home of them.	According to Ukraine’s cultural heritage laws, cultural heritage and archaeological objects located in Ukraine are State property.
The objects have been discovered, studied and preserved by the Crimean Museums.	On the basis of its sovereign rights over the Crimean territory, the objects are part of its national patrimony, protected by international conventional law.
The objects are considered the cultural heritage of Crimea (with real experts on Crimean ancient history).	A Decree of 2 February 2000 designed the collections of the four Crimean museums as State Property.
The loss of them means the loss of the cultural code of Crimean people.	The export licences have expired, resulting in an illicit situation.

<sup>44</sup> See Amsterdam District Court, 14 December 2016, case number HA ZA 14-1179/ ECLI:NL:RBAMS:2016:8264; this judgment (in Dutch), may be seen at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2016:8264> (last accessed 2 September 2019).

<sup>45</sup> See Evelien Campfens and Irina Tarsis, “Cri-me-a-river! Crimean Gold in the Crosshairs of Geopolitics”, *International Foundation of Art Research Journal* 18, n.1 (2017): 36-48. On their opinion, “this case offers a wealth of political, legal and ethical dilemmas for experts in the field of cultural property disputes”, at 38. The conclusions of this verdict at 46.

Crimean Museums	Ukraine
The principle of integrity of museum collections must be applied to this case.	The ownership of all archaeological objects finds in the State of Ukraine.
The loan agreements stipulated that the Allard Pierson Museum would return the loaned materials to each of the five museums in a timely manner “after the expiration of the term of the temporary storage for the purpose of demonstration”.	Ukraine considers Crimea to be temporarily occupied. The UNESCO Convention and The Hague Convention and Protocol set up an obligation to the Netherlands to keep the objects safe and out of the hands of the occupying State.
The Autonomous Republic of Crimea should be considered the owner of the majority of the loaned objects.	The owner of the objects is Ukraine.

Source: Author's creation based on bibliographical references.

In January 2017, the Crimean Museums lodged an appeal; on August 2019 it is still pending. Maybe, another ways should be explored by the parties, because this is a clear example of a judicial decision that will not solve all the surrounding questions. Who owns the Crimean past?<sup>46</sup> A difficult question to be solved...and “there is no heritage without conflict”<sup>47</sup>.

Another side of the coin is the need to fight against illicit trafficking in works of art<sup>48</sup>; the European Union<sup>49</sup>, UNESCO<sup>50</sup> and Interpol<sup>51</sup> have a very prominent role to play. This is another circle that must be closed.

<sup>46</sup> This is the title of a study made by Rob van der Laarse, “Who Owns the Crimean Past? Conflicted Heritage and Ukrainian Identities”, in *A Critical Biographic Approach to Europe's Past: Conference Ename*, Dirk Callebaut (ed.), (Gent, November 28-29 2014): 15-52.

<sup>47</sup> See Van der Laarse, *Who Owns...* 40.

<sup>48</sup> See Peter B. Campbell, “The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage”, *International Journal of Cultural Property* 20, n.2 (2013): 113-153; Juris Kila and Marc Balcells, *Cultural Property Crime: an Overview and Analysis on Contemporary Perspectives and Trends* (Leiden, Boston: Brill (2015); Saskia Hufnagel and Duncan Chappell, *The Palgrave Handbook on Art Crime* (London: Palgrave Macmillan (2019).

<sup>49</sup> See María Isabel Torres Cazorla, “La lucha contra el tráfico ilícito de bienes culturales y obras de arte: pasos dados en pos de este objetivo en la Unión Europea y sus implicaciones para España”, in *España y la Unión Europea en el orden internacional*, Joaquín Alcaide Fernández & Eulalia Petit de Gabriel (eds.) (Valencia: Tirant lo Blanch (2017): 1363-1373; Maja R.J. Dehouck, “Balancing Markets, Morals and Law: The Fight to Regulate Illicit Trafficking in Cultural Goods and the EU Regulation on the Import of Cultural Goods”, *Art, Antiquity and Law* 24, n.1 (2019): 1-37.

<sup>50</sup> See Zsuzanna Veres, “The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention”, *Santa Clara Journal of International Law* 12, n.2 (2014): 91-116.

<sup>51</sup> See <https://www.interpol.int/Crimes/Cultural-heritage-crime/The-issues-cultural-property> (last accessed 2 September 2019).

### III. SAILING A TERRA INCOGNITA

These are some reflections to admit a question of fact: we are sailing the legal world and, as sailors of a *terra incognita* there are more questions than answers at this preliminary stage of this twenty-first century. We can discover this *terra incognita* on some pictures of Fernando Zóbel<sup>52</sup>, the Spanish painter born in the Philippines.

An analysis of emerging legal issues give us the notion of *ius gentium for new and revolutionary issues*<sup>53</sup>; the evolution of humanity is full of examples of revolutionary ideas that have been transformed into fundamental concepts (i.e.: the notions of genocide and crimes against humanity before the Nuremberg trials)<sup>54</sup>. The ideas of new and emerging are always relative. After a lapse of time, we hope that these emerging issues will be transformed into realities, sailing the legal world. And, as sailors, I finish this key-note with the words of José Rizal, on his “Song of the Wanderer”<sup>55</sup>:

“Anxious, he seeks joy everywhere  
and joy eludes him and flees  
a vain shadow that mocks his yearning  
and for which he sails the seas”.

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<sup>52</sup> See as an example, *Icarus*, <https://d2jv9003bew7ag.cloudfront.net/uploads/Fernando-Zobel-Icarus-detail-1962.jpg> (last accessed 2 September 2019).

<sup>53</sup> This is a metaphorical use of the expression coined by Daniel Ignacio García San José, *Interstellar Law. Ius gentium for new worlds* (Murcia: Laborum (2018).

<sup>54</sup> See the idea of Sir Hersch Lauterpacht about the concept of crimes against humanity and Raphael Lemkin about genocide in Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity*, (London: Weidenfeld & Nicholson (2016).

<sup>55</sup> José Rizal wrote in Spanish and this paragraph of the poem “Canto del Viajero” says:

“Busca ansioso doquiera la dicha  
y la dicha se aleja fugaz:  
¡Vana sombra que burla su anhelo!...  
¡Por ella el viajero se lanza a la mar!”.

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# EMERGING LEGAL ISSUES: A BIRD'S-EYE-VIEW

## *Cuestiones jurídicas emergentes: un análisis a vista de pájaro*

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