

# Cross-Border Movement and the Law: For an Epistemological Approach\*

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## Summary

*Even though its development has been extraordinary in recent times, the movement of persons, services and goods between territories is described by the act of inter-territorial circulation in nothing other than ordinary terms. Numerous solutions for this cross-border movement can be found under international law in its broadest sense. However, it is remarkable to observe that lawyers have interpreted the notion of movement inadequately, whereas it could be used to support and assist with the issues we face today. This article takes up example from new epistemological developments in the legal handling of «movement situations».*

1. Internationality occupies a choice position in the constructions of international law in its widest sense (public and private international law, transnational law, European law-type regional law, etc.). Each time a situation requires a legal mechanism to be implemented because an element of internationality or “foreignness” is involved, it could be said that the law makes this international phenomenon the subject of its treatment<sup>1)</sup>.

This treatment is often singular or at least different from that which prevails for strictly local or national situations. In a given territory, a foreigner or non-resident is not necessarily treated under the same rules as a national or local resident, and an international contract observes specific rules that do not apply to an internal contract and the same goes for international arbitration, whether this involves the State or the private sector, etc.

2. Legal approaches to internationality are wide-ranging. This is particularly the case of the abundant studies produced by lawyers on the geopolitical movements of globalisation<sup>2)</sup> with their many variations, each one more modern than the next (trans-

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\* This paper is based on the conference entitled “Border Crossing Phenomena and the Law: Which Method?”, which took place on January 18<sup>th</sup>, 2017, at the Ritsumeikan University’s College of Law. The conference was subsidized by the Ritsumeikan University’s Advanced Research Programs.

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1) See particularly on this theme, L’internationalité, bilan et perspectives, Revue Lamy, Supplement n° 46, Feb. 2002 (ed. S. Poillot-Peruzzetto and J.-P. Marty; synopsis: H. Gaudemet-Tallon). Compare E. Wyler and A. Papaux (ed.), L’extranéité ou le dépassement de l’ordre juridique étatique, Pedone, 1999.

2) On which, see in particular: C. Kessedjian and E. Loquin (ed.), La mondialisation du droit: Litec ↗

nationalisation<sup>3)</sup>, fragmentation<sup>4)</sup>, regionalisation<sup>5)</sup>, globalisation<sup>6)</sup>, etc.).

All of these movement phenomena have the common characteristic of highlighting a weakness in the central role accorded to modern States<sup>7)</sup> and to domestic state laws. The most recent work referred to above attests to the dynamism of this research, including within such areas as private international law, which for a long time remained rooted solely within state frameworks since they existed first<sup>8)</sup>.

### 3. On a much more basic level, internationality describes an act of movement

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↘2000; Collectif, *La mondialisation entre illusion et utopie*, Archives de Philosophie du Droit: Dalloz, t. 47, 2003; J.-L. Halpérin, *Profils des mondialisations du droit*: Dalloz, 2009; H. Ruiz Fabri and L. Gradoni (ed.), *La circulation des concepts juridiques: le droit international de l'environnement entre mondialisation et fragmentation*: SLC, 2009.

3) We would mention four significant contemporary publications that consider the phenomenon in constitutional law and in private law: Ch. Joerges, I.-J. Sand, and G. Teubner (ed.), *Transnational Governance and Constitutionalism*: Hart, 2004; G.-P. Callies and P. Zumbansen, *Rough Consensus and Running Code — A theory of Transnational Private Law*: Hart, 2012; M. Maduro, K. Tuori, S. Sankari (ed.), *Transnational Law*, Cambridge U. Press, 2014; G. Lhuillier, *Le droit transnational*, Dalloz, 2016.

4) The theme has developed significantly. See, in particular: J.-M. Thouvenin and Ch. Tomuschat (ed.), *Droit international et diversité des cultures juridiques*: Pedone, 2008; M. Forteau, J.-S. Bergé, M.-L. Niboyet, J.-M. Thouvenin (ed.), *La fragmentation du droit applicable aux relations internationales — Regards croisés des internationalistes privatistes et publicistes*: Pedone, 2011; M. Young (ed.), *Regime Interaction in International Law - Facing Fragmentation*: Cambridge University Press, 2012.

5) On the regionalisation of law arising from the development of European law, see in particular: S. Poillot-Peruzzetto and L. Idot (ed.), *Internormativité et réseaux d'autorités: l'ordre communautaire et les nouvelles formes de relations entre les ordres juridiques*: Petites Affiches 2004, n° 199 & 200 (special editions); V. W. Graf Vitzthum, C. Prieto and R. Mehdi (ed.) *Europe et Mondialisation — Europa und die Globalisierung*: PUAM, 2006; S. Robin-Olivier and D. Fasquelle (ed.), *Les échanges entre les droits, l'expérience communautaire: une lecture des phénomènes de régionalisation et de mondialisation du droit*: Bruylant, 2008; M. Le Barbier-Le Bris (ed.), *L'Union européenne et la gouvernance mondiale - Quel apport avec quels acteurs?*, Bruylant, 2012. On the other forms of regionalisation and the impact on public international law, see S. Doumbé-Billé (coord.), *La régionalisation du droit international public*, Bruylant, 2012. For collective research of this type in private international law: J.-S. Bergé, S. Francq and M. Gardeñes Santiago (ed.), *Boundaries of European Private International Law*, Bruylant, 2015.

6) There is considerable literature on the subject. For different approaches to the phenomenon in various legal disciplines: G. Teubner (ed.), *Global Law without a State*, Dartmouth, Aldershot, 1997; J. Basedow and T. Kono (ed.), *Legal aspects of Globalization*: Kluwer Law International, 2000; J.-B. Auby, *La globalisation, le droit et l'État*: Montchrestien, 2me éd., 2010; M. Faure and A. van de Walt, *A Globalization and private law*: Edward Elgar, 2010; J.-Y. Chérot and B. Frydman (ed.), *La science du droit dans la globalisation*: Bruylant, 2012. B. Frydman, *Petit manuel pratique de droit global*, Académie Royale de Belgique, 2014 H. Muir Watt, D. P. Fernández Arroyo (ed.), *Private International Law and Global Governance*, OUP, 2014; J. Basedow, *The Law of Open Societies — Private Ordering and Public Regulation in the Conflict of Law*, Brill Nijhoff, 2015.

7) That came into being in the 15<sup>th</sup>-16<sup>th</sup> centuries according to the analysis generally advocated by historians.

8) To cite only two significant recent examples, see H. Muir Watt, D. P. Fernández Arroyo (ed.), *Private International Law and Global Governance*, prev.; J. Basedow, *The Law of Open Societies — Private Ordering and Public Regulation in the Conflict of Law*, prev.

between the territories - one which could be described simply as “the act of cross-border movement”- occurring when persons or goods move between territories.

This perfectly commonplace phenomenon of border crossing<sup>9)</sup> has seen unprecedented development in our modern society, given the volume and speed at which people (individuals or legal entities) and goods (in their widest sense, tangible and intangible, including services and capital) move around.

Common or newer movement phenomena are the consequence of material reality (travel and displacements) and social reality (the organisation of a sector, a network). The law knows how to deal with them, not only as bare facts<sup>10)</sup> but also as often complex social constructions<sup>11)</sup>, even if it should be acknowledged that the latter do not fit as easily into the legal sphere as the former.

4. It is this basic act of inter-territorial or cross-border movement that we would like to develop here by questioning the method the lawyer employs to tackle it. We would like to demonstrate, (I.) that lawyers do not sufficiently mobilise this act of cross-border movement in their constructions, (II.) whereas this cross-border movement fuels the highly topical questions and concerns of today, relating particularly to the legal treatment of movement situations.

## **I. The classic legal treatment of cross-border movement**

5. In a general sense, as is required at this point, it is possible to define three current underlying trends used by lawyers when dealing with cross-border movement. These three trends can be summarised as follows: (A.) lawyers carry out insufficient research into the cross-border movement phenomenon (B.) legal subject areas deal with the phenomenon in an essentially specialised way, and (C.) the phenomenon is dealt with using an unorganised plethora of legal techniques.

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9) Understood in the classic sense of “state borders”, but the approach may be naturally sophisticated with a more complex vision of borders and territories that are not simply limited to state institutional realities but also, and once again at a basic level, geophysical realities and experienced realities.

10) For example, human activity gives rise to cross-border pollution, the law incorporating it into the legal category of crime, subject to certain conditions of the specific regime of “complex crime”.

11) For example, cross-border pollution by a radioactive cloud - the explosion, the resulting cloud, its movement and its fallout into various locations like splashes of paint - should not simply be the subject of legal action in its unprocessed form. The law is also interested in all of the social constructions generated by that event and which, by way of contagion and ripple effect, can have a full dimension: the displacement of populations, consumption bans and/or the destruction of contaminated assets, the decision of certain countries to phase out nuclear energy, etc. That which is true for the unprocessed act is all the more true for the socially established act: contractual practices and common practices that they produce in a given company, for example, a mercantile society with the hypothesis of *lex mercatoria* or even a mafia organisation of a channel for clandestine migration and waste or the large-scale organised movement of data such as that practised by Internet search engines, etc.

### A. –Lawyers carry out insufficient research into the cross-border movement phenomenon

6. An international lawyer, it might be said, albeit a little brutally, does not generally, and even less systematically, study cross-border movement.

There are many circumstances that back up this assertion, from which we are not claiming immunity. Books on international law (*lato sensu*) rarely, if at all, focus on the phenomenon itself, the subject generally being disposed of in the introduction. Legal conferences organised on the particular theme of movement, in the sense as we understand it here (for example of persons, services, goods, capital etc.) rarely attempt to present, quantify and qualify the phenomenon the law offers as a study subject, other than as a preliminary remark.

There are exceptions, of course. But these are limited to highly specialised multidisciplinary works<sup>12)</sup> or focus on a strictly legal subject<sup>13)</sup>, which is not connected to the reality of cross-border movement as envisaged here.

7. This very general observation translates into two positions whose future must be called into question. The first originates in the lawyer's outdated approach to cross-border movement. To highlight this, we could also ask whether, in France for example, the *Matter doctrine*<sup>14)</sup> fossilised understanding of the movement phenomenon once and for all. Such a judgement may be excessive. For example, reflections on the *lex mercatoria*, transnational law and global law demonstrate that lawyers, undoubtedly in greater numbers than we would often like to think, prefer to review the facts on the basis of which the most solid and rich legal constructions have been established.

However, it may simply be observed that movement is rarely mobilised in these works. The term is absent from specialised dictionaries<sup>15)</sup>, it does not appear in the index of books other than with specific relation, as we will see, to the development of the law governing free trade and particularly the freedom of movement within Europe<sup>16)</sup>.

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12) To cite just three recent examples: M. Darnovsky & D. Beeson (2014). Global surrogacy practices (K. E Cheney, ed.), ISS Working Paper Series/General Series (Vol. 601) accessible on <http://repub.eur.nl/pub/77402>; M. Faure, A. Lawogni and M. Dehoumon (ed.), *Les mouvements transfrontières de déchets dangereux*, Bruylant 2015; A. Supiot (ed.), *L'entreprise dans un monde sans frontières. Perspectives économiques et juridiques*, Dalloz, 2015.

13) See in above notes on the movement of concepts, norms or legal decisions.

14) This expression is used to denote the conclusions of Judge Matter in the case of *Pélissier du Besset* (Civ. 17 May 1927, D.P. 1928 I. 25, note H. Capitant). To define international situations (here in payment matters), this senior French judge stated: "The contract must operate as an ebb and flow of movement above the borders".

15) For example, the verbo "movement" does not appear in the Dictionary of globalisation (ed. A.-J. Arnaud, ed. LGDJ, 2010).

16) On the subjects' approach to movement, see explanations below, § II. B.

8. The second position relates to the very general situation of legal doctrine (particularly in France, but we could also give numerous counter-examples) that does not have available or has not created specific discussion forums for the study of the movement phenomenon. It is difficult to imagine these forums not being multidisciplinary. The lawyer may have a particular understanding of the phenomenon of movement: movement of concepts, of norms, of legal decisions, etc. On the one hand, this understanding is not exclusive of others': alongside the lawyer is the geographer, the historian, the sociologist, the anthropologist, the political scientist, the economist, the manager, the mathematician, the computer scientist (etc.), all who have knowledge to bring to the table on the study or phenomena of movement. On the other hand, the lawyer's thinking must be able to break through into other disciplines and not remain isolated in its own sphere. To remedy this type of partitioning, tools, such as institutional tools, exist to enable multidisciplinary research to be developed where each remains autonomous in developing its constructions but agrees to be open to the reflections of others. As far as we are aware, no research forum to date has sought to understand the cross-border movement phenomenon in broad and general terms.

**B. – The legal subject areas deal with the phenomenon in an essentially specialised way**

9. Cross-border movement is not a legal subject in its own right incorporating all aspects of the phenomenon's legal treatment. Although there is a rule of civil law, sport law, fundamental freedoms law, etc. there is no rule of law governing cross-border movement.

However, we can identify three specialist legal fields that recognise movement as a subject matter.

10. The first is established by *the right of movement*. In the area of transport<sup>17)</sup>, for example, we know that territorial areas are subject to varied and restrictive rules to enable ordered movement along terrestrial, sea, river and air transport routes. This right of movement is present at all levels; local, national and international. It spreads into as many branches and sub-branches as the object that is moving and the route it is taking.

The second legal field is the *right of free trade*. This right originating in state and interstate dealings has a long-standing history. It has gathered significant momentum on the institutional stage since the Second World War with establishment of the GATT 1947 and the creation in 1994 of a specialised international organisation with a dispute settlement body (DSB). This right, deriving from international trade law<sup>18)</sup>, has experienced

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17) There is considerable literature on the subject (encyclopaedias, professional documentation, books, journals, etc.). There are legal research institutes specialising in this domain (in France, for example, the Institute of International Transport Law (IDIT) in Rouen: <http://www.idit.fr>).

18) There is considerable literature on the subject (encyclopaedias, professional documentation, books, ↗

significant regional and inter-regional development across every continent. Even though there may be elements of dispute, we can say that it has never been more powerful<sup>19)</sup>.

This leaves the third field, *the right of free movement*, which must not be confused with the above right of free trade. This right characterises the process of regional integration, with the world's largest example being that of our European Union. A fundamental right of free movement has been created in a period of sixty years. Individuals can directly enforce their rights in Member States to assert a commonly defined imperative around the free movement of persons, goods, services and capital<sup>20)</sup>.

11. Beyond these three fields, the whole of international trade law is more generally based on dynamic exchanges and, consequently, on movement. Books written on this subject necessarily include economic thinking, which contains the majority of legal policies we recognise in this field<sup>21)</sup>. But as mentioned above, the phenomenon of movement is not understood as such in general terms. It is most often dealt with through a specialised domain.

### C. – The phenomenon is dealt with using an unorganised plethora of legal techniques

12. The legal subjects' approach to cross-border movement is limited. Outside these established domains, such an approach leaves an important role to an undoubtedly incalculable number of legal techniques for understanding and grasping any particular expression of movement. In terms of the public sphere<sup>22)</sup> and without this list being in any way exhaustive, we might give a few examples. For ease of presentation, we will begin with the main specialities of international law understood in their widest sense.

In private international law<sup>23)</sup>, the movement of situations is governed by specific mechanisms. We use the theory of "mobility conflict" for the hypothesis were a lawyer

↘ journals, etc.). There are legal research institutes specialising in this domain (in France, for example, the CREDIMI in Dijon: <http://credimi.u-bourgogne.fr/>).

19) As shown by the most recent Trans-Pacific agreements and the current discussions on Trans-Atlantic trade.

20) There is considerable literature on the subject (encyclopaedias, professional documentation, books, journals, etc.) and a majority of, particularly French, universities host legal research entities specialising in the subject.

21) In recently published books, note in particular that of C. Kessedjian (*Droit du commerce international*, ed. Puf, coll. Thémis, 2013) whose introduction includes a comprehensive exposition on the subject. In earlier books, see, often cited, P. Lerebours-Pigeonnières which in the 5<sup>th</sup> edition of its *Précis de droit international privé*, Dalloz, 1948), talked about the "demands" of private international trade (n° 207). The expression was later toned down to a consideration of the "needs" of private international trade (6<sup>th</sup> ed., 1954, n° 207).

22) The private techniques used to comprehend movement phenomena are also innumerable. Every time a private player wants to set up a production or distribution network, it puts in place a legal regime of private movement law that is obviously of interest to the law.

23) See below.

has to decide whether to take account of a change in connecting factor occurring as a result of movement or change affecting a person, an asset or, potentially, a written instrument<sup>24)</sup>. We also use conventional mechanisms specially designed to enable certain movements of persons<sup>25)</sup> or documents, for example<sup>26)</sup>. In a wider sense, the place given to an individual's choice as to the law to apply in their private law relations is an example of the legal techniques that could allow a greater flow of movement<sup>27)</sup>.

In public international law, various texts declare a right of movement, even if, at the same time, they grant States the option of restricting or influencing its scope<sup>28)</sup>. Some texts try to regulate the possibilities of movement from one territory to another<sup>29)</sup> or aim to stop cross-border crime<sup>30)</sup> and organise mechanisms for the restitution or return of unlawful exports<sup>31)</sup>.

The situation is even more pronounced in European Union law. Within the European "Internal market" and "Freedom, security and justice" areas, the movement of situations forms part of the reality that the European institutions are in a better place to deal with than national institutions, which do not hold an overarching position in relation to cross-border movement situations<sup>32)</sup>. We have lost count of the amount of secondary legislation whose aim it is to provide a framework for movement: exhaustion of intellectual property rights<sup>33)</sup>, cross-boundary media<sup>34)</sup>, return of unlawfully exported cultural

24) For a relatively recent analysis of the institution in the context of a Ph.D. thesis, see with the numerous references quoted: M. Souleau-Bertrand, *Le conflit mobile*, ed. Dalloz, 2005.

25) 1980 Hague Convention on the civil aspects of international child abduction that organises, as everyone knows, a mechanism for returning the unlawfully removed child. On the instruments of European law, see below.

26) 1961 Hague Convention abolishing the requirement of legalisation for foreign public documents with the aim of encouraging movement.

27) See, for example, in the recent *Mélanges en l'honneur du Professeur P. Mayer* (ed. LGDJ, 2015), contributions on the theme of H. Gaudement-Tallon (*L'autonomie de la volonté: jusqu'où?*, p. 255), P. Kinsch (*Quel droit international privé pour une époque néolibérale?*, p. 377), Y. Lequette (*De la «proximité» au «fait accompli»*, p. 478) and M.-L. Niboyet (*De l'optimisation juridique dans les relations civiles internationales*, p. 629).

28) For example, art. 12 of the 1966 International covenant on civil and political rights.

29) 1989 Basel Convention on the Control of transboundary movements of hazardous wastes and their disposal.

30) 2000 United Nations Convention against transnational organised crime.

31) 1995 Unidroit Convention on stolen or unlawfully exported cultural objects.

32) See on this theme, the commentary of M.-N. Jobard-Bachellier and J.-S. Bergé, «La réception du droit communautaire en droit des conflits de lois», *La réception du droit communautaire en droit privé des Etats membres* (coll.), Bruylant 2003, p. 182 et seq.

33) For example, Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 approximating laws of the Member States on trademarks. On this mechanism that imposes the free movement of intellectual property objects every time the owner of the right has exercised and therefore exhausted his prerogatives, see the explanations and bibliographic references put forward in our book: *La protection internationale et européen du droit de la propriété intellectuelle*, Larcier, 2015, spec., n° 119 s.

34) Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 relating to the coordination of certain legislative, regulatory and administrative provisions of the Member States on ↗



objects<sup>35)</sup>, export of personal data<sup>36)</sup>, circulation of judgements within the European area<sup>37)</sup>, etc.

13. Nevertheless, these numerous techniques for dealing with the cross-border movement phenomenon are not sufficient to fill a gap: the lack of a legal construction to unite them. These techniques are interested in movement. But, as far as we are aware, no reflection exists on connecting them together, making them coherent, particularly given the reasons behind them and the cumulative chain reaction or effects they produce. In summary, cross-border movement is there, present. But the lawyer either does not deal with it or does little to deal with it despite it offering some very interesting potential.

## II. Potential for new developments: the legal treatment of movement situations

14. To outline out new potential for developing lawyers' mobilisation of cross-border movement, we need to explain the objective behind research of this type that, put simply, consists (A.) of introducing a reality into the law which it is currently does not acknowledge (B.), before then identifying two legal treatments for movement situations: constraint and recognition (C.).

### A. –The objective: to introduce the cross-border movement into the law

15. To imagine the place of cross-border movement in law, one must consider a situation where a phenomenon exists “antecedent” to the law, to take an author's well-known expression<sup>38)</sup>.

As we stated above, the law can draw conclusions from a movement situation. We can also say that it fuels the phenomenon of movement with its rules. But it does not make movement a legal subject, i.e. a legal construction (notion, concept or category). At the most, it is interested in its features: *free* movement, *regulated*, *legal* or *illegal* movement.

16. A legal approach to movement could take one of many paths. We will present

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↘ the provision of audiovisual media services.

35) Directive 2014/60/EU of the European Parliament and the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State.

36) Directive 95/46/EC of the European Parliament and the Council, of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

37) Among other examples, Regulation (EU) n° 1215/2012 of the European Parliament and the Council of 12 December 2012 on the jurisdiction, recognition and enforcement of judgements in civil and commercial matters.

38) On the use of this expression regarding “the fact of social order”, see Santi Romano, *L'ordre juridique*, 2me ed. (1945) translated by L. François and P. Gothot, re-ed. Dalloz 2002, spec. p. 30, in notes. For a recent commentary on this work, see with this editor, the collection *Tiré à part*, volume 13, 2015.



two of them, of which only the second will be developed.

One path would be to characterise the study subject in law. The expression “act of cross-border movement” covers a considerable number of different realities. It would be a mistake to believe that the law could deal with all of them using an encompassing legal concept. Similarly, we might doubt the operative value of such a legal concept in so far as the realities described, which are of a widely diverse nature, should not have to adhere to a unique or common legal regime. On first reflection, we would need to define the study subject if we want to create a useful tool for the lawyer deriving from its legal conceptualisation. The concept must be accurate. It must target specific, without doubt few, circumstances in order to justify new legal treatment, different from those more common realities that already exist. It’s what we call for a long term research “Full movement beyond control and the law”.

17. The second path, more modest but still difficult, would be to accommodate movement at the centre of legal constructions. For this, movement situations in the sense that we initially understand the term here - the act of cross-border movement - must be perceived and questions asked as to whether movement could define a legal mechanism capable of explaining this state of movement.

Such an approach must remain sufficiently wide so as not to trigger the above complaint of movement being treated in only a specialist context by a branch or field of international law. As far as possible, it must describe existing realities if we want to demonstrate its usefulness.

By combining these various requirements, we could say that in current substantive law, movement could attain legal status through two ways: movement constraint and acknowledgement of movement situations.

#### **B. – Introducing a new reality into the law: about the long term research “Full movement beyond control and the Law”<sup>39)</sup>**

18. It should be acknowledged today that the existing legal mechanisms do not deal with both the full and uncontrollable nature of certain movement phenomena. Even if the law is able to mobilise a full legal arsenal for each movement situation, it does not do so both in consideration of the fullness of the act of movement and of its uncontrollable dimension. It does not designate such movement as a phenomenon in itself. More often than not, the law addresses its effects, at best, in a partial, badly anticipated or unplanned way, as if the situation were neither “total”, nor “uncontrollable”.

Let me take three significant examples. The first concerns the movement of waste. The portion of waste that circulates and escapes the control of the operators (public and

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<sup>39)</sup> This research is already supported by the Institut Universitaire de France (2016–2021).

private, legal and illegal) occurs just about everywhere in the world in varying proportion, depending on the areas in question. The rule of law does not address these situations of full movement beyond control as they exist. The law seeks to monitor movement. But it does not seek to address situations in which, by nature, movement escapes the control of all the operators. The second example is the movement of personal data through digital networks. There is an enormous chasm between the reality of this movement, whose full and uncontrollable level can be technically proven in numerous hypotheses, and the architecture of the national, international or regional (notably European) rules of law, which fail to define the phenomenon in its full and uncontrollable dimension. The same is true for the mass demands for asylum, where the host states are overwhelmed both in terms of actual flow management as in attempting to apply rules designed for less voluminous flows.

What is missing in our society and in law in particular is a key concept to define the phenomenon of full movement that stretches beyond the control of the operators concerned. The objective of this research is to make it a clear-cut and pronounced subject of law. If we want to be able to discuss it and organise its legal treatment in other specialised areas of law (public and private law, local, national, international, regional and transnational law), the notion of uncontrollable movement must be given a designated legal name.

19. The most modern expressions of the ancient process of globalisation and its various forms (for example internationalisation, trans-nationalisation) gives the research on «full movement beyond control and the law» its relevancy and pertinence.

Let us take an example. During high agenda discussions at United Nations Conferences on climate change (such as COP21 in Paris in December 2015), the central issue is what public and people-orientated policy measures should be taken, first, to reduce global carbon gas emissions in the hope that global warming remains below a certain threshold over a defined timescale, and second, to adapt the locations, particularly the megacities, which are already threatened by the effects of these emissions and particularly by rising water levels.

This research project would involve inviting this type of forum to bring up a second major issue for discussion. It would involve responding to the following question: how do we anticipate the hypothesis of the global movement of greenhouse gas reaching uncontrolled levels? This question should be asked in addition to the first and not instead of it, literally doubling the scope of the discussion and therefore the public, corporate or citizen-based governances. No-one would any longer pretend to believe that the causes and/or effects of the phenomenon could be contained. The question would be asked openly of what measures should be taken in the face of a phenomenon of full and uncontrollable dimension.

That which applies in the crucial issue of global warming also applies in a whole

series of currently pertinent topics. In addition to the cited cases of the movement of data (the big data), waste (displacement of plastic islands in the China Sea or the Gulf of Mexico), migrant populations (political and climate refugees), the full, uncontrollable movement of multinationals, capital, goods or services, considered as a whole or in any specific situation, also needs to be designated by a legal concept to be capable of treatment in real terms.

20. The law deals with movement. But it never deals specifically with the phenomenon of full movement beyond control.

Currently, various areas of law approach the phenomenon of movement just as well as legal techniques. By areas of law, we can identify movement law, particularly transport law, free trade law that comes under international economic law and the law of free movement, which is a characteristic of integrated judicial areas like the State or especially the European Union. The areas of law have only a limited approach to movement. There is enough room outside these established domains for a large number of legal techniques designed to address particular movement situations. The public sphere provides us with some examples. For ease of presentation, we will begin by using three important specialities of international law in its broadest sense. Private international law, although not in the sense of its modern European context, has its own legal mechanisms to deal with the movement of situations, such as the theory of “mobile conflict” where the lawyer must decide whether to take a change of connecting factor into account pursuant to the movement of a person, asset or potentially a document. There are also statutory mechanisms specially designed to allow certain movements of persons (e.g. return of wrongfully removed children) or documents (e.g. foreign public documents). Under public international law, various texts herald a right to move, even if they give States the simultaneous option to put restrictions or conditions on its scope. Many texts try to create a framework for movement possibilities from one territory or another or aim to address cross-border crime and arrange mechanisms for restitution or return in cases of illicit export. The European Union is also very present; within “internal market” and “freedom, security and justice” areas, movement situations are realities that the European institutions seek to address from many angles (for example, cross-border media, return of a legally exported cultural objects, export of personal data, movement of judgements within the European area).

Nevertheless, the many ways in which positive law succeeds in addressing movement situations does not make up for those in which it fails. The law is incapable of taking a firm grip on the phenomenon of movement in a general sense, and more specifically, the phenomenon of full movement beyond control.

In general, an act of movement is “antecedent” to the law, to take the famous expression of an author who was referring to an act of social order (Santi Romano, 1918,

1945). A lawyer spends a lot of time dealing with movement, but movement is not a legal concept. Taken in its general sense, the term does not appear in the index of legal books. It does not occupy a significant position in legal dictionaries or books whose aim is to examine the global phenomenon using renewed and in-depth methods. Movement is deemed to be an act with no place in general legal vocabulary.

This initial impression is underpinned by a series of specific observations. Let us mention two of them. The first is taken from an experience that we nourished during a previous research project where we noticed that legal theory did not give any explanation of a lawyer's obligation in a modern globalised society to apply the law in a plurality of contexts, localised at potentially different levels (national, international or European). It therefore had to be built around that which we called the "legal constraint of movement". A second similar observation is the lack of the law's engagement with a strong concept of legal movement in cases where such movement is immediately produced by a rule of law. Remarkably, this is true in relation to mechanisms for the mutual recognition of foreign legal acts (such as judgements, public documents or private debt securities), which are reviewed as a matter of policy or legal technique, but never seen as creating possible phenomena of full uncontrolled legal movement.

In summary, it can be seen that even if movement is naturally present in the realities with which lawyers are faced, it is not a phenomenon that gives rise to legal reflection. A lawyer may draw potential legal consequences from movement, whether or not that movement is the consequence of a rule of law. But he or she does not seek to classify or categorise this movement in law as a reality needing to be addressed (even though not all realities deserve direct legal intervention).

This shortcoming creates gaps in the law and deficiencies in its effectiveness that much more profound research into the law cannot fill or make up for until movement beyond control is designated as a potential subject of law.

It is this research we are proposing to undertake.

21. The conviction in the research is that if lawyers claim to have an unquestionable ability to treat the concept of full movement beyond control in law, they have, except in specific cases, an utterly limited grasp of the reality of the corresponding material and social phenomena. As a lawyer, I am not able to think of a way out of this predicament. It is therefore necessary, before any legal approach is taken, to leave the law and widen the lawyer's knowledge of an act of movement by using a multidisciplinary understanding of such a notion. The law is still part of this comparative exercise. But it considers its perception of full movement beyond control alongside that of other disciplines.

This step consists of submitting the currently non-conceptualised idea of full uncontrollable movement to various disciplines in such a way as to identify the vocabulary and analytical methods that each discipline might use.

Research into other disciplines may reveal a conceptual dimension, such as that pursued under this project in relation to law. But this is not what the project is proposing. Each discipline remains completely autonomous. If full uncontrollable movement calls for abstract research in fields of knowledge other than the law (for example, a mathematical theory able to model an act of full movement), it is no doubt a good thing for the project. But it is not to be recommended for lawyer who can only work within his own means.

Rather, the research that needs to be done is that of finding a starting point common to the various disciplines.

The only way we can see of achieving this is to begin with a sample of diverse situations. Research of this nature is meaningless unless it can extend beyond a narrow domain. In fact, if one wants to be able to create a concept with a general scope, in this case a legal concept, it is indispensable to carry out a broad range of study. A common concept can only be created when circumstances in differing environments are addressed and dealt with in the same way. Human and social science frequently take this approach. Although less frequently used in law, we do have past experience of employing it.

These research subjects can have wide or narrow scopes. For example, full movement beyond control can be perfectly assessed at building, district, town, country, continent or global level. The key point of the research is to reach an understanding of how each discipline describes with its own words and methods situations in which movement escapes the control of its operators.

In this regard, we should consider three categories of operator: public authorities (the State and its structures; international and European organisations), companies (in their legal dimension (particularly the multinationals) or illegal dimension (Mafia-type organisations)) and citizens (especially in their modes of self-organisation (social networks) and collective organisation (NGO, association, think-tank)). We can well imagine that the perception of full movement beyond control varies widely from one operator to another. Neither one is favoured. Each operator will give a potentially equal amount of indication as to its perception of full movement in order to characterise the phenomenon. The study is not to be given a general scope because the field would be far too wide. It will carry out surveys on concrete and clearly identified situations.

Prior to legal analysis, the first phase considered here must remain open and, at the same time, retain modest objectives. In the first instance, our goal is not to set out on interdisciplinary, or even transdisciplinary research into the phenomenon of full movement beyond control. Our goal is to enrich the lawyer's approach through contact with other disciplines by suggesting these disciplines take a kind of sidestep, opening themselves up to the idea of "full movement beyond control" which may not necessarily form part of their current vocabulary. This comparison of approaches taken by the various disciplines considering the same practical circumstances should be mutually enriching. For example, the law has its own perception of full movement beyond control where a case involving

high mobility is referred in parallel to several national, international or regional courts or in the case described above of the automatic cross-border recognition of legal documents and situations. This perception is worthy of being presented to other disciplines, which can in turn communicate their own, and so on.

22. In order to understand the fundamental dimension of this project in law, it is worth considering an instance when a concept foreign to the law succeeds in entering the legal sphere.

There are an infinite number of examples of this occurring because in a positivist view of the law, shared by the majority of lawyers around the world, the law takes an act, transforms it into a legal notion by classifying it, potentially creating a new category if a suitable cannot be found upon classification, and regulating it. For example, man causes cross-border pollution, the law integrates it into the legal category of illicit acts (criminal offences), classifies it as a “complex crime” in certain conditions (an event giving rise to damage in several locations) and, as a consequence, to a specific legal regime.

However, not all acts gain access to the legal sphere so easily. Take the case of genocide, which, it can be said, became a subject of law (international law in this case) in 1948, after the Second World War. Genocidal phenomena already existed prior to legal recognition of the phenomenon and the law only received this reality after a long and hard journey made possible only at the cost of an intellectual, insistent and in-depth process. In this case, an individual (Raphaël Lemkin) highlighted the specific legal nature of a factual reality which, up until that point, had not been designated in law. This meant the individual was therefore unable to rely on the phenomenon as such. There are many other examples; in the past with the *lex mercatoria* (literally, the “law of merchants” which develops its own practices), today with corporate social responsibility and all the practices it generates. All of these realities ask the tough question of their reception into the law. Past experience has shown that the path is always difficult, wrong routes numerous and the lawyer’s capacity to shut out possibilities on the grounds that these realities are extraneous to the law, immense. . .

We do not imagine that it will be any different for full movement beyond control. There is a reason for this. This act, whatever its origin, is not likely to be of any real interest for the law other than as an established social reality. If we say an act of movement beyond control is full, we mean that at any given place and time, all the institutional and private operators are incorporating the phenomenon in their collective organisational methods more or less voluntarily. However, the phenomenon’s force lies in the fact that full movement surpasses the stage of being simple material act. It is more likely to be the result of a socially established movement, often even several movements that interact with each other and therefore give it its uncontrollable dimension. A real chain of causalities develops. For example, the unstoppable act of cross-border pollution

caused by a radioactive cloud - the explosion, the resulting cloud, its movement and its fallout into various locations like splashes of paint - should not simply be the subject of legal action in its unprocessed form. The law is also interested in all of the social constructions generated by that event and which, by way of contagion and ripple effect, can have a full dimension: the displacement of populations, consumption bans and/or the destruction of contaminated assets, the decision of certain countries to phase out nuclear energy, etc. That which is true for the unprocessed act is all the more true for the socially established act: the mafia-type organisation of a channel for clandestine migration and waste, the large-scale organised movement of data such as that practised by Google, etc.

At one time or another and in specific circumstances, all of these processes can escape not only their instigators but all the other operators, whether they are public or private. They are uncontrollable full movements.

Full movement beyond control is therefore very often and undoubtedly in essence a particularly complex reality that develops notably in crisis situations. It will not enter the law in its unprocessed state. In-depth work into the law is needed to enable it to make space for the phenomenon.

23. This work progresses through various stages: identification of a legal category, legal classification of the act and its equipping with a legal regime.

Without wishing to anticipate this research, which is at the heart of the multi-annual project, we will attempt to outline these stages.

There are several ways to identify a legal category. It might be said that the phenomenon of movement could create a legal category of its own, of which full movement beyond control would be a subcategory. Alternatively, one could start with existing legal categories (force majeure, the management of risk or the state of emergency, for example) and accommodate the phenomenon of full movement beyond control with each of them, potentially with a specific legal regime. At this stage of the project, our intuition is that the phenomenon would produce too much disorder in the existing categories for a simple re-configuration to work. Force majeure requires there to be an external element that could well be lacking in the particular case of full movement beyond control and the only unforeseeable event that does not require this external condition offers pretty narrow avenues for treatment. The management of risk requires that the risk remain manageable whether at the level of an individual, a company or a State, which is not certain in our case. A state of emergency presumes, among other things, the existence of a threat for the State, which is not always clear with full movement beyond control, as it could easily play to the advantage of public authorities. The available possibilities are so numerous that tests must be done in an attempt to adjust the legal categories so they accommodate the phenomenon in the best way possible.



For a lawyer to be able to classify an act of full movement beyond control in law, he must be able to formulate the characteristics of an act of full movement beyond control fulfilling a series of conditions that must be met to authorise use of a legal classifier. Given the three-fold composition of the phenomenon in question - movement - full - beyond control -, we do not imagine at this initial point in the research that there can be a single characteristic and therefore a single condition. It will necessarily involve considering the elements of the classification that can be used and testing all possible combinations.

Finally, to grant full movement beyond control a legal regime will also demonstrate a certain amount of imagination. It could be considered that an act of this type derogates from the usual applicable rules, as is the case in crisis situations initiated through emergency or necessity. When faced with such phenomena, it might be worth considering whether existing legal rules need equipping with some sort of reversibility (undoubtedly of a temporary nature); movement that was legal becomes illegal and vice-versa. That which was free of charge becomes payable and vice-versa. That which was channelled is no longer so, etc. Beyond the material legal regime for full acts of movement beyond control, it is their procedural requirements that must be invented. Full movement beyond control is a highly evolving act. Regular assessment of both its full and uncontrollable nature must be subjected to specific procedures, enabling a decision to be re-assessed in light of the most recent developments. The legal treatment of these situations could also comply with regulation processes. There should be a balance found between coercive and restrictive legal tools and regulatory, even auto-regulatory tools.

24. A lawyer's work does not stop at the formulation of a category, a classification or a legal regime. In a final phase, he must concern himself with the implementation of his constructions and naturally their consequences.

"Full movement beyond control" calls for a special effort by the lawyer to be open to other perspectives to complete his task well.

An initial perspective is to take a quantitative approach to the flows. To define an act of full movement beyond control, it must be capable, in certain hypotheses, but probably not all, of being quantified. The policymaker (public or private) will undoubtedly need to fix a threshold above which full movement is deemed uncontrollable. And it is easy to imagine that this threshold could vary considerably from one operator to another and from one situation to another. Once a threshold has been defined, it must be applied. In order to do this, a set of indicators would be required. It is difficult to see how a lawyer could provide them. He must have recourse to an expert, which is always a very sensitive matter. The threshold of fullness and non-control of an act of movement could be partly measured from quantitative data indicating levels of flow that can be observed at a single moment in a given area.

On a similar theme, a lawyer would have to enquire specifically into patterns of

movement to localise the phenomenon. A large number of scientific specialities seek to represent networks of movement in this way. It is difficult to see how a lawyer could fail to be aware of the existence of this available knowledge which would give him a better understanding of the reality he is seeking to address.

There may also be other perspectives at work when assessing the consequences of legal measures designed to react to an act of full movement beyond control. These measures, as we have said, could be severe. If, for example, it were decided to make a legal rule reversible, a political scientist, manager or anthropologist, for example, might ask questions concerning the social and political consequent and potentially harmful effects of this reversibility. It would therefore be necessary to follow-up on the consequences to enable the stakeholders, especially the decision-maker (political player, business leader, court), to reassess its decision in light of the effects it produces.

### **C. – The legal treatment of movement situations: the example of movement constraint and the recognition of movement situations**

25. Legal constraint of movement is a construction that we have developed during research on the contextualisation of cases of global legal pluralism<sup>40)</sup>. This expression attempts to provide a legal explanation for the obligation often weighing upon the lawyer in modern society to apply the law in many different contexts and at potentially different levels (national, international or European level).

Such an explanation was not available in legal thinking. It had to be developed. In order to do this, we were inspired by the theory of legal constraints<sup>41)</sup>, which we adapted to our hypothesis of applying the law at different levels.

The blueprint is as follows: a situation is treated in a legal context at a certain level and a legal mechanism might require it to be further examined in another legal context at another level. The lawyer therefore observes that the same situation could be dealt with in two contexts and at two different levels. This movement of the situation from one context to another will produce a constraining effect on his work. The lawyer draws conclusions from mobility as he knows that the situation he is dealing with could or can be treated in another context.

26. There are many illustrations of this legal movement constraint<sup>42)</sup>: the international

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40) L'application du droit national, international et européen — Approche contextualisée des cas de pluralisme juridique mondial — Dalloz, coll. Méthodes du droit, 2013, spec. n° 149 et seq. In collaboration with Mrs G. Helleringer, an adaptation in English of this book is in preparation: *Operating Law in a Global Context*, Edward Elgar Publishing, to be published (June 2017).

41) M. Troper, V. Champeil-Desplats, Ch. Grzegorzczuk (ed.), *Théorie des contraintes juridiques*, Bruylant — LGDJ, 2005. The theory of constraints is part of a realist approach to the law that gives the interpreter, particularly the judge, a central role in legal construction.

42) Having carried out this research, we were able to refer to the various case studies in the book ↗

arbitrator who anticipates mandatory provisions being later applied in a European or national context; the European or international judge who, in his legal frame of reference, takes into account information from national, international and European law applicable in the context of the national referring judge (for the ECJ) or of the national judge who ruled before him (for the ECHR or the ICJ, for example); the national judge who draws conclusions at his level from the law applied previously at European or international level in the case referred to him, etc.

In these different scenarios, movement does not describe a simple factual or even cultural phenomenon from which the law would mechanically or metaphorically draw conclusions. It describes an intellectual process for the construction of a legal solution. This process is not solely led by the desire of one advocate to be open to legal solutions other than his own. It is the consequence of a legal movement constraint that, in certain but an increasing number of cases, influences the solution. This constraint exists every time it is imposed by a rule of law: referral by a national judge following the intervention of an international authority (private arbitrator or public authority); obligation for such national judge to ask a European court for a preliminary ruling (the ECJ today and maybe tomorrow, also the ECHR); option, and sometimes right, for States or individuals to refer the matter to a supra-national court after exhaustion of domestic remedies, etc.

This initial development on the legal constraint of movement shows that movement can, in certain circumstances, have an explicative and supportive value that no other legal notion brings.

27. The recognition of situations is central to one of the most important reflections to have shaken the doctrine of private international law at the beginning of the 21<sup>st</sup> century<sup>43)</sup>. In 2016 the subject has provoked submission of no less than two communications to the

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↘ cited above (L'application du droit national, international et européen... , spec. n° 149). For an adaptation in English of this "movement" aspect of the work, see *Operating International Law in a Global Context: Taking Circulation Seriously* - in collaboration with G. Helleringer — SYBIL (Spanish Yearbook of International Law), vol. 18 2013/2014, p. 11.

43) A lot of research has been carried out on this subject. We will only mention the first research project that established the framework for subsequent discussion: P. Lagarde, «La reconnaissance, mode d'emploi», in *Mélanges en l'honneur de H. Gaudemet-Tallon*, «Vers de nouveaux équilibres entre ordres juridiques», Dalloz 2008, p. 481; also E. Pataut, «Le renouveau de la théorie des droits acquis», TCFDIP 2006–2008, Pedone 2009, 71; on the first elements of discussion, see particularly or also: P. Lagarde, *Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures*, *RabelsZ* 2004, 225; P. Mayer, *La méthode de la reconnaissance en droit international privé*, *Mélanges en l'honneur de Paul Lagarde*, Dalloz, 2005, 547; C. Pamboukis, *La reconnaissance-métamorphose de la méthode de reconnaissance*, *RCDIP* 2008, 513. See most recently, or the contributions assembled by P. Lagarde (ed.), *La reconnaissance des situations en droit international privé*, ed. Pedone 2013. As well as P. Lagarde, *La méthode de la reconnaissance est-elle l'avenir du droit international privé?*, Conférence inaugurale, session de droit international privé, 2014, *RCADI* (Volume 371), 9.

French private international law Committee<sup>44)</sup>. It has become established following long-term arguments on the recognition of judgements and other foreign public instruments. It asks the blunt but essential question of whether a State should legally recognise a situation that has developed abroad, without applying its own conflict rule to check that the situation is valid<sup>45)</sup>.

The issue that we would like to raise in our reflections on cross-border movement within these prolific discussions is what place movement could hold as a legal construction.

28. We have already made the general comment that lawyers mobilise movement very little. We deal here and there with movement (movement of persons or written instruments) but in a narrow sense (the EU freedoms of movement in particular) or not in a specifically legal sense. In the vast array of literature on the subject, the enabling concept is none other than recognition and the underlying notion of an established or an acquired situation.

In order to test the potential offered by movement in the general cases envisaged by the recognition technique, we would suggest trying to counteract the general trend by use of the expression: “recognition of movement situations”.

Before considering what this formula might cover, it would be helpful to establish a link between the above development on the (legal) constraint of movement and the present development on the (legal) recognition of movement situations.

We can see the same legal phenomenon occurring with regard to the hypotheses described above (§ II. B) and those examined here. In fact, in all of these cases, we witness what we might call dissociation between the invocable law and the applicable law. Given that a situation moves from one context to another, the law applicable or applied in context A becomes invocable in context B even though it is not necessarily applicable in context B. Movement enables a unique process to be defined whereby a law applicable in a given context is invoked in another context in which it is not necessarily applicable.

This dissociation between the applicable law and the invocable law, which we have studied in the particular case of an application of the law in a global context<sup>46)</sup>, is true for more general recognition mechanisms. To recognise a foreign degree, a foreign certificate, a foreign judgement, a foreign civil status certificate, a factual situation established abroad, is to accept that this degree, this certificate, this judgement, this civil status certificate, this situation may potentially produce effects in the host country under a law that is applicable and, subject to verification, applied, in the home country, but is not necessarily applicable in the receiving country.

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44) Contributions of our colleagues Louis d’Avout in March, and Dario Moura Vicente in June.

45) Definition inspired by P. Lagarde, *Sur la vulnérabilité des situations juridiques*, in *Mélanges P. Mayer*, *prev, spec.* p. 441.

46) See the references mentioned above.

It is interesting to compare these two important scenarios. It gives a first indication of the use that could be made of a legal concept of movement, not only in the above cases of constraint of movement, but also in the recognition of movement situations of interest here.

29. This initial response allows us to look more directly at the utility of the expression “recognition of movement situations” as compared to the shorter, generally used, expression “recognition of situations”.

The response leaves no doubt in our minds. To talk about the recognition “of movement situations” is to ask the direct question of whether the rule of law, here the rule of recognition, should or should not apply to the movement of situations. The perspective opened up is wider and more interesting than that offered by the simple “recognition of situations”. It becomes not so much a question of encouraging or objecting to a material movement situation that the law would seek to establish as a *fait accompli* by the technique of recognition, with the limited possibilities for discussion offered by a later intervention<sup>47)</sup>. It becomes rather a question of reflecting on the phenomenon of movement, much further upstream of the rule of recognition.

This movement phenomenon could have two types of relationship with the legal mechanism of recognition.

One approach would be to understand the rule of recognition as a legal tool that creates legal movement. This approach to the mechanism of recognition is not new. For example, the historic European law of judicial co-operation in civil matters has been considered as a tool to encourage the movement of judgements in Europe<sup>48)</sup>. But it is intriguing to see that the issue of movement is mobilised so little today. We could, for example, conduct a study on all movement effects produced by the mechanisms of recognition in private international law. The wider this recognition, the more automatic it is and the more the lawyer is faced with and should place the phenomenon of the legal movement of situations at the centre of his analysis. How many situations are moving? Between which areas? Does this legal movement correlate with material movements (goods or persons) or is it happening mechanically, in a disconnected way, with no link to the geophysical and social realities, before going on to produce an uncontrolled chain reaction?

However, the reality is quite different. The main part of the discussion is on the place of the mechanism of recognition in relation to the competing mechanisms in private international law (conflict of laws in particular). In these discussions, the movement phenomenon, to which the law contributes to a large degree especially in situations of

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47) Reference is made to the contribution of Y. Lequette, *Mélanges P. Mayer*, prev.

48) See the historical presentation of H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 5<sup>th</sup> ed., LGDJ, 2015, spec., n° 7 that quotes the case of Krombach (CJCE, 28 March 2000, C-7/98).

automatic recognition, has barely been worked out, whereas it could effectively be the starting point of an analysis on the theoretical and practical meaning, value and scope of the movement of those instruments and situations by a wider legal mechanism of recognition.

30. A second approach would be to say that the rule of law does not *a priori* represent recognition of movement situations. The rule is faced with an overwhelming factual and complex phenomenon of movement. Here, the question is whether the expression “recognition of movement situations” rather than the simple “recognition of situations” gives a more direct understanding of whether the rule of law should adopt a potentially full and uncontrollable movement situation or not.

Such hypothesis exists - in the case of surrogacy<sup>49)</sup>. Movement is omnipresent in situations of this type. It has a strong legal dimension from the moment a situation occurring abroad produces legal effects in France when we know that French law does not authorise surrogate motherhood on her soil. The authors deal with this type of situation by way of in-depth and detailed discussion on which mechanisms to prioritise (for example, recognition subject to conditions) or to relegate (for example, the mechanism of fraudulent evasion of the law). But little attention is given, at first analysis, to the importance of the movement phenomenon in these “outlawed” surrogacy situations. This movement is multifaceted, however: movement of the so-called parents’ intention, the surrogate mother, the gametes, the child, the medical certificate, the civil status certificate, the adoption decision, etc. Multi-disciplinary and comparative research, conducted under the auspices of the Law and Justice public interest group (*GIP Droit et Justice*), is currently underway taking its starting point from the study of movement phenomena and trying to explain how they lead to a neutralisation of a certain number of regulatory legal mechanisms<sup>50)</sup>. It is uncertain whether all the conclusions of such an investigation will have merit. However, it is highly likely that of all the surrogacy situations that can exist, some explain better than others the state of our current substantive law, by the sheer scale of the movement phenomenon that mobilises them.

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49) In addition to the various references quoted above, see in particular the most recent studies published on this equally prolific subject: S. Bollée, *La gestation pour autrui en droit international privé*, Travaux du CFDIP, Pedone, 2014, 215; H. Fulchiron and C. Bidaud-Garon, *Reconnaissance ou reconduction ? A propos de la filiation des enfants nés par GPA, au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l’homme*, RCDIP 2015, 1; D. Sindres, « Le tourisme procréatif et le droit international privé », JDI 2015, 429.

50) GIP Justice (Decision 14. 18) — Ministère français de la justice — CNRS — Mission Droit et Justice — Programme « Analyse juridique et sociologique de l’état des questions en France à la lumière des pratiques étrangères en matière de filiation des enfants conçus hors la loi (Belgique, Grande-Bretagne, Israël) » — 2015-2016 — EHESS — Co-piloting of the project: M.-A. Hermitte, K. Parizer-Krief, S. Mathieu and J.-S. Bergé.

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31. In conclusion, we will note that the objective of this work was none other than to question the method of a lawyer who, faced with an international phenomenon, mobilises the concept of movement very little on balance. In order to be truly operative, research into this matter needs to be carried out. It is not so much the fact of movement in general that the law needs to accommodate than its most singular manifestations, those which explain the difficulties with which our law, particularly international law (*lato sensu*), deals in situations involving movement. These situations are more and more frequent. The phenomenon of movement must be at the centre of an epistemological analysis of the legal mechanisms used to deal with these movement situations.